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14 July 2022

Dear Members

Meeting of the Sentencing Council – 22 July 2022

The next Council meeting will be held in the **Queens Building, Judges Conference Room, 1st Floor Mezzanine at the Royal Courts of Justice.** This will be a hybrid meeting, so a Microsoft Teams invite is also included below. **The meeting is Friday 22 July 2022 and will from 9:45 to 16:00**.

If you are not planning on attending in person please do let me know ASAP so Jessica and I can plan accordingly.

A **security pass is needed** to gain access to this meeting room. Members who do not know how to access this room can, after entry head straight to the Queen's Building where Jessica and Gareth will meet members at the lifts and escort them up to the meeting room. If you have any problems getting in or finding the Queen's Building, then please call the office number on 020 7071 5793.

The agenda items for the Council meeting are:

- Agenda SC(22)JUL00
- Minutes of meeting held on 17 June SC(22)JUN01
- Action log SC(22)JUL02
- Blackmail SC(22)JUL03
- Miscellaneous amendments SC(22)JUL04
- SC Framework SC(22)JUL05
- Aggravated vehicle taking SC(22)JUL06
- Environmental SC(22)JUL07
- Imposition SC(22)JUL08

Refreshments

Tea, coffee and water will be provided on the day but, due to the current existing RCJ safety guidance, a buffet style lunch will not be provided. Members are welcome either to bring lunch with them (the kitchen area next door contains a fridge) or to avail themselves of the local lunch options. The lunch break is 30 minutes.

Members can access papers via the members' area of the website. As ever, if you are unable to attend the meeting, we would welcome your comments in advance.

The link to join the meeting is: Click here to join the meeting

Best wishes

Steve Wade

Head of the Office of the Sentencing Council

Sentencing Council

COUNCIL MEETING AGENDA

22 July 2022
Royal Courts of Justice
Queen's Building

09:45 - 10:00	Minutes of the last meeting and matters arising (papers 1 & 2)
10:00 - 11:00	Blackmail/threats to disclose/kidnap/false imprisonment presented by Mandy Banks (paper 3)
11:00 – 11:15	Break
11:15 – 12:15	Miscellaneous amendments - presented by Ruth Pope (paper 4)
12:15 – 12:45	Sentencing Council MoJ Framework Document - presented by Ollie Simpson (paper 5)
12:45 – 13:15	Lunch
13:15 – 14:15	Aggravated Vehicle taking presented by Zeinab Shaikh (paper 6)
14:15 – 14:45	Environmental - presented by Ruth Pope (paper 7)
14:45 - 15:00	Break
15:00 – 16:00	Imposition - presented by Jessie Stanbrook (paper 8)

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Sentencing Council

MEETING OF THE SENTENCING COUNCIL

17 JUNE 2022

MINUTES

Members present:	Tim Holroyde (Chairman) Rosina Cottage Rebecca Crane Rosa Dean Nick Ephgrave Diana Fawcett Max Hill Stephen Leake Juliet May Maura McGowan Alpa Parmar Beverley Thompson
Apologies:	Jo King
Representatives:	Hanna van den Berg for the Lord Chief Justice (Legal and Policy Advisor to the Head of Criminal Justice) Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy)
Members of Office in attendance:	Steve Wade Phil Hodgson Ruth Pope Ollie Simpson Jessie Stanbrook

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 13 May 2022 were agreed.

2. MATTERS ARISING

2.1 The Chairman welcomed Stephen Leake to his first meeting following his recent appointment as the district judge member of the Sentencing Council.

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

3.1 The Council considered a series of proposed amendments to guidelines necessitated by changes being brought in by the Police, Crime, Sentencing and Courts Act 2022. It was agreed that the more substantial changes to guidelines should be subject to consultation and that other necessary changes could be made without consultation when the legislation comes into effect. In some cases an interim note would be added to the guidelines pending consultation on the full changes.

3.2 The Council agreed that a list of any changes not being consulted on should be included in the consultation document for reference.

3.3 The Council also agreed to consult on some amendments to wording on disqualification from driving in guidelines and explanatory materials for magistrates' courts in response to feedback from guideline users.

3.4 Some changes to terminology in the Sentencing offenders with mental disorders, developmental disorders, or neurological impairments overarching guideline were discussed and it was agreed that these should be made without consultation.

4. DISCUSSION ON IMPOSITION – PRESENTED BY JESSIE STANBROOK, OFFICE OF THE SENTENCING COUNCIL

4.1 The Council considered and agreed a proposal to undertake a standalone review of the Imposition of community and custodial sentences guideline and to consult on any changes proposed.

4.2 The Council also agreed a range of proposed amendments to be made prior to this and without consultation, necessitated by the Police, Crime, Sentencing and Courts Act 2022, policy changes (such as the reunification of Probation Services), and correcting inconsistencies. These amendments included updating the increased maximum hours per day and duration for curfew requirements.

5. DISCUSSION ON CHILD CRUELTY – PRESENTED BY OLLIE SIMPSON, OFFICE OF THE SENTENCING COUNCIL

5.1 The Council discussed the proposed wording of the revised culpability levels for the guidelines for Causing or allowing a child to die/suffer serious physical harm and for Cruelty to a child. The Council considered the accompanying resource assessment and signed off the draft guidelines for consultation.

6. DISCUSSION ON GUIDELINE PRIORITIES – PRESENTED BY STEVE WADE, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council reviewed the proposed allocation of resources against the work plan and agreed them.

6.2 The Council noted the importance of ensuring guidelines for different offences receive separate consideration even if the work to produce them falls under the same overarching project.

7. DISCUSSION ON ANNUAL REPORT – PRESENTED BY PHIL HODGSON, OFFICE OF THE SENTENCING COUNCIL

7.1 The Council discussed the content of the Sentencing Council Annual Report 2021/22. Subject to amendments agreed at the meeting and any minor corrections, the Council approved the report for submission to the Lord Chancellor.

8. DISCUSSION ON TOTALITY – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

8.1 The Council considered revised wording for guidance on sentencing offences committed prior to other offences for which an offender has already been sentenced. Subject to a few minor amendments, the Council agreed that this guidance should be consulted on.

8.2 The Council also agreed other minor changes to the guideline to improve clarity. The Council was given a demonstration of how the revised guideline would look as a digital guideline and agreed to consult on this version.

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Sentencing Council

SC(22)JUL02 July Action Log

ACTION AND ACTIVITY LOG – as at 14 July 2022

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 17 June 2022					
1	**Imposition Guideline**	Members to email Jessie with proposals for areas/elements to include in scope of upcoming Imposition project.	**Council members**	Responses received from Max and Rebecca	**ACTION CLOSED:** Suggestions included in July Council paper

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Sentencing Council

Sentencing Council meeting:	**22 July 2022**
Paper number:	**SC(22)JUL03 - Blackmail, kidnap, false imprisonment, child abduction and threats to disclose private sexual images**
Lead Council member:	**Juliet May**
Lead official:	**Mandy Banks** **Mandy.Banks@sentencingcouncil.gov.uk** **0207 071 5785**

1 ISSUE

1.1 This is the second meeting to discuss blackmail offences and first meeting to discuss the scope of the rest of the project. This meeting will consider a draft guideline for blackmail offences.

1.2 There are currently four Council meetings scheduled to discuss the draft guidelines, with a consultation in Spring 2023. This timetable is indicative only however at this early stage of the project.

2 RECOMMENDATION

2.1 At today's meeting the Council are asked:

- To consider the draft blackmail guideline
- To agree the scope of the rest of the project

3 CONSIDERATION

Blackmail

3.1 There currently is no guideline for this offence. The offence of blackmail is committed when a person with a view to gain for themselves or another, or intending to cause loss to another, makes an unwarranted demand with menaces. (Section 21 of the 1968 Act). It is a serious offence, indictable only, with a maximum penalty of 14 years' custody. Sentencing data for this offence is attached at **Annex A,** and shows that, in 2020, around 110 offenders were sentenced for this offence with 65 per cent sentenced to immediate custody (tabs 5.1 and 5.2.) However, it is possible that the figures for 2020 may have been impacted by the COVID-19 pandemic: around 130 adult offenders were sentenced in 2019 with 77 per cent being sentenced to immediate custody and around 160 were sentenced in 2018, of which 79 per cent received an immediate custodial sentence. Over the last decade the average custodial sentence length (ACSL) has remained stable at around 2 years 10 months (post guilty plea).

3.2 A draft guideline is attached at **Annex B.** It has been developed by considering around 30 transcripts of sentenced cases, considering the available sentencing data and in conjunction with the guideline lead, Juliet. Sentencing authorities are generally fact specific. In *R v Hadjou* (1989) Lord Lane CJ said blackmail was one of the ugliest and most vicious offences, often involving 'attempted murder of the soul' and that deterrence was perhaps the most important part of the sentence. A crucial element will often be the relationship between the amount of money demanded and the means available to the victim; also important will be the psychological harm done or intended to be done to the victim: *R v Ford [2015].*

3.3 In *R v Hutchinson [2018]* the judge sentencing a dentist who had conspired to blackmail his former surgery had been entitled to treat the fraud guideline as an indicator of the proper approach to culpability, and to take the view that blackmail was more serious than an attempt to obtain an equivalent amount of money by fraud alone. The assessment of seriousness in any given case has to take account of the nature of the menaces made, and the sentence should, amongst other matters, reflect the nature of the menaces *R v Atkinson [2018].* However, even where the menaces consist of a threat to kill it would be unwise to place too much weight on the guideline for threats to kill, because blackmail involves much more than simply making threats and carries a greater maximum sentence: *Murphy [2019].*

3.4 Starting with the culpability factors on page two of **Annex B,** the proposed high culpability factors have been included following consideration of the 30 transcripts of blackmail cases and are designed to capture the most serious cases. Offending over a sustained period of time, in some cases over a number of years, increased the seriousness of the offence, according to courts. If the offending was particularly sophisticated or planned, this again makes the offending more serious, such as the offender who placed contaminated jars of baby food in Tesco, and blackmailed Tesco saying that babies would be harmed unless he was given a large sum of money.

3.5 It is also proposed that there is a factor within high culpability regarding the deliberate targeting of a particularly vulnerable victim. Some offenders target their victims very carefully, exploiting particular vulnerabilities in order to make their demand for money more likely to succeed. For example, an offender who blackmailed his ex-partner that he would tell her family of their relationship and disclose intimate images unless she gave him money. The offender and his girlfriend were of different religions and he knew his ex-partner, who was from a particularly religious family, would do anything to avoid her family finding out and bringing shame upon the family. This type of cruel behaviour makes the offending more serious than cases where victims are picked at random. Lastly it is argued that violence should place an offender in high culpability.

Question 1: Are the Council content with the proposed high culpability factors? Does the Council feel they adequately capture the most serious types of offending?

3.6 In medium culpability it is proposed that there should be a factor of '*violence threatened'* and:

- Other cases that fall between categories A and C because:
    - Factors are present in A and C which balance each other out **and/or**
        - The offender's culpability falls between the factors described in A and C

3.7 Thought has been given as to whether there are any other factors that should go into medium culpability, as we know that sentencers find this helpful, but there do not seem to be any other obvious factors.

Question 2: Are there any other factors the Council think should go into medium culpability? If so, what are they?

3.8 In lower culpability it is proposed there are factors relating to offences that are unplanned or limited in scope or duration, if the offender was involved through coercion, intimidation or exploitation or the offender's responsibility was reduced due to a mental disorder or learning disability. There are cases at the other end of seriousness where the offending was of a very brief duration, or they were very unsophisticated. Equally there are cases of offenders pressured into the offence by others.

Question 3: Is the Council content with the proposed lower culpability factors?

3.9 Turning now to the proposed harm factors, these have been designed to try and capture the varying types of harm caused by the offence. The category one harm factors have been designed to try and capture the serious impact of this offence, which can leave victims feeling violated. it is proposed there is '*serious distress caused to the victim'* and also '*serious distress caused to others',* in recognition that those close to the victim, such as family members can be caused serious distress if their safety etc is threatened. Also proposed is *'very large amount of money obtained'* and '*serious consequential financial impact of the offence',* the latter to reflect instances where victims have gone bankrupt or into severe levels of debt as a result of paying the money demanded. As well as the financial impact on victims there can the financial impact on a business, Tesco estimated the total costs as a result of the contamination to be £2.7 million. Also proposed is '*widespread public impact of the offence',* a factor cited in the Tesco baby food case as making the offending more serious, as the public feared that not all the contaminated jars had been located.

3.10 Proposed category two harm factors are lesser versions of the factors in category one harm, so: '*some distress caused to the victim' 'some distress caused to others' 'some*

consequential financial impact of the offence' and *'considerable amount of money obtained'.* In category three harm there is '*limited effects of the offence'* and *'small amount of money obtained'.*

Question 4: Are the Council content with the proposed harm factors? Do the category one factors go far enough to capture the most serious types of harm caused to victims?

3.11 Turning now to the draft sentence ranges on page three. These are based on current sentencing practice, which tells us that the ACSL in 2020 was three years eight months (estimated pre-guilty plea) and two years ten months (post-guilty plea). This has remained stable over the last decade (tab 5.3 of **Annex A).** The vast majority of offenders received a custodial sentence (65 per cent immediate custody and 29 per cent a suspended sentence order in 2020). Tab 5.4a of **Annex A** also shows us that 90 per cent of offenders sentenced to immediate custody received an estimated pre-guilty plea custodial sentence of six years or less. The range at the top in A1 stops at 10 years as only two offenders received a sentence over 10 years' custody within the last five years, with the longest determinate sentence in 2020 of 12 years. Included at the bottom of the range in C3 is a high level community order, although as only a tiny handful of offenders receive community orders each year (less than 4 per cent) the Council may wish instead to remove this option, so courts would go outside the guideline to sentence offenders to community orders.

3.12 At this early stage the Council will wish to decide whether the guideline should seek to replicate current sentencing practice or seek to change it. Initially the draft ranges were slightly higher, but a resentencing exercise using those draft ranges and transcripts of sentenced cases showed that the higher ranges would have led to higher sentences than were actually given in the case. As a result, the ranges and starting points were lowered to the ones shown below.

Harm	**Culpability**		
	A	**B**	**C**
Category 1	**Starting Point** 7 years' custody **Category Range** 4 - 10 years' custody	**Starting Point** 4 years' custody **Category Range** 2 -6 years' custody	**Starting Point** 2 years' custody **Category Range** 1 -4 years' custody

Category 2	**Starting Point** 4 years' custody **Category Range** 2 -6 years' custody	**Starting Point** 2 years' custody **Category Range** 1 -4 years' custody	**Starting Point** 1 years' custody **Category Range** 6 months'- 2 years' custody
Category 3	**Starting Point** 2 years' custody **Category Range** 1 -4 years' custody	**Starting Point** 1 years' custody **Category Range** 6 months' - 2 years' custody	**Starting Point** 6 months' custody **Category Range** High level Community order – 1 years' custody

3.13 The risk with using any higher ranges is that it is likely to lead to an increase in the severity of sentencing. Although volumes of this offence are small there could still be an impact on prison and probation resources as a result. Given the criticism that the Council contributes to sentence inflation through its guidelines, this is something the Council needs to consider carefully. In deciding what the appropriate ranges should be the Council are asked to consider if there is any evidence to suggest that blackmail offences are currently under sentenced, and also proportionality with other offences.

Question 5: What is the Council's view on the draft sentence ranges?

3.14 Looking at the aggravating factors on page four, the first factor '*disturbing nature of the threat(s)'* is proposed to capture really frightening and perturbing threats such as a threat to rape a victim's daughter or to throw acid at their family members. '*Offence related to other criminal activity'* is proposed as a certain number of offences are connected to other offending, often involving drugs. '*Abuse of trust or dominant position'* is designed to capture offenders who abuse their position to commit the offence; knowledge gleaned in a professional capacity, for example. '*Others put at risk of harm by the offending'* is for cases where the victim's family or friends are put at risk - threats to firebomb their house for example.

3.15 The mitigating factors are all standard ones that are used across the guidelines - there are no proposed offence specific ones.

Question 6: Are the Council content with the proposed aggravating and mitigating factors? Are there any offence-specific mitigating factors that should be included?

Remainder of the offences within the scope of the project

3.16 It is proposed to consider draft guidelines for kidnap and false imprisonment together at the September Council meeting, as there is some overlap between the two offences. It is proposed that consideration of how to reflect the expansion of the legislation to cover threats to disclose private sexual images is dealt with at one of the later meetings.

3.17 There is currently an existing guideline for disclosing private sexual images, it is possible that the Council can just amend this guideline to take into account the change to legislation to include threats to disclose the images.

3.18 However, before doing so, the Council will wish to consider any available information about how these cases are being sentenced. The legislation was amended in June 2021 to include threats to disclose along with disclosing private sexual images. Unfortunately, the Court Proceedings Database (CPD) includes both of these offences under a single offence code, which means we cannot distinguish volumes for the two versions of the offence from one another. We have ordered all the transcripts for those offenders sentenced for disclosing private sexual images in the latter half of 2021, hoping that some of the sentencing outcomes will be for threats to disclose images. Although, given that it will take some time for these cases to reach court, there is a risk that none of these transcripts may ultimately involve the new threats to disclose offence. Until we receive the transcripts, we will not know if any of them are concerning *threats* to disclose images (rather than disclosing private sexual images), in order to understand current sentencing practice for this new offence. To mitigate, we are monitoring media reports of sentenced threats cases to gain some information about how these cases are being sentenced.

3.19 The Council will also wish to note that the Law Commission has recently published a report following a review of taking, making and sharing intimate images without consent. They are proposing a new offence that would criminalise threatening to share an intimate image that would replace the recently introduced threats to disclose a private sexual image under section 33 of the Criminal Justice and Courts Act 2015.

3.20 As part of this review they also considered that threats to share intimate images are prevalent in the context of controlling and coercive relationships. Accordingly they make a specific recommendation to the Sentencing Council of:

'We recommend that the Sentencing Council consider reviewing the sentencing guidelines for domestic abuse offences in light of the recommendations in this report, and the evidence of intimate image abuse perpetrated in the context of abusive relationships in this report and the consultation paper.'

Arguably, however, such offending within a domestic context would be aggravated in any

case. In terms of the recommendation regarding changes to legislation, the Government will now need to consider the recommendations made as part of the review and respond in due course. This of course could take quite some time, even if Government were minded to respond positively, it is unlikely legislation would be brought forward quickly given other demands on Parliament's time. It is therefore recommended that the Council presses on with the work to amend the existing disclosing private sexual images guideline to reflect the recent change to legislation, albeit that we consider this work at a later meeting once we have examined some transcripts.

Question 7: Is the Council content to continue with work to amend the existing disclosing private sexual images guideline?

Child abduction offences

3.21 There are two offences under the Child Abduction Act 1984 that could potentially be included within the project, the taking of a child (aged under 16) out of the UK by a parent, guardian etc without consent (s.1), and the taking or detaining of a child (aged under 16) by a person other than a parent or guardian etc without lawful authority or reasonable excuse (s.2). Volumes of these offences are very low, 7 offenders were sentenced in 2020 for the s.1 offence, and around 50 offenders sentenced in 2020 for the s.2 offence. There have been no requests to the Council to produce guidelines for these offences, other than mention in an Andrew Ashworth article in an edition of the Criminal Law Review in 2018, which stated that the CACD felt it necessary to give some guidance to sentencers, so queried whether a guideline should be produced.

3.22 The Law Commission published a report in 2014 which recommended that both the common law offences of kidnap and false imprisonment should be replaced with statutory offences and the child abduction offence be amended. It was proposed that the maximum penalty for child abduction should be increased to 14 years and the abduction offence extended to situations where a child is lawfully taken abroad but then unlawfully retained abroad. The Government has not formally accepted any of these recommendations, however it is understood that at some point the changes to the child abduction offence might be contemplated, although there are no immediate plans or proposed legislative vehicle to do so.

3.23 There is a link to kidnap offences for the s.2 offences, but no particular links to the s.1 offence with the rest of the offences being considered as part of this project. Including these two offences as part of the project will increase the size of the project and lengthen the time it will take to produce guidelines for the other offences. Given the very low volumes of

cases sentenced, the fact that there have been no requests for guidelines for child abduction, and that these offences are ones that potentially Government may look to amend at some point, it is recommended that we do not include them within this project.

Question 8: Does the Council agree with the recommendation not to include child abduction offences within the project?

4 EQUALITIES

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

5 IMPACT AND RISKS

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

Sentencing Council

Sentencing Council meeting:	**22 July 2022**
Paper number:	**SC(22)JUL04 – Miscellaneous Amendments**
Lead Council member:	**Jo King**
Lead official:	**Ruth Pope**
	Ruth.pope@sentencingcouncil.gov.uk

1 ISSUE

1.1 This is the third of three meetings to discuss the miscellaneous amendments prior to consultation in September. The responses to the consultation will be discussed in December and January to enable any changes agreed upon to be made on 1 April 2023.

2 RECOMMENDATION

2.1 The Council is asked to consider what if any action should be taken in relation to the matters set out in the paper and whether these should be consulted on as part of the miscellaneous amendments consultation.

3 CONSIDERATION

Changes to the Sentencing children and young people guideline

3.1 The Police, Crime, Sentencing and Courts Act 2022 (PCSC) makes changes to detention and training orders (DTOs) and youth rehabilitation orders (YROs). Stephen Leake has made some helpful suggestions for this section of the paper.

3.2 For offences **sentenced** on or after 28 June 2022, section 158 PCSC removes the fixed lengths of DTOs so that any length of DTO from 4 months up to 24 months can be given. Section 160 and Schedule 16 makes time spent on remand or on qualifying bail credited as time served rather than being taken into account when setting the length of the DTO (as it was previously).

3.3 The 'Custodial sentences' part in section six of the Children and young people guideline needs to be amended to take account of this change. The opening paragraph currently reads:

> **A custodial sentence should always be used as a last resort. If offence specific guidelines for children and young people are available then the court should consult them in the first instance to assess whether custody is the most appropriate disposal.**
>
> The available custodial sentences for children and young people are:

Youth Court	Crown Court
Detention and training order for the following periods: • 4 months; • 6 months; • 8 months; • 10 months; • 12 months; • 18 months; or • 24 months.	• Detention and training order (the same periods are available as in the youth court) • Long-term detention (under section 250 Sentencing Code) • Extended sentence of detention or detention for life (if dangerousness criteria are met) • Detention at Her Majesty's pleasure (for offences of murder)

3.4 This could be updated by changing the wording in the first column to:

- Detention and training order for at least 4 months but not more than 24 months

3.5 At present the version of the Sentencing Code on legislation.gov.uk has not been updated with these changes, but once it has, a link could be added: (section 236 of the Sentencing Code).

3.6 A further proposed change to this table is to add the following to each column:

- Required special sentence of detention for terrorist offenders of particular concern (under section 252A of the Sentencing Code)

3.7 In the section headed: **Detention and training order (DTO)** the following paragraph requires amendment:

> 6.53 A DTO can be made only for the periods prescribed – 4, 6, 8, 10, 12, 18 or 24 months. Any time spent on remand in custody or on bail subject to a qualifying curfew condition should be taken into account when calculating the length of the order. The accepted approach is to double the time spent on remand before deciding the appropriate period of detention, in order to ensure that the regime is in line with that applied to adult offenders.[35] After doubling the time spent on remand the court should then adopt the nearest prescribed period available for a DTO.

3.8 Following amendment by the PCSC, section 240ZA of the Criminal Justice Act 2003, now reads:

> **240ZA Time remanded in custody to count as time served: terms of imprisonment or detention and detention and training orders**
>
> (1) This section applies where—
>
> (a) an offender is serving a term of imprisonment in respect of an offence, and

(b) the offender has been remanded in custody (within the meaning given by section 242) in connection with the offence or a related offence.

(1A) This section also applies where—

(a) a court, on or after the day on which Schedule 16 to the Police, Crime, Sentencing and Courts Act 2022 came into force, makes a detention and training order in respect of an offender for an offence, and
(b) the offender concerned has been remanded in custody in connection with the offence or a related offence.

(1B) In this section any reference to a *"sentence"* , in relation to an offender, is to—

(a) a term of imprisonment being served by the offender as mentioned in subsection (1)(a), or
(b) a detention and training order made in respect of the offender as mentioned in subsection (1A)(a).

(2) It is immaterial for subsection (1)(b) or (1A)(b) whether, for all or part of the period during which the offender was remanded in custody, the offender was also remanded in custody in connection with other offences (but see subsection (5)).

(3) The number of days for which the offender was remanded in custody in connection with the offence or a related offence is to count as time served by the offender as part of the sentence. But this is subject to subsections (4) to (6).

(4) If, on any day on which the offender was remanded in custody, the offender was also detained in connection with any other matter, that day is not to count as time served.

(5) A day counts as time served—

(a) in relation to only one sentence, and
(b) only once in relation to that sentence.

(6) A day is not to count as time served as part of any automatic release period served by the offender (see section 255B(1))

(6A) Where a court has made a declaration under section 327 of the Sentencing Code in relation to the offender in respect of the offence, this section applies to days specified under subsection (3) of that section as if they were days for which the offender was remanded in custody in connection with the offence or a related offence.

(7) For the purposes of this section a suspended sentence—

(a) is to be treated as a sentence of imprisonment when it takes effect under paragraph 13(1)(a) or (b) of Schedule 16 to the Sentencing Code, and
(b) is to be treated as being imposed by the order under which it takes effect.

(8) In this section *“related offence”* means an offence, other than the offence for which the sentence is imposed (“offence A”), with which the offender was charged and the charge for which was founded on the same facts or evidence as offence A.

(8A) Subsection (9) applies in relation to an offender who is sentenced to two or more consecutive sentences or sentences which are wholly or partly concurrent if—

(a) the sentences were imposed on the same occasion, or
(b) where they were imposed on different occasions, the offender has not been released during the period beginning with the first and ending with the last of those occasions.

(9) For the purposes of subsections (3) and (5), the sentences are to be treated as a single sentence.

(10) The reference in subsection (4) to detention in connection with any other matter does not include remand in custody in connection with another offence but includes—

(a) detention pursuant to any custodial sentence;
(b) committal in default of payment of any sum of money;
(c) committal for want of sufficient distress to satisfy any sum of money;
(d) committal for failure to do or abstain from doing anything required to be done or left undone.

(11) This section applies to a determinate sentence of detention under section 91 or 96 of the PCC(S)A 2000, under section 250, 252A, 254, 262, 265, 266 or 268A of the Sentencing Code or under or section 226A, 226B, 227, 228 or 236A of this Act as it applies to an equivalent sentence of imprisonment.

3.9 Section 242 Criminal Justice Act 2003 reads:

242 Interpretation of sections 240ZA, 240A and 241

(1) [NOT REPORDUCED].

(2) References in sections 240ZA and 241 to an offender's being remanded in custody are references to his being—

(a) remanded in or committed to custody by order of a court,
(b) remanded to youth detention accommodation under section 91(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, or
(c) remanded, admitted or removed to hospital under section 35, 36, 38 or 48 of the Mental Health Act 1983.

(3) In sections 240ZA and 240A, "detention and training order" has the meaning given by section 233 of the Sentencing Code.

3.10 The effect of this is that time spent on remand in custody (but not to local authority accommodation) prior to the imposition of a DTO is automatically deducted and the sentencing court no longer needs to make an adjustment. The court will be required to consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Code (as is the case with adult offenders).

3.11 The proposal is to amend paragraph 6.53 to read:

> For cases sentenced on or after 28 June 2022, any time spent on remand in custody to youth detention accommodation under section 91(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will automatically be taken into account under section 240ZA of the Criminal Justice Act 2003 and does not need to be deducted from the length of the order. The court must consider whether to give credit for time spent on bail subject to a qualifying curfew in accordance with section 240A of the Criminal Justice Act 2003 and section 325 of the Sentencing Code.
>
> A remand to local authority accommodation under section 91(3) of the 2012 Act is neither a remand in custody for the purposes of section 240ZA of the 2003 Act nor a remand on bail for the purposes of section 240A of the 2003 Act and section 325 of the Sentencing Code. Therefore, if the offender was subject to a qualifying curfew while remanded to local authority accommodation the relevant credit should be given by the court by reducing the sentence as if a direction under section 240 or 325 had been given.

3.12 As these changes apply immediately it may be preferable to make them now, without consulting and add them to the annex of changes made in the consultation document. However, some of the proposed changes (highlighted in yellow at 3.6 and 3.11) are not entirely straightforward or uncontroversial and the Council may consider it appropriate to consult on these.

Question 1: Does the Council agree to the proposed amendments to the C&YP guideline (at 3.4, 3.6 and 3.11) relating to custodial sentences and which changes should be made without consulting?

3.13 A further change is required in respect of DTOs in the Guilty pleas section of the guideline. Paragraph 5.9 currently reads:

> 5.9 A detention and training order (DTO) can only be imposed for the periods prescribed – 4, 6, 8, 10, 12, 18 or 24 months. If the reduction in sentence for a guilty plea results in a sentence that falls between two prescribed periods the court must impose the lesser of those two periods. This may result in a reduction greater than a third, in order that the full reduction is given and a lawful sentence imposed.

3.14 This could be amended to read:

> 5.9 A detention and training order (DTO) must be for a term of at least 4 months but must not exceed 24 months. If the reduction in sentence for a guilty plea results in a sentence that falls below 4 months a non-custodial sentence should be imposed.

3.15 This would reflect what is said later in the guideline:

> 6.43 The term of a custodial sentence must be the shortest commensurate with the seriousness of the offence; any case that warrants a DTO of less than four months must result in a non-custodial sentence. The court should take account of the circumstances, age and maturity of the child or young person.

3.16 Again, it is proposed that this change could be made without consultation.

Question 2: Does the Council agree to make the proposed amendment to the C&YP guideline (at 3.14) relating to guilty pleas without consulting?

3.17 In respect of YROs, the guideline lists the available requirements:

6.27 The available requirements within a YRO are:

- activity requirement (maximum 90 days);
- supervision requirement;
- unpaid work requirement (between 40 and 240 hours);*
- programme requirement;
- attendance centre requirement (maximum 12 hours for children aged 10–13, between 12 and 24 hours for young people aged 14 or 15 and between 12 and 24 hours for young people aged 16 or over (all ages refer to age at date of the finding of guilt);
- prohibited activity requirement;
- curfew requirement (maximum 12 months and between 2 and 16 hours a day);
- exclusion requirement (maximum 3 months);
- electronic monitoring requirement;
- residence requirement;*
- local authority residence requirement (maximum 6 months but not for any period after young person attains age of 18);
- fostering requirement (maximum 12 months but not for any period after young person attains age of 18);**
- mental health treatment requirement;
- drug treatment requirement (with or without drug testing);
- intoxicating substance requirement;
- education requirement; and
- intensive supervision and surveillance requirement.**

* These requirements are only available for young people aged 16 or 17 years old on the date of the finding of guilt.

** These requirements can only be imposed if the offence is an imprisonable one AND the custody threshold has been passed. For children and young people aged under 15 they must be deemed a persistent offender.

Many of the above requirements have additional restrictions.

Magistrates, always consult your legal adviser before imposing a YRO.

3.18 Section 161 and Schedule 17(4) PCSC amends para 18 of Schedule 6 to the Sentencing Code which now reads:

18 Curfew requirement

(1) In this Code *"curfew requirement"*, in relation to a youth rehabilitation order, means a requirement that the offender must remain, for particular periods ("curfew periods"), at a particular place.

(2) A youth rehabilitation order which imposes a curfew requirement must specify—

(a) the curfew periods, and

(b) the place at which the offender must remain for each curfew period.

(3) Different places or different curfew periods may be specified for different days.

(4) The curfew periods must amount to—

(a) not less than 2 hours in any day,

(b) not more than the relevant number of hours in any day, and

(c) not more than 112 hours in any period of 7 days beginning with the day of the week on which the requirement first takes effect.

(4A) In sub-paragraph (4)(b), *"the relevant number of hours"* —

(a) in relation to a youth rehabilitation order in respect of an offence of which the offender was convicted before the day on which paragraph 19 of Schedule 17 to the Police, Crime, Sentencing and Courts Act 2022 came into force, means 16 hours, and

(b) in relation to a youth rehabilitation order in respect of an offence of which the offender was convicted on or after that day, means 20 hours.

(5) The specified curfew periods must fall within the period of 12 months beginning with the day on which the requirement first takes effect.

3.19 This change could be accommodated by replacing the highlighted bullet point at 3.17 above with wording similar to that recently added to the Imposition guideline:

- curfew requirement (maximum 12 months);
  - for an offence of which the offender was convicted on or after 28 June 2022: 2–20 hours in any 24 hours; maximum 112 hours in any period of 7 days beginning with the day of the week on which the requirement first takes effect; or
  - for an offence of which the offender was convicted before 28 June 2022: 2-16 hours in any 24 hours

3.20 Amendments in Schedule 17(4) in relation to education requirements are also in force. It is not considered necessary to make any amendments in relation to them as they are infrequently made and the guideline does not currently give any details but directs the user to the statutory provisions by the words “Many of the above requirements have additional restrictions.”

Question 3: Does the Council agree to make the change proposed at 3.19 without consulting?

3.21 Section 162 PCSC abolishes reparation orders in respect of an offence for which an offender is convicted on or after 28 June 2022. Reparation orders are referenced in the following places in the guideline:

(At paragraph 6.10)

Sentences available by age

	Age of child or young person			
Sentence	**10-11**	**12-14**	**15-17**	**Rehabilitation period**
Absolute or conditional discharge or reparation order	√	√	√	Absolute discharge and reparation: spent on day of sentence Conditional discharge: spent on last day of the period of discharge

Absolute or conditional discharge and reparation orders

6.15 A reparation order can require a child or young person to make reparation to the victim of the offence, where a victim wishes it, or to the community as a whole. Before making an order the court must consider a written report from a relevant authority, e.g. a youth offending team (YOT), and the order must be commensurate with the seriousness of the offence.

6.16 If the court has the power to make a reparation order but chooses not to do so, it must give its reasons.

Breach of a reparation order

7.4 If it is proved to the appropriate court that the child or young person has failed to comply with any requirement of a reparation order that is currently in force then the court can:

- order the child or young person to pay a fine not exceeding £1,000; or
- revoke the order and re-sentence the child or young person using the range of sentencing options that are currently available. However the sentence imposed must be one that could be imposed on a child or young person who was the age that the offender was when in fact convicted.

If re-sentencing the child or young person the court must take into account the extent to which the child or young person has complied with the requirements of this order.

7.5 If the order was made by the Crown Court then the youth court can commit the child or young person in custody or release them on bail until they can be brought or appear before the Crown Court.

7.6 The child or young person or a Youth Offending Team (YOT) officer can also apply for the order to be revoked or amended. There is no power to re-sentence in this situation as the child or young person has not been found to be in breach of requirements.

3.22 In the short term it is proposed to reword paragraph 6.15 to read:

6.15 A reparation order is available only if the offender was **convicted of the offence before 28 June 2022**. It can require a child or young person to make reparation to the victim of the offence, where a victim wishes it, or to the community as a whole. Before making an order the court must consider a written report from a

relevant authority, e.g. a youth offending team (YOT), and the order must be commensurate with the seriousness of the offence

3.23 We could then consult on removing all or most of the references to reparation orders on the basis that by the time the changes are implemented in April 2023, there will be very few if any being made. It could be argued that the section on breach of a reparation order should be left in place for slightly longer – views could be sought on that point.

Question 4: Does the Council agree to make the change proposed at 3.22 without consulting?

Question 5: Does the Council agree to consult on whether to remove all references to reparation orders with effect from April 2023?

Other proposed changes

3.24 There has been a judgment giving guidance on the application of the guilty plea section of the C&YP guideline and the Council may feel it would be helpful to consult on referring to this in the guideline.

3.25 In R v B [2000] EWCA Crim 643 the court held that it will sometimes be appropriate to treat a young person as needing further information, assistance or advice before indicating their plea, and thereby to allow the maximum level of reduction for a guilty plea that was not entered at the first stage of the proceedings, even though it would not do so in the case of an adult.

3.26 The relevant paragraphs in the guideline are:

> 5.5 **Plea indicated at the first stage of the proceedings**: Where a guilty plea is indicated at the first stage of proceedings a reduction of **one-third** should be made (subject to the exceptions below). The first stage will normally be the first hearing in the magistrates' or youth court at which a plea is sought and recorded by the court.[21]
>
> **Exceptions**
>
> **Further information, assistance or advice necessary before indicating plea**
>
> 5.16 Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the child or young person's ability to understand what was alleged, or otherwise made it unreasonable to expect the child or young person to indicate a guilty plea **sooner than was done**, a reduction of one-third should still be made.

3.27 A sentence could be added to the end of para 5.16 such as:

> It may sometimes be appropriate to treat a child or young person as needing such information, assistance or advice, where it would not be needed in the case of an adult.

3.28 Alternatively a similarly worded footnote could be added to para 5.16 (and/or a reference to the case could be footnoted).

3.29 The same case also made it clear that the correct sequence when using an adult guideline to arrive at a sentence for a child or young person is to apply the appropriate reduction for youth, and then apply the guilty plea reduction. This could be accommodated by adding the highlighted sentence to the end of para 6.46:

> 6.46 When considering the relevant adult guideline, the court **may** feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence **the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age**. This reduction should be applied before any reduction for a plea of guilty.

Question 6: Does the Council agree to consult on the proposed changes to the C&YP guideline arising from case law?

Use of the word 'gang' in the bladed articles/offensive weapons guidelines

3.30 The Council has stopped using the word 'gang' in factors in guidelines because of the potential for this to disadvantage certain demographic groups. The Possession of a bladed article/offensive weapon, the Bladed articles and offensive weapons - threats and the Bladed articles and offensive weapons (possession and threats) - children and young people guidelines still have the following aggravating factor:

- Offence was committed as part of a group or gang

3.31 The factor in all three guidelines has the expanded explanation which reads:

> The mere membership of a group (two or more persons) should not be used to increase the sentence, but where the **offence was committed as part** of a group this will normally make it more serious because:
>
> - the **harm** caused (both physical or psychological) or the potential for harm may be greater and/or
> - the **culpability** of the offender may be higher (the role of the offender within the group will be a relevant consideration).
>
> Culpability based on role in group offending could range from:
>
> - Higher culpability indicated by a leading role in the group and/or the involvement by the offender of others through coercion, intimidation or exploitation, to

- Lower culpability indicated by a lesser or subordinate role under direction and/or involvement of the offender through coercion, intimidation or exploitation.

Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation (including as a result of domestic abuse, trafficking or modern slavery) which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.

Where the offending is part of an organised criminal network, this will make it more serious, and the role of the offender in the organisation will also be relevant.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and/or lack of maturity when considering the significance of group offending.

3.32 It is proposed that the factor should be amended to:

- Offence was committed as part of a group

3.33 As this is now standard wording across guidelines it is proposed that the change can be made without consultation, and it can be added to the annex of changes to be included in the consultation document.

Question 7: Does the Council remove the word 'gang' from the bladed articles/ offensive weapons guidelines, without consultation?

Minimum terms for bladed article/ offensive weapon possession and threats offences

3.34 At the June meeting the Council agreed to consult on changes to possession and threats guidelines to take account of changes the threshold for passing a sentence below the minimum term for repeat offenders for certain offences from 'unjust in all the circumstances' to 'exceptional circumstances' for offences committed on or after 28 June 2022. In the interim a note has been added to the guidelines.

3.35 The recent case of Uddin [2022] EWCA Crim 751 clarifies a point of law relating to whether it is permissible to suspend a sentence imposed under the minimum term provisions.

3.36 The Court concluded (at para 25):

> it is lawful to impose a minimum sentence of imprisonment or detention in a young offender institution, pursuant to section 315, but to suspend it. Although not unlawful, however, we are also satisfied that suspending such a sentence will only rarely be appropriate, because in most cases the suspending of the sentence would undermine the punitive and deterrent effect which Parliament plainly intended the minimum sentencing provisions to have. There will be few circumstances in which a court concludes that the imposition of an appropriate custodial sentence would not be unjust but, notwithstanding the clear intention of Parliament, that the sentence can nonetheless be suspended.

3.37 Consideration has been given to adding a note to the Possession of a bladed article/offensive weapon and the Bladed articles and offensive weapons - threats guidelines setting out that it would be lawful to suspend the minimum term but it would rarely be appropriate. However, offence specific guidelines do not generally refer to suspended sentences and there is no obvious way of addressing the point in the guideline without appearing to encourage the practice of suspending the minimum term.

3.38 The wording the Council agreed to consult on for the possession guideline includes:

> **Step 3 – Minimum Terms – second or further relevant offence**
>
> When sentencing the offences of:
>
> - possession of an offensive weapon in a public place;
> - possession of an article with a blade/point in a public place;
> - possession of an offensive weapon on school premises; and
> - possession of an article with blade/point on school premises
>
> a court must impose a sentence of at least 6 months' imprisonment where this is a second or further relevant offence **unless:**
>
> - (If the offence was committed before 28 June 2022) **the court is of the opinion that there are particular circumstances relating to the offence, the previous offence or the offender which make it unjust to do so in all the circumstances**; or
> - (If the offence was committed on or after 28 June 2022) **the court is of the opinion that there are exceptional circumstances which relate to the offence or to the offender, and justify not doing so.**

3.39 Views are sought as to whether and how a reference could be added to the availability of suspending the sentence imposed.

Question 8: Should any further changes be made to the bladed article/ offensive weapon guidelines?

Life sentence for manslaughter of an emergency worker

3.40 At the June meeting the Council considered a proposal to amend the Unlawful act manslaughter guideline to take account of Section 3 of the PCSC which inserts a new s258A (re 16 and 17 year olds), s274A (re 18-20 year olds) and s285A (re 21 and older) in the Sentencing Code. The effect of this is that for unlawful act manslaughter where the victim is an emergency worker acting in that capacity, the court must impose a life sentence (unless there are exceptional circumstances). The proposal was to make only minimal changes to the guideline on the grounds that such cases will be very rare.

3.41 However, the Council felt that more guidance should be provided to sentencers on the consideration of exceptional circumstances in such cases. Accordingly the proposed changes have been amended (new wording in red):

- Firstly, adding the following to the header of the guideline (immediately before the text on the type of manslaughter):

  For offences committed on or after 28 June 2022, if the offence was committed against an emergency worker acting in the exercise of functions as such a worker, the court **must** impose a life sentence **unless** the court is of the opinion that there are exceptional circumstances which (a) relate to the offence or the offender, and (b) justify not doing so (sections 274A and 285A of the Sentencing Code). See step 3

- Secondly, in statutory aggravating factors at step 2, changing:

  Offence was committed against an emergency worker acting in the exercise of functions as such a worker

To:

  Offence was committed against an emergency worker acting in the exercise of functions as such a worker. NOTE: For offences committed on or after 28 June 2022, if the offence was committed against an emergency worker acting in the exercise of functions as such a worker, the court **must** impose a life sentence **unless** the court is of the opinion that there are exceptional circumstances which (a) relate to the offence or the offender, and (b) justify not doing so. (sections 274A and 285A of the Sentencing Code) see step 3

3.42 Then it is proposed to add a new step 3 to the guideline as follows:

Step 3 – Required sentence and exceptional circumstances

The following paragraphs apply to adult offenders – there is a separate dropdown section below for those aged under 18 at the date of conviction.

Required sentence

1. Where the offence was committed against an emergency worker acting in the exercise of functions as such a worker, the court **must** impose a life sentence **unless** the court is of the opinion that there are exceptional circumstances which (a) relate to the offence or the offender, and (b) justify not doing so (sections 274A and 285A of the Sentencing Code)**.**

Applicability

2. The required sentence provisions apply when a person is convicted of unlawful act manslaughter committed on or after 28 June 2022, the offender was aged 16 or over at the offence date and the offence was committed against an emergency worker acting in the exercise of functions as such a worker.

3. The circumstances in which an offence is to be taken as committed against a person acting in the exercise of functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying

out functions which, if done in work time, would have been in the exercise of functions as an emergency worker.

4. An emergency worker has the meaning given by section 68 of the Sentencing Code.

5. Where the required sentence provisions apply a guilty plea reduction applies in the normal way (see step 5 – Reduction for guilty pleas).

6. Where the required sentence provisions apply and a life sentence is imposed, the notional determinate sentence should be used as the basis for the setting of a minimum term to be served.

7. Where the required sentence provisions apply, this should be stated expressly.

Exceptional circumstances

8. In considering whether there are exceptional circumstances that would justify not imposing the statutory minimum sentence, the court must have regard to:

    - the particular circumstances of the offence **and**
    - the particular circumstances of the offender

    either of which may give rise to exceptional circumstances.

9. Where the factual circumstances are disputed, the procedure should follow that of a Newton hearing: see Criminal Practice Directions VII: Sentencing B.

10. Where the issue of exceptional circumstances has been raised the court should give a clear explanation as to why those circumstances have or have not been found.

Principles

11. Circumstances are exceptional if the imposition of the required sentence would result in an arbitrary and disproportionate sentence.

12. The court should look at all of the circumstances of the case taken together, including circumstances personal to the offender. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances.

Where exceptional circumstances are found

13. If there are exceptional circumstances that justify not imposing the required sentence then the court should impose the sentence arrived at by normal application of this guideline**.**

Sentencing offenders aged under 18 at the date of conviction [Dropdown]

1. Where the offender is aged 16 or 17 **at the date of conviction**, the required sentence provisions apply only if the offender is aged 16 or over **when the offence was committed** and the offence was committed against an emergency worker acting in the exercise of functions as such a worker (section 258A of the Sentencing Code).

2. Subject to the required sentence provisions, where the offender is aged under 18 **at the date of conviction** the court should determine the sentence in accordance with the Sentencing Children and Young People guideline, particularly paragraphs 6.42-6.49 on custodial sentences.

3. This guidance states at paragraph 6.46: “When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age.”

4. The considerations above on exceptional circumstances relating to the offence or offender apply equally when sentencing offenders aged 16 or 17 at the date of the conviction.

3.43 The proposed wording reflects that in other guidelines (notably firearms and that proposed for terrorism) but omitting some of the wording designed to discourage overuse of exceptional circumstances.

Question 9: Does the Council agree to consult on the proposed additions to the unlawful act manslaughter guideline?

4 EQUALITIES

4.1 No significant issues relating to equality or diversity have been identified.

5 IMPACT AND RISKS

5.1 The impact of majority of the proposals in this paper (and those agreed previously) on prison or probation resources will be relatively minor. The most significant changes are those necessitated by legislative changes. The consultation will be accompanied by a narrative resource assessment which will be circulated to Council members in August.

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Sentencing Council

Sentencing Council meeting:	**22 July 2022**
Paper number:	**SC(22)JUL05 - Framework Document**
Lead Council member:	**n/a**
Lead official:	**Ollie Simpson** **ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Finalising a draft framework agreement between the Sentencing Council and the Ministry of Justice.

2 RECOMMENDATIONS

2.1 That Council notes the current draft of the proposed framework agreement at **Annex A,** and in particular sections 14 and 16 on the roles of the Council and its individual members.

3 CONSIDERATION

3.1 Despite some attempts in previous years, there has never been a finalised and agreed framework document drawn up to set out the relationship and respective duties of the Sentencing Council and its sponsor department, the Ministry of Justice. This was one of the recommendations arising out of the Tailored Review of the Council conducted by the Cabinet Office, which reported in 2019.

3.2 Since then, we have worked with the Arms Length Body (ALB) Centre of Expertise in MoJ to develop such a document. The draft at **Annex A** is similar in structure to, and shares wording with, similar documents used to govern the working relationship between ALBs and their sponsor departments across Whitehall. However, we have been especially careful to ensure that there is no suggestion that the independence of the Council be compromised. For example, we have been clear that we can and should follow guidance from the department to the extent to which it relates to good governance, including financial and management practice, but this cannot extend into the policy sphere.

3.3 The Governance sub-Group has overseen several iterations of the document over time and in practice it is this group that will consider matters relating to the budget, risk and other governance issues on an ongoing basis. Section 14 of the attached draft sets out the composition and duties of the Council as a whole. Beyond its statutory functions, these include reviewing performance against the objectives we have set out in the annual business plan, making appropriate financial management decisions, and ensuring that effective arrangements are in place for risk management.

3.4 Paragraph 16.1 sets out the responsibilities of individual Council members, which are to:

- comply at all times with the Code of Conduct for Board Members of Public Bodies, which covers conduct in the role and includes the Nolan Principles of Public Life as well as rules relating to the use of public funds and to conflicts of interest;
- not misuse information gained in the course of their public service for personal gain or for political profit, nor seek to use the opportunity of public service to promote their private interests or those of connected persons or organisations;
- comply with the MoJ's rules on the acceptance of gifts and hospitality, and of business appointments;
- act in good faith and in the best interests of the Council; and
- ensure they are familiar with any applicable guidance on the role of Public Sector Boards that may be issued from time to time by the Cabinet Office, HM Treasury or wider government.

3.5 Subject to clearance by the Chair, there will be a further process on MoJ's side, working with Cabinet Office, to finalise the document. Whilst nothing specific is asked of Council members, this meeting provides an opportunity to raise awareness of the document and the duties it sets out for the Council, and for Council members to raise any questions they may have on it.

Sentencing Council

Sentencing Council meeting:	**22 July 2022**
Paper number:	**SC(22)JUL06 – Aggravated vehicle taking**
Lead Council member:	**Rebecca Crane**
Lead official:	**Zeinab Shaikh** **zeinab.shaikh@sentencingcouncil.gov.uk**

1 ISSUE

1.1 The Council is invited to consider how work to revise guidelines for aggravated vehicle taking can be sequenced alongside the public consultation on motoring offences. The Council is also invited to approve revisions to the sentencing tables, and to aggravating and mitigating factors for these guidelines.

2 RECOMMENDATIONS

2.1 That the Council:

- Notes our intention to delay consulting on proposals to revise the guidelines for aggravated vehicle taking while we await the findings of the ongoing consultation on motoring offences;
- Approves the proposed sentencing tables and aggravating and mitigating factors for the aggravated vehicle taking guidelines.

3 CONSIDERATION

Timing

3.1 Existing sentencing guidelines for aggravated vehicle taking have been in place since 2008. As such, they are now out of date and offer minimal guidance to sentencers. While the statutory maximum penalties for aggravated vehicle taking offences are not changing, the Council has agreed to revise these guidelines alongside wider work on motoring offences.

3.2 In May, the Council agreed to proceed with four revised guidelines for aggravated vehicle taking, covering the following:

- Causing vehicle or property damage
- Causing injury
- Causing death
- Involving dangerous driving

3.3 The Council provisionally agreed culpability and harm factors for each of these guidelines (attached at Annex A). The Council also provided a steer that these guidelines should draw heavily from what has been agreed for motoring offences, particularly in terms

of step one factors for dangerous driving and elements of the guidelines for injury by wanton/furious driving and death by dangerous driving.

3.4 The public consultation on motoring offences runs until late September 2022. Given the overlap between some of the motoring guidelines being consulted on and the proposals for aggravated vehicle taking, we believe it is most sensible to await the outcome of this consultation, potentially including the Council's formal response, before publishing the proposals for aggravated vehicle taking. This will allow us to consider the responses to the motoring consultation and to incorporate any further changes the Council sees fit to make to the motoring guidelines.

3.5 This approach will, however, slow progress on revising the aggravated vehicle taking guidelines. Publication of the consultation will be pushed back to 2023, with resulting delay to the launch of the revised guidelines. Any delay is likely to be extended as it will be challenging to consult on the revised aggravated vehicle taking guidelines before the Council has published its response to the motoring consultation. There is otherwise a risk that we would be committing the Council to a particular approach while the motoring guidelines are still being finalised before publication, or of giving a preview of elements of the motoring guidelines before they are formally published.

3.6 If we do not await the outcome of the consultation on the motoring guidelines, we will likely be launching the aggravated vehicle taking consultation soon after the motoring consultation has closed. As such, there is a risk of reputational damage if the Council is perceived as not having listened to feedback on motoring, and we may receive the same responses again, at least in part, rather than having respondents engage with the detail of our proposals.

3.7 On balance, we believe the best approach is to delay the consultation on aggravated vehicle taking until we can take stock of the findings from the motoring consultation. At this later stage, we can consider how best to sequence the aggravated vehicle taking consultation around publication of the motoring guidelines. In the meantime, we will continue to prepare the draft guidelines and consultation paper as far as possible, so that these can be published as soon as any changes resulting from the motoring consultation are made.

<u>Sentencing tables</u>

3.8 Under the existing guidelines for aggravated vehicle taking, the sentencing tables offer minimal guidance to sentencers by providing examples of different types of offence severity, along with a starting point and category range for each. In revising the tables, we have followed the now standard approach of using culpability and harm levels to offer starting points and category ranges for varying levels of offence severity, and have looked at

comparator guidelines to ensure alignment. Data on cases from 2020 (at Annex B) has also been considered, to try to ensure that the revised tables will not inadvertently make sentencing more or less severe.

3.9 When considered as a whole, the proposed sentencing tables treat death as the most serious of the four aggravated vehicle taking offences. Injury and dangerous driving sit beneath this and are roughly on par with one another, as in the existing guideline (where these offences are combined). Vehicle/property damage sits at the bottom, with lower starting points and category ranges, in line with how the existing guideline compares to the other offences.

Vehicle/property damage

3.10 The proposed sentencing table for vehicle/property damage covers both the summary only variation (damage of under £5,000) and the either way variation (damage of £5,000 and over). In May, the Council agreed that lower value damage variation should be limited to harm category 3. To reflect this, a rubric has been included at the top of the sentencing table which sets out that cases falling under harm category 3 are limited to a maximum sentence of six months' custody. Category ranges and starting points in the bottom row of the table have been pitched to allow magistrates to award community orders across all cases of lower value damage where appropriate (as, in 2020, 60 per cent of damage under £5,000 offences received a community order).

3.11 The proposed table covers an offence range of low level community order to 1 year 6 months' custody. The bottom of the range is broadly in line with the existing guideline and the top of the range is capped for proportionality with the injury guideline.

3.12 In effect, boxes 1A to 2C in the proposed table will cover higher value damage (which has a statutory maximum of two years), with the range starting at a medium level community order. While community orders sit within the category ranges for three of these six boxes (1C, 2B and 2C), only one box has this as a starting point (2C). In 2020, 42 per cent of offenders sentenced for higher value damage received a community order, and so there may be a risk that this approach results in an increase in custodial sentences if sentencers are guided by starting points rather than the scope afforded by the category ranges. This can be explored further in road testing exercises at the consultation stage.

3.13 We have taken the general starting points and category ranges from the existing guideline and modified these for the bottom row of the table, staggering starting points and category ranges for medium and high harm upwards to allow for a gradual step up to the top of the range. There is intentional overlap between category ranges across boxes to allow sentencers sufficient scope to account for any relevant aggravating and mitigating factors.

3.14 The proposed sentencing table is more lenient than what is included in the general dangerous driving guideline (at Annex C), which also contains a high harm factor of 'damage caused to vehicles or property'. This could, arguably, be justified by the increased risk involved in dangerous driving, in contrast with vehicle/property damage. We are limited in our ability to move sentences for vehicle/property damage upwards if we want to retain a distinction between this offence and causing injury, where the latter is treated as the more serious of the two offences. A narrow scope for movement is also imposed by the statutory maximum of two years' custody across these offences.

Rubric: Where the total damage caused is valued under £5,000, this will be a summary-only offence with a statutory maximum penalty of six months' custody. This is reflected in the starting points and ranges for category 3 harm in the sentencing table below.			
Harm/culpability	High culpability A	Medium culpability B	Lower culpability C
Harm category 1	Starting point: 1 year's custody Category range: 26 weeks' custody – 1 year 6 months' custody	Starting point: 26 weeks' custody Category range: 18 weeks' custody – 1 year's custody	Starting point: 12 weeks' custody Category range: High level community order – 26 weeks' custody
Harm category 2	Starting point: 26 weeks' custody Category range: 18 weeks' custody – 1 year's custody	Starting point: 12 weeks' custody Category range: High level community order – 26 weeks' custody	Starting point: High level community order Category range: Medium level community order – 12 weeks' custody
Harm category 3	Starting point: 12 weeks' custody Category range: High level community order – 26 weeks' custody	Starting point: High level community order Category range: Medium level community order – 12 weeks' custody	Starting point: Medium level community order Category range: Low level community order – High level community order

Question 1a: Are you content to approve the sentencing table for vehicle/property damage as proposed?

Injury

3.15 The proposed sentencing table for aggravated vehicle taking causing injury largely mirrors what was agreed by the Council for the comparator guideline of causing injury by wanton or furious driving (at Annex D). However, the bottom of the offence range here has been revised upwards slightly, to a low level community order rather than a fine. This reflects

that very few fines are handed out for this offence in practice (usually less than five per cent in recent years), with low volumes for this offence overall, and aligns with what is being proposed for vehicle/property damage. The bottom of the category ranges for 3B and 2C have also been revised upwards slightly as a result, to a medium level community order. The starting points and category ranges in the proposed table are otherwise generally higher than what is being proposed for vehicle/property damage, which seems right given that physical and/or psychological harm is involved here.

Harm/culpability	High culpability A	Medium culpability B	Lower culpability C
Harm category 1	Starting Point: 1 year 6 months' custody Category range: 1 - 2 years' custody	Starting Point: 1 year's custody Category range: 26 weeks' – 1 year 6 months' custody	Starting Point: 26 weeks' custody Category range: High level community order – 1 year's custody
Harm category 2	Starting Point: 1 year's custody Category range: 26 weeks' – 1 year 6 months' custody	Starting Point: 26 weeks' custody Category range: High level community order – 1 year's custody	Starting Point: High level community order Category range: Medium level community order – 26 weeks' custody
Harm category 3	Starting Point: 26 weeks' custody Category range: High level community order – 1 year's custody	Starting Point: High level community order Category range: Medium level community order – 26 weeks' custody	Starting Point: Medium level community order Category range: Low level community order – High level community order

Question 1b: Are you content to approve the sentencing table for causing injury as proposed?

Death

3.16 The Council previously agreed to a separate guideline for aggravated vehicle taking causing death, given the markedly different statutory maximum of 14 years' custody. The sentencing table proposed below borrows heavily from what has been agreed for causing death by dangerous driving (at Annex E), and the rubric is lifted unchanged. The starting points and category ranges, however, are tailored to sit within the statutory maximum for this offence, with overlapping category ranges to allow for significant increase or reduction if aggravating or mitigating factors apply.

3.17 The bottom of the offence range here starts at two years' custody, which is the top of the offence range for aggravated vehicle taking causing injury, recognising that this is a more serious offence. The top of the offence range has been capped at 12 years' custody, to allow sentencers some leeway to further increase sentences in exceptional cases (such as where multiple deaths have been caused and where a number of aggravating factors apply).

Starting points and category ranges

Rubric: Where more than one death is caused, it will be appropriate to make an upwards adjustment from the starting point within or above the relevant category range before consideration of other aggravating features. In the most serious cases, the interests of justice may require a total sentence in excess of the offence range for a single offence. See the Totality guideline and step six of this guideline.

Culpability	**Starting point**	**Range**
High	10 years	7 – 12 years
Medium	5 years	3 – 8 years
Lower	3 years	2 – 4 years

Question 1c: Are you content to approve the sentencing table for causing death as proposed?

Dangerous driving

3.18 The Council previously provided a steer that the harm table for aggravated vehicle taking involving dangerous driving should mirror what was approved for the general dangerous driving offence. As a result, the sentencing table proposed here is taken unchanged from the general dangerous driving guideline. While consideration was given to increasing some of the category ranges and starting points to reflect the additional vehicle taking aspect of this offence, the statutory maximum penalty of two years' custody across the two offences limits our ability to do this. Arguably, there is also already some consideration of this aspect of the offence in the culpability and aggravating factors being proposed for the guideline.

Harm/culpability	High culpability A	Medium culpability B	Lower culpability C
Harm category 1	Starting point: 1 year 6 months' custody Category range: 1 – 2 years' custody	Starting point: 1 year's custody Category range: 26 weeks' – 1 year 6 months' custody	Starting point: 26 weeks' custody Category range: High level community order – 1 year's custody
Harm category 2	Starting point: 1 year's custody	Starting point: 26 weeks' custody	Starting point: High level community order

	Category range: 26 weeks' – 1 year 6 months' custody	Category range: High level community order – 1 year's custody	Category range: Low level community order – 26 weeks' custody

Question 1d: Are you content to approve the sentencing table for dangerous driving as proposed?

Aggravating and mitigating factors

3.19 In drafting aggravating and mitigating factors, our general approach has been to draw together a core list from what the Council has agreed for the motoring guidelines (namely, the general dangerous driving guideline) and, in a more limited way, from existing guidelines for aggravated vehicle taking. These factors have been tailored to each variation of aggravated vehicle taking as necessary, with reference to Crown Court transcripts (at Annex F) to ensure common factors are represented.

3.20 The core list also includes four factors that the Council suggested moving out of culpability and harm for aggravated vehicle taking in the May meeting. These are 'vehicle taken as part of burglary', 'taken vehicle was an emergency vehicle', 'taken vehicle belongs to a vulnerable person' and 'disregarding warnings of others'.

3.21 For the draft guidelines covering vehicle/property damage, injury and death, consideration was given to recognising the standard of the offender's driving. In particular, we explored including an additional aggravating factor of 'bad driving' (such as speeding or driving in the wrong direction, particularly in residential areas). However, on balance, bad driving occurs so frequently as to almost be a prerequisite for aggravated vehicle taking, and it is treated as such in the provisional step one factors through the inclusion of a lower culpability factor of 'vehicle not driven in an unsafe manner' (which is included for all offences aside from aggravated vehicle taking involving dangerous driving). An alternative approach would be to include a mitigating factor of 'impeccable driving record', in line with the general motoring guidelines and the mitigating factors being proposed for dangerous driving. However, this may risk inadvertently 'double counting' the issue when considered alongside the provisional lower culpability factor.

Vehicle/property damage

3.22 The list of non-statutory aggravating factors for vehicle/property damage has been expanded to reflect the aspect of this offence of causing damage, either to the taken vehicle, another vehicle, or other property, such as in the additional factor of 'damage caused in moving traffic accident'.

Statutory aggravating factors
• Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction • Offence committed on bail
Other aggravating factors
• Vehicle taken as part of burglary • Taken and/or damaged vehicle was an emergency vehicle • Taken and/or damaged vehicle belongs to a vulnerable person • Disregarding warnings of others • Damage caused in moving traffic accident • Victim was a vulnerable road user, including cyclists and horse riders • Taken vehicle is an LGV, HGV or PSV etc • Other driving offences committed at the same time • Blame wrongly placed on others • Failed to stop and/or assist, or seek assistance at the scene • Passengers, including children • Offence committed on licence or while subject to court order(s)
Mitigating factors
• Actions of the victim or a third party contributed significantly to collision or damage • Efforts made to assist or seek assistance for victim(s) • No previous convictions or no relevant/recent convictions • Remorse • Serious medical condition requiring urgent, intensive or long-term treatment • Age and/or lack of maturity • Mental disorder or learning disability • Sole or primary carer for dependent relatives

Question 2a: Are you content to approve the aggravating and mitigating factors for vehicle/property damage as proposed?

Injury

3.23 The aggravating and mitigating factors for causing injury largely mirror what is proposed for vehicle/property damage. Two additional aggravating factors have been added to account for instances where there may be multiple victims, or where the victim is a worker providing a public service or an emergency worker, and to increase offence severity as a result. This is intended to reflect the fact that police officers are likely to be the injured victims in these cases, and borrows from the approach taken in the assault guidelines. While this is not currently included as an aggravating factor in the general motoring guidelines, there may be a case for its addition at the post-consultation stage, for purposes of parity across the guidelines.

Statutory aggravating factors
• Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction • Offence committed on bail
Other aggravating factors
• Vehicle taken as part of burglary • Taken vehicle was an emergency vehicle • Taken vehicle belongs to a vulnerable person • Disregarding warnings of others • Multiple victims involved (see step 6 on totality when sentencing more than one offence) • Victim was providing a public service or performing a public duty at the time of the offence, or was an emergency worker • Victim was a vulnerable road user, including pedestrians, cyclists and horse riders • Taken vehicle is an LGV, HGV or PSV etc • Other driving offences committed at the same time • Blame wrongly placed on others • Failed to stop and/or assist, or seek assistance at the scene • Passengers, including children • Offence committed on licence or while subject to court order(s)
Mitigating factors
• Actions of the victim or a third party contributed significantly to collision or injury • Efforts made to assist or seek assistance for victim(s) • No previous convictions or no relevant/recent convictions • Remorse • Victim was a close friend or relative • Serious medical condition requiring urgent, intensive or long-term treatment • Age and/or lack of maturity • Mental disorder or learning disability • Sole or primary carer for dependent relatives

Question 2b: Are you content to approve the aggravating and mitigating factors for causing injury as proposed?

Death

3.24 In line with the agreed approach to culpability, the list of aggravating and mitigating factors for causing death mirrors what is being proposed for causing injury. The only change has been to remove the aggravating factor for multiple victims, as this is already explicitly considered within the sentencing table and accompanying rubric for causing death.

Statutory aggravating factors
• Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

• Offence committed on bail
Other aggravating factors
• Vehicle taken as part of burglary • Taken vehicle was an emergency vehicle • Taken vehicle belongs to a vulnerable person • Disregarding warnings of others • Victim was providing a public service or performing a public duty at the time of the offence, or was an emergency worker • Victim was a vulnerable road user, including pedestrians, cyclists and horse riders • Taken vehicle is an LGV, HGV or PSV etc • Other driving offences committed at the same time • Blame wrongly placed on others • Failed to stop and/or assist, or seek assistance at the scene • Passengers, including children • Offence committed on licence or while subject to court order(s)
Mitigating factors
• Actions of the victim or a third party contributed significantly to collision or death • Efforts made to assist or seek assistance for victim(s) • No previous convictions or no relevant/recent convictions • Remorse • Victim was a close friend or relative • Serious medical condition requiring urgent, intensive or long-term treatment • Age and/or lack of maturity • Mental disorder or learning disability • Sole or primary carer for dependent relatives

Question 2c: Are you content to approve the aggravating and mitigating factors for causing death as proposed?

Dangerous driving

3.25 The aggravating and mitigating factors proposed for dangerous driving most closely mirror what the Council has agreed for the general dangerous driving offence. We have retained the lower culpability factor of 'impeccable driving record', but other factors that are not likely to be relevant to this specific offence have been removed, such as the vehicle being poorly maintained or the offending arising out of a genuine emergency.

3.26 In May, the Council agreed that step 1 factors for the aggravated vehicle taking - dangerous driving offence should mirror those proposed for the general dangerous driving offence. This approach means that consideration of whether the offender had a leading or minor role in group offending, which is placed at step 1 for the other aggravated vehicle taking guidelines, is not included in culpability for dangerous driving. These factors are intended to capture passengers who may have been highly culpable but who did not drive the vehicle themselves. While we could include these elements in aggravating and mitigating

factors for this guideline as an alternative, there is a risk of inconsistency with sentencing of the other aggravated vehicle taking offences. As such, we recommend departing from the general dangerous driving guideline in this single respect, adding leading/minor role in group offending to the culpability factors as with the other aggravated vehicle taking guidelines.

Statutory aggravating factors
• Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction • Offence committed on bail
Other aggravating factors
• Vehicle taken as part of burglary • Taken vehicle was an emergency vehicle • Taken vehicle belongs to a vulnerable person • Victim was a vulnerable road user, including pedestrians, cyclists and horse riders • Taken vehicle is an LGV, HGV or PSV etc • Other driving offences committed at the same time • Blame wrongly placed on others • Failed to stop and/or assist, or seek assistance at the scene • Passengers, including children • Offence committed on licence or while subject to court order(s)
Mitigating factors
• Actions of the victim or a third party contributed significantly to collision or injury • Efforts made to assist or seek assistance for victim(s) • Impeccable driving record • No previous convictions or no relevant/recent convictions • Remorse • Victim was a close friend or relative • Serious medical condition requiring urgent, intensive or long-term treatment • Age and/or lack of maturity • Mental disorder or learning disability • Sole or primary carer for dependent relatives

Question 2d: Are you content to approve the aggravating and mitigating factors for dangerous driving as proposed?

Question 2e: Do you agree to include factors covering leading/minor roles in group offending within culpability for this offence?

4 IMPACT AND RISKS

4.1 As discussed earlier in this paper, the sequencing of the public consultation on the revised aggravated vehicle taking guidelines will need to be considered alongside timings for the work on general motoring offences, particularly given the overlap between the two pieces of work. We will need to balance the requirement for revised guidelines with full

consideration of feedback on the proposed changes, to ensure that we minimise the risk of reputational damage to the Council.

4.2 The impact of the proposed changes to the sentencing tables and aggravating/mitigating factors is anticipated to be limited as the statutory maximum penalties for these offences are not changing and as the sentencing levels proposed are intended to reflect current sentencing practice. This is also the case for higher volume variations of aggravated vehicle taking, such as causing vehicle/property damage of under £5,000 and involving dangerous driving. Once draft guidelines for aggravated vehicle taking have been finalised, a resource assessment will be drafted and circulated to the Council for sign off.

Sentencing Council

Sentencing Council meeting:	**22 July 2022**
Paper number:	**SC(22)JUL07 – Environmental Offences**
Lead Council member:	**n/a**
Lead official:	**Ruth Pope**
	Ruth.pope@sentencngcoucil.gov.uk

1 ISSUE

1.1 In September 2021 the Council discussed a letter from the Herts Fly Tipping Group (attached at Annex A) requesting that the Council consider making changes to the Environmental offences guideline specifically in relation to the way it operates in sentencing fly tipping cases.

1.2 A response was sent in October 2021 (see Annex B) explaining in detail why the Council would not be reviewing the guideline as requested. In March this year a further letter was received (see Annex C) requesting further consideration of issues and we agreed to raise these points with the Council at the next opportunity.

1.3 Separately the Environmental Audit Committee Report has produced the Water quality in rivers report which makes a recommendation directed at the Council.

2 RECOMMENDATION

2.1 That the Council considers if further work should be done to:

- establish if there are any ways in which the environmental guideline for individuals could be revised to ensure that it operates effectively in fly-tipping cases.
- investigate if any changes could usefully be made to the environmental guideline for organisations to ensure that sentences for very large organisations are proportionate.

3 CONSIDERATION

Background

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

statutory maximum sentence for an organisation is an unlimited fine and the guideline offence range is £100 fine – £3 million fine.

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

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

3.4 Recently the National Fly-Tipping Prevention Group (NFTPG) has published a document: 'Fly-tipping toolkit: How to present robust cases to the courts' which may go some way to ensure that prosecutors provide courts with the necessary information to assist them to apply the guideline effectively to the cases before them. We had sight of this document when it was being developed and took the opportunity to provide feedback on the elements relating to guidelines (without endorsing it).

Issues raised relating to fly-tipping

3.5 In their most recent letter the Herts Fly Tipping Group state:

a) Whilst we appreciate the SC drawing to our attention to the guidance to magistrates on fixed penalty notices which appears in essence to require magistrates to ignore the availability of an FPN [fixed penalty notice], we note this is guidance. Therefore this suggests that guidance can be updated to take into account current realities in relation to fly tipping and the lack of deterrent impact court judgements are having.

3.6 The guidance to magistrates on fixed penalty notices contained in the explanatory materials to the MCSG states:

- the fact that the offender did not take advantage of the penalty (whether that was by requesting a hearing or failing to pay within the specified timeframe) does not increase the seriousness of the offence and must not be regarded as an aggravating factor. The appropriate sentence must be determined in accordance with the sentencing principles set out in this guidance (including the amount of any fine, which must take an offender's financial circumstances into account), disregarding the availability of the penalty

3.7 While it is certainly true that the Council *could* review this guidance – it is difficult to see what grounds there would be for treating an offender who was offered an FPN but did not accept it, more severely (or in any other way differently) than one who was not offered an

FPN. Any change to the guidance could not alter the fact that the court is bound by legislation (s124 Sentencing Code) to take into account the offender's financial circumstances in setting a fine.

3.8 As noted when this was considered previously, although the fine imposed may in some cases be lower than the FPN, when costs and the surcharge (now 40% of any fine) are added, the overall amount is still likely to be as high or higher than an FPN for most of those who go to court.

3.9 The next point raised is:

b) Linked to point a) we note in your letter of the 15th October 2021 reference to Section 57 of the Sentencing Council Act 2021(sic). Section 2b explicitly refers to reducing crime including by deterrence. In contrast however, given our consultations with those that represent the majority of frontline enforcement capability across the country, it would be difficult to find anyone that thinks typical court judgements in response to successful prosecutions represent any form of effective deterrent; and on that basis it would appear advisable to revisit this to ensure that the intention is matched by the reality.

3.10 There is very little evidence that sentencing in general is an effective deterrent – though there are occasions when it can be. Where fly-tipping is carried out for commercial gain, there is an argument that substantial financial penalties would make unlawful disposal less attractive compared to lawful disposal.

3.11 If it is accepted that in some cases more severe penalties could be effective as a deterrent in fly-tipping cases, the question remains of what more the guideline could do to achieve that. Simply imposing higher fines that an offender cannot or will not pay would not be effective and would not comply with the legal requirement to take into account the offender's financial circumstances. The guideline already provides steps that require the court to consider compensation, confiscation, and removing economic benefit from the offending. It may be that the guidance issued to prosecutors in the tool-kit will encourage more challenges to assertions of limited means and more information being provided to the court of the costs avoided by the offending and the costs incurred in cleaning up afterwards, which in turn may lead to higher financial penalties in appropriate cases.

3.12 The third point raised is:

c) Community Orders. We note the SC's reference to community orders being available for offences in band D and F fines. However, the point raised in our letter was for more use of such powers based on making such orders available across more bands. Stakeholders do not feel this issue has been addressed and therefore urge you to revisit this to help ensure that the optimum (sic) across bands is evident to all.

3.13 It could be argued that the guideline steers sentencers away from community sentences. Wording above the sentence table states:

> ## Starting points and ranges
>
> Where the range includes a potential sentence of custody, the court should consider the custody threshold as follows:
>
> - has the custody threshold been passed?
> - if so, is it unavoidable that a custodial sentence be imposed?
> - if so, can that sentence be suspended?
>
> Where the range includes a potential sentence of a community order, the court should consider the community order threshold as follows:
>
> - has the community order threshold been passed?
>
> **However, even where the community order threshold has been passed, a fine will normally be the most appropriate disposal.** Where confiscation is not applied for, consider, if wishing to remove any economic benefit derived through the commission of the offence, combining a fine with a community order.

3.14 It is likely that most fly-tipping cases would be assessed as 'deliberate' culpability and category 3 harm. As can be seen from the table below, a community order is available for all levels of harm where the culpability is deliberate:

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

3.15 One difficulty is that it is not clear whether an increased use of community orders would be more effective than financial penalties in deterring offending or how that could be measured. In September 2021, the Council rejected a suggestion that consideration could be given to removing the reference to Band D, E and F fines from the face of the guideline and replacing them with community orders.

3.16 Perhaps though there could be some merit in reconsidering the emphasis that the guideline puts on fines over community penalties. This guideline was developed before the

Imposition guideline existed and perhaps the inclusion of the text quoted at 3.13 above over-emphasises fines at the expense of other disposals. Fines have been imposed in around three-quarters of cases since the guideline came into force. Prior to that the proportion of fines was slightly lower and the proportion of discharges higher.[1]

Question 1: Does the Council wish to investigate further whether any aspects of the environmental guideline for individuals should be reviewed?

Issues raised by the *Environmental Audit Committee Report*

3.17 The Water quality in rivers report makes the following recommendation relating to enforcement and prosecution:

> 206. We further recommend that, in the interests of promoting public confidence in the criminal justice system and reducing the likelihood of reoffending, the Sentencing Council review the sentencing guidelines for water pollution offences. In our view, penalties for such offences should be set at a level that will ensure that the relevant risk assessments are routinely on the agenda of the boards of each water company.

3.18 The report (at para 194) reports on the prosecution of Southern Water in 2021 which resulted in a £90 million fine. It refers to the sentencing remarks in that case which stated that despite having been fined substantial amounts for offences in 2013 - 2015 there was 'no evidence that the Defendant took any notice of the penalty imposed or the court's remarks. Its offending simply continued'. The report quotes Sir James Bevan (Chief Executive of the Environment Agency), speaking a month **before** Southern Water was sentenced, saying:

> … the fines are not big enough. Even the biggest one, which we secured against Thames Water of about £20 million, is peanuts compared with the daily turnover of a company like Thames Water. We don't control the amount fined, which is a matter for the sentencing guidelines. It is good that courts have started to impose higher fines than they were a few years ago, but we would still like to see, frankly, eye-watering fines for water companies. Until they are big enough to concentrate the minds of boards, we will not have the effect that we want.

3.19 The Southern Water case illustrates that application of the guideline *does* result in very substantial fines (the fine was £135 million before guilty plea reduction which amounted to 10% of its net assets and compared to an annual pre-tax profit of £213 million).

3.20 The environmental guideline for organisations (and those for health and safety and food safety) have sentence tables for 4 sizes of organisation (micro, small medium and large) and above them the following rubric:

[1] This relates to all adult offenders sentenced for offences covered by the guideline – not all of which will be fly-tipping offences.

Very large organisations

Where a defendant company's turnover or equivalent very greatly exceeds the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence.

3.21 The Court of Appeal in R v Thames Water Utilities Ltd [2015] EWCA Crim 960 in upholding a £20 million fine, set out (at para 40) the approach to be adopted when sentencing very large organisations for these offences stating:

> there must not be a mechanistic extrapolation from the levels of fine suggested at step 4 of the guideline for large companies. This is made clear by (1) the fact that by definition a very large commercial organisation's turnover very greatly exceeds the threshold for a large company, and (2) the requirement at step 6 of the guideline to examine the financial circumstances of the organisation in the round.

3.22 Reflecting the wording in the guideline, the court went on to say (at para 42):

> Even in the case of a large organisation with a hitherto impeccable record, the fine must be large enough to bring the appropriate message home to the directors and shareholders and to punish them. In the case of repeat offenders, the fine should be far higher and should rise to the level necessary to ensure that the directors and shareholders of the organisation take effective measures properly to reform themselves and ensure that they fulfil their environmental obligations.

3.23 The impression from these cases is that by applying the guideline courts are imposing very large fines and that these fines are being upheld on appeal. There is, however, some anecdotal evidence from our road-testing of guidelines that some sentencers are unused to and uncomfortable with imposing very large fines. The Court of Appeal in the *Thames* case noted that the Recorder at first instance had faced a difficult sentencing exercise and 'we would have had no hesitation in upholding a very substantially higher fine'.

3.24 The concluding observation was:

> Sentencing very large organisations involves complex issues as is clear from this judgment. It is for that reason that special provision is made for such cases in Crim PD XIII, listing and classification. Such cases are categorised as class 2 C cases and must therefore be tried either by a High Court Judge or by another judge only where either the Presiding Judge has released the case or the Resident judge has allocated the case to that judge. It is essential that the terms of this Practice Direction are strictly observed.

3.25 The Council may feel that the guideline for organisations provides the sentencing court with all the tools and guidance required to impose appropriate sentences in serious

cases involving very large offending organisations and that nothing would be gained by re-visiting the guideline.

Question 2: Does the Council agree that the guideline for organisations does not need to be reviewed?

4 IMPACT AND RISKS

4.1 There is clearly a risk of the Council appearing unresponsive if nothing is done to address the matters raised in this paper. However, even if the Council felt some of the points raised had merit and were minded to consider making appropriate amendments the Council has many competing demands and limited resources and will want also to ensure that its resources are directed where they can have most benefit.

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Sentencing Council

Sentencing Council meeting:	**22 July 2022**
Paper number:	**SC(22)JUL08 – Imposition**
Lead Council member:	**Jo King**
Lead official:	**Jessie Stanbrook** **jessie.stanbrook@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is the first meeting to discuss the scope of the project on the overarching guideline: *Imposition of community and custodial sentences*. The recommendations below cover all the areas currently proposed for review but should further research including the current evaluation underway highlight further areas that would benefit from inclusion, Council may be asked to broaden the scope in the future.

2 RECOMMENDATION

2.2. That the Council agrees to the recommended scope of the Imposition Guideline project, which is proposed to include a review of the *current* sections:

I. Community requirements

II. Community order levels table

III. Pre-Sentence Reports

IV. Suspended Sentence Orders

V. Thresholds for custodial and community sentences

VI. Electronic Monitoring

In addition, inclusion more generally of a review of the:

VII. Structure and style of the Guideline

And finally, consideration of *new* sections pertaining to:

VIII. Points of principle on issues affecting sentencing specific cohorts of offenders, including issues raised by the Equality and Diversity Working Group and consideration of the way we currently reference the Equal Treatment Bench Book

IX. Deferred Sentences

X. Five purposes of sentencing, including information on rehabilitation preventing crime more generally

3 CONSIDERATION

3.1 The inception of the current Imposition Guideline began in the development of the Breach Guideline in 2015/2016, in which the Office of the Sentencing Council (OSC) identified a potential issue with suspended sentence orders (SSOs) being effectively treated as more severe forms of community orders (CO), and being passed in circumstances where it may be arguable that the custody threshold had not been reached. A significant driver behind the development of the Imposition guideline was to address this issue; to reinforce the principle that a SSO was a custodial sentence, not a standalone sentence to be imposed as a level between a CO and a custodial sentence.

3.2 The Imposition Guideline (hereafter 'the Guideline') is now the main guideline sentencers and other users turn to, not only for information on when to impose a custodial sentence and in what circumstances this can be suspended, but also for direction on the imposition of community orders and the requirements attached to them, guidance on requesting pre-sentence reports, and details on band ranges for fines, amongst other things.

3.3 The last consultation for the Guideline was during its development in 2016. In this consultation, there were a range of views on different sections and detail for inclusion, some of which were taken on board by the Council, and some that were not.

3.4 After the Guideline was published in February 2017, the OSC identified that it may not be being followed as closely as expected – particularly in relation to the imposition of SSOs – and so the then Chairman issued a letter which emphasised the need for sentencers to follow the Guideline. Early analysis of initial data alludes to this letter helping in raising knowledge and use of the Guideline by the courts.

3.5 Five years later, there are now shifting trends and circumstances that may justify updates to the Guideline, as well as a variety of both ad hoc and more general feedback that justify the Guideline being reviewed.

3.6 The following sections have been recommended for initial inclusion in the review of the Guideline for a variety of reasons, some of which will be set out below.

I. Community Requirements

3.7 There are 14 requirements that may be imposed as part of a community order under legislation, and only 12 of these are listed in the Requirements section under Community Orders. The two requirements that are not listed in this section are Electronic Monitoring requirements and are considered in the Electronic Monitoring part of this paper at VI.

3.8 In addition to this, it is proposed that the way in which the different requirements are presented in the Requirements section of the Guideline is reviewed. Some of the

requirements have detail on their applicability, some have detail on their range and duration and some have detail on the considerations sentencers must take into account before imposing. Consistency between the level of detail for each of the requirements may be beneficial to sentencers as well as other relevant stakeholders, such as probation.

3.9 Rehabilitation activity requirements (RARs) are 1 out of the 14 possible requirements that can be imposed on a CO (or SSO). As per latest probation data, almost 70% of all COs have a RAR imposed on them; and almost 70,000 RARs were commenced in the 12 months to September 2021. Their relative importance therefore is extremely high, however the Guideline does not provide direction on when they may be suitable, nor direction on what number of days may be appropriate in what circumstances (the latter which will be dealt with in the next section covering Community Order Levels Table). In addition, the Guideline states "*Where appropriate this requirement should be made in addition to, and not in place of, other requirements*", however, as sentencers can decide what requirements are considered punitive and for what purpose they are imposed, it may be beneficial to explore whether this is an unnecessary limitation.

3.10 Further, it may be beneficial to explore the extent to which the Guideline should advise when and in what circumstances certain requirements should and could be imposed, and for how long. For example, using the RAR as an example, ad hoc feedback from the Probation Service has identified inconsistency in the number of days imposed for a RAR. This is because once sentenced, specific activities as part of a RAR are determined by probation according to the *needs* of the offender, and these needs, as well as the activities and the number of days needed, can vary greatly.

3.11 For other requirements, ad hoc feedback from the Probation Service notes that offenders can sometimes be sentenced to requirements that are unsuitable due to their individual circumstances that are only uncovered in the post-sentence assessment. Consequently, probation can sometimes have difficulty getting the offender to engage, and/or have to make an application to court to amend the requirements. From ad hoc engagement, this seems to be most prominent for the (accredited) programme requirement given the specific timings and location this requirement requires. If this section were included in scope, we would consider what further research might be possible to understand these issues. For example, if possible and time allows, it may be beneficial to consider probation data on requirements on COs and SSOs, particularly to understand the scope of potential unsuitable requirements sentenced to understand how the Guideline could reduce this risk.

3.12 The 14 requirements are varied, though mostly fit in either one or both of the categories of punishment, or rehabilitation. While the legislation and Guideline states that

one requirement must be imposed for the purpose of punishment (with some exceptions), it is up to the sentencer to determine what requirement can be considered punishment, and this could theoretically be any of the 14 requirements available. Whether rehabilitation should be considered for a specific requirement could be explored in more detail if Council agrees this section should be in scope of the review.

Question: Is the Council content for the community requirements to be included in the review of the Imposition Guideline?

II. Community order levels table

3.13 It is recommended the community order levels table is included for several reasons.

3.14 In the May meeting, the Council agreed to proposed amendments to the curfew requirement in the Requirements section of the Guideline to bring it in line with the increased maximum hours and requirement duration as enacted in the Police, Crime and Sentencing Act (PCSC) 2022. These changes have now been made, as well as addressing the inconsistencies of style across the levels table in the three ranges also agreed at the May meeting.

3.15 The Council agreed, however, that it would be more appropriate to consider changes to the curfew ranges set out in the community order levels table as part of a wider review and subsequent consultation, given the complexity of the ranges. It is therefore proposed, at minimum, this review includes the consideration of a new proposed group of ranges for curfew requirements, in line with the new legislation.

3.16 Further to this, it is not entirely clear why only certain requirements are included in the community order levels table. While the table is discretionary, there does not seem to be a specific purpose for the inclusion of just 5, out of the possible 14 requirements. Inclusion of the community order levels table in the review would allow considering whether the inclusion of more, or all, requirements would be beneficial in the levels table. The table states: "*A full list of requirements, including those aimed at offender rehabilitation, is given below*." However, this is not a full list of requirements, so arguably may influence sentencers to have particular attention to just those in the table and not others.

3.17 As an example, for RARs specifically, during the last consultation, a number of respondents proposed that ranges of activity days which may be suitable for a RAR should be included for each level of community order. The Council considered this but decided that given the bespoke nature of a RAR and the wide variety of RAR interventions between providers, that this may be restrictive for an offender's rehabilitation.

3.18 There are no longer different providers of probation services in the same way; probation reunified in June 2021 and all community orders are managed by the Probation Service. In addition to this, the variety of possible rehabilitative interventions to be delivered under a RAR has been significantly narrowed; there are now four main rehabilitative interventions or services that can be delivered under a RAR: these are structured interventions, toolkits, accredited programmes and referrals to Commissioned Rehabilitative Services through the Dynamic Framework, which include services to support issues with accommodation, debt, emotional well-being, women's services and more[1]. It can be posed to Probation colleagues whether ranges would now be a helpful addition to the RAR in the community order levels table if the Council agrees for this area to be included in the review.

Question: Is the Council content for the community order levels table to be included in the review of the Imposition Guideline?

III. Pre-Sentence Reports

3.19 It is recommended that the pre-sentence report (PSR) section is included for a variety of reasons.

3.20 The Guideline currently has separate information on PSRs in both the Imposition of *Community* Orders and the Imposition of *Custodial* Sentences sections. There may be merit in considering both bringing these two sections together into one section and moving that section to the beginning of the Guideline. Section 30(2) of the Sentencing Code 2022 sets out that the "*the court must obtain and consider a pre-sentence report before forming the opinion"*; PSRs are requested prior to a final decision of a sentence and should necessarily influence that sentence should information be contained in them that is helpful to the court. For example, the Guideline encourages sentencers to consider whether a sentence of imprisonment is unavoidable if a community order could provide sufficient restriction on an offender's liberty and address rehabilitation, which information in a PSR could support.

3.21 Secondly, the colleagues in the Justices' Legal Advisers and Court Officers' Service (formerly Justices' Clerks' Society) have suggested a variety of amendments to the wording in the pre-sentence report sections. These suggestions have been made to provide sentencers with more guidance on when to give, or not give, an indication of sentence and what information should be highlighted in a report, to the probation service when requesting a PSR. The suggested amendments were posed to the Magistrates Courts Sentencing

[1] Page 86 of the Target Operating Model sets this out in more detail MOJ7350_HMPPS_Probation_Reform_Programme_TOM_Accessible_English_LR.pdf (publishing.service.gov.uk)

Guidelines Working Group as part of the Miscellaneous Amendments project in February 2022 and while some proposals were agreed with, views were split on others, specifically how and when the court should give an indication to probation of the court's preliminary view of the sentence. Inclusion would merit further consideration of the various issues and would allow us to seek views from a broader range of interested parties, not least the Probation Service that produces PSRs.

3.22 A further reason for the inclusion of the pre-sentence report section in the Guideline review pertains to the level of direction the Guideline currently gives sentencers to request a PSR in line with the legislation. In discussions during the development of the Imposition Guideline in 2016, the Council agreed it may be better for more detailed direction on PSRs to be outlined by the Criminal Procedure Rules Committee (CPRC) or the Criminal Practice Directions (CPD). While this topic has been discussed by the CPRC over the years, the Criminal Procedure Rules and the Criminal Practice Directions still say little about the process for getting a PSR, and nothing about what a PSR should contain. Considering this, it may be timely to revisit whether the Guidelines should give more detail.

3.23 Finally, there is an error to be corrected in the pre-sentence report paragraph in the custodial sentence section. The Guideline states: "*Whenever the court reaches the provisional view that:*

- *the custody threshold has been passed; and, if so*
- *the length of imprisonment which represents the shortest term commensurate with the seriousness of the offence;*

the court should obtain a pre-sentence report, whether verbal or written, unless the court considers a report to be unnecessary. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case."

3.24 The second bullet of this paragraph is either missing a word or has an extra word, and, as such, is not easily understandable.

3.25 A review of the PSR section does not necessarily mean that the conclusion would be to bring together the two current texts, or include further direction and detail, however it is recommended that this is explored as to the relative benefits and risks.

Question: Is the Council content for the pre-sentence reports to be included in the review of the Imposition Guideline?

IV. Suspended sentence orders (SSOs)

3.26 As mentioned previously, a significant driver behind the development of the Guideline was to ensure that SSOs were only being imposed as a custodial sentence that was then suitable to be suspended, not as a more severe form of a CO in which the custody threshold had not been passed and therefore custody could not reasonably be activated in breach. The resource assessment of the Guideline, therefore, set out an anticipated increase in the number of COs and a corresponding decrease in the numbers of SSOs. While this trend was not seen immediately after the publication of the Guideline, ongoing internal analysis has found evidence to support this occurring after the issuing of a letter to the judiciary by the then Chairman of the Sentencing Council, which emphasised the need for sentencers to follow the Guideline. The full findings will be circulated to the Council at a later date.

3.27 It may be beneficial to explore further whether and when SSOs are still being imposed as more severe forms of COs, and/or whether a further increase of SSOs at the expense of immediate custody is expected, intended and/or beneficial. This could be explored through engagement with sentencers to see whether it is now clear that an SSO should only be sentenced once the decision to impose a custodial sentence has been made, what information sentencers use in the decision to suspend, and how sentencers receive that information.

Question: Is the Council content for suspended sentence orders (SSOs) to be included in the review of the Imposition Guideline?

V. Thresholds

3.28 Currently, the community order threshold and the custodial threshold are not presented in the same way. The first mention of the community order threshold is in the general principles, but does not set out what this is, and then it is referred to in the community order levels table. The custodial threshold is then referred to below this in more detail. Similar to the PSR section, thresholds for community and custodial sentences are considered chronologically prior to the detail of the relevant sentences, but this not reflected in the Guideline.

3.29 It would be interesting to explore how well understood the thresholds are by sentencers and whether there is a large ‘cusp of custody’ cohort that the Guideline could provide more direction on. Max has suggested that it may be beneficial to scope what role the Sentencing Council might play in cases around the cusp of custody; specifically those that may cross the custodial threshold but due to mitigating factors (or other), a CO is, or could be, imposed instead. For cusp of custody cases, the Guideline currently states “*imprisonment should not be imposed where there would be an impact on dependants which*

would make a custodial sentence disproportionate to achieving the aims of sentencing." It is possible that more could be said in cusp of custody cases, especially as this cohort of cases is not well defined. The Crown Prosecution Service applies public interest factors to determine whether prosecution or diversion is the right outcome, so the use of a similar approach for the Council might be one way in which this could be explored.

Question: Is the Council content for community and custodial thresholds to be included in the review of the Imposition Guideline?

VI. Electronic Monitoring

3.30 The recommendation to include electronic monitoring (EM) in the Guideline review does not pertain to the current EM section specifically, but the presentation of electronic monitoring generally across different sections in the guideline.

3.31 Firstly, the list of requirements in the Requirements section does not include EM, in either of its two statutory forms. This is different to the legislation, which lists both the *electronic compliance monitoring requirement* and the *electronic whereabouts monitoring requirement* in the Community Order requirements table at section 201, totalling 14 requirements rather than the 12 listed in the Guideline. While the *electronic compliance monitoring requirement* is linked and therefore not applicable without the imposition of at least another relevant order (such as curfew), the *electronic whereabouts monitoring requirement* may be imposed without the imposition of another requirement (though in reality is likely to be imposed with another requirement). The inclusion of EM in this review would allow Council to consider the benefits of aligning the number of requirements in the Requirements section of the Guideline with the number in the legislation.

3.32 Further to this, recent probation guidance has set out operational expectations for probation court duty officers to do a risk assessment on the suitability of all EM requirements to ensure PSR authors only recommend EM and curfew requirements where it is safe to do so, for example for safeguarding or domestic abuse concerns. This guidance sets out that information must be sourced from the police, the local authority and the main property resident; that EM cannot be recommended if information from the police is not received; and that an adjournment should be requested where time is needed to collate this information.

3.33 Currently, the Guideline states an exception for imposing EM with a curfew or exclusion requirement as, amongst others, "*in the particular circumstances of the case, it considers it inappropriate to do so*." It may be beneficial to consider whether the Guideline ought to reflect similar points to the issues probation are required to consider, to strengthen

safeguarding for EM cases and ensure consistency in approach. For example, the Guideline could encourage or mandate that when sentencers are considering a CO with a curfew and EM requirement, they either request a PSR or an alternative risk/safeguarding assessment. In cases of EM, it may be reasonable to state that there can be no 'exceptional circumstances' that would preclude a safeguarding check. This could be explored with the inclusion of EM in the review of this Guideline.

Question: Is the Council content for electronic monitoring to be included in the review of the Imposition Guideline?

VII. Structure and style of the Guideline

3.34 The current structure of the Imposition Guideline is arguably not in chronological order, unlike offence-specific guidelines. Ad hoc feedback from a magistrate has raised this as an issue and suggested that it would be helpful for the Imposition Guideline to have the 'step' approach as in the offence-specific guidelines. The Council may wish to consider whether a different structure, more in line with the chronology of a sentencing hearing, may improve the use and understanding of the Guideline.

3.35 For example, pre-sentence reports can, and are encouraged to, be requested before a sentencing decision, and can be before a hearing. Pending the decision of the Council on what amendments may be necessary to the pre-sentence report section, it may be more appropriate for the PSR section to be the first section of the guideline, as mentioned above.

3.36 Further, the current flow chart in the Guideline needs to be reviewed as in its current form it is not suitable for digital use. It references "*section 4 at pages 7 and 8*", which no longer make sense with the digital guideline which has no numbered sections or pages.

3.37 On that note, it may be helpful to reformat the Guideline to have numbered sections to make it easier to access. The OSC has also received some feedback from a magistrate via the website feedback tool that suggests the Guideline could be condensed into bullet points to make for easier reading and retaining.

3.38 Finally, the Guideline also still contains a variety of footnotes. It should be considered whether this format of legislation references is the best for the digital guideline. All of the above and any related issues will be considered if the Council agrees to include this section.

Question: Is the Council content for the structure and style of the guideline to be included in the review of the Imposition Guideline?

VIII. Points of principle on issues affecting sentencing specific cohorts of offenders, including issues raised by the Equality and Diversity Working Group and consideration of the way we currently reference the Equal Treatment Bench Book

3.39 The Guideline does not currently include any information on, or points of principle about sentencing specific cohorts of people, in particular young adults, carers, old/infirm offenders, those with neurodiverse characteristics and female offenders. There are considerable issues affecting the sentencing of these cohorts, some of which are currently dealt with in more detail in the Expanded Explanations, and this review could explore the benefits of including some of these considerations in the main body of the Guideline.

3.40 While there is a specific definitive guideline on sentencing children and young people and on sentencing offenders with *mental disorders, developmental disorders or neurological impairments*, there is no reference to these in the Imposition Guideline, nor is there any separate guideline on sentencing other notable groups, for example female offenders. There is considerable justification for female offenders in particular to be included in the consideration of points of principle due to the volume of research and data evidencing the impact of custody on women, their families and their communities. For example, there are far fewer women's prisons nationally than men's, so the likelihood of a female offender being housed further away from home is much higher, and women are more likely to have dependants who would be detrimentally impacted by their imprisonment. This point is also relevant to old or infirm offenders.

3.41 Finally, there are a number of considerations that are under active consideration by the Council's Equality and Diversity group. This may include, for example, considerations of whether and what additional information ought to be considered when sentencing those from minority ethnic backgrounds, or those from lower social-economic backgrounds. While we do not yet have final findings of this work, the Council may wish for us to explore whether the Imposition Guideline review could be a suitable vehicle for delivering some of these improvements. Similarly, the Council may also wish to consider the way we currently reference the Equal Treatment Bench Book. This will also be included in the review should Council agree various points of principle should be considered.

Question: Is the Council content for the various points of principle to be included in the review of the Imposition Guideline?

IX. Deferred sentences

3.42 There is currently no reference to deferred sentences in guidelines but some limited guidance is set out in the explanatory materials to magistrates' guidelines.

3.43 There has been recent literature and discussion mostly in the academic community about deferred sentencing. Julian Roberts suggested in a seminar in November 2021 that the guidance on deferred sentences in the explanatory materials could be reviewed as more offenders, specifically vulnerable or female offenders, may benefit from the opportunity to demonstrate to the court that they can make sufficient progress towards desistance to justify a non-custodial sentence. In addition, Elaine has written about the lack of guidelines for deferred sentencing and is speaking at a Sentencing Academy seminar on this topic on 21 July 2022. Ruth posed the inclusion of deferred sentences to the MCSG working group who agreed it was a topic which warrants fuller consideration as they are currently rarely used.

3.44 The Ministry of Justice's Sentencing White Paper 'A Smarter Approach to Sentencing' published in September 2020 also 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 into services and away from the criminal justice system. The White Paper referenced vulnerable women in particular, whom, they stated, "*are likely to benefit from referral to a woman's centre*" as an example. The White Paper states "*A greater use of deferred sentencing will also provide opportunities for restorative justice practices to be deployed*". The Sentencing Act 2020 specifies a similar circumstance for a deferment order, namely that requirements can be imposed which may include requirements as to the residence of the offender or restorative justice requirements.

3.45 The Council may wish to explore the benefits of including deferred sentencing in the Imposition Guideline. As the Guideline covers the process of sentencing from pre-sentence report stage, it may be reasonable to consider a section or reference to deferred sentencing in this process.

3.46 The inclusion of deferred sentencing in the review would also consider any available data on the volume and efficacy of deferred sentencing, though this data is likely to be limited and may not be accurate.

Question: Is the Council content for deferred sentencing to be included in the review of the Imposition Guideline?

X. Five purposes of sentencing, including information on rehabilitation preventing crime more generally

3.47 Finally, there are currently no guidelines that contain explicit reference to the five statutory purposes of sentencing (though these are set out on a public-facing page on the Council website). Although Council has previously resisted the suggestion to include the five purposes in offence-specific guidelines, it has been suggested more recently that there may be merit in considering whether the five purposes of sentencing should be contained in the Guideline. The relative benefits of this inclusion can be explored in the review.

3.48 Further to this, it may be useful to continue the conversation to consider explicitly referencing rehabilitation being one way to prevent crime and reoffending. There is a wealth of research in this area, and while the Guideline does encourage rehabilitation to be considered in a range of ways, it is not directly set out what impact rehabilitation may have on preventing crime. This can be explored as part of the imposition guideline should the Council wish to include this section for review.

Question: Is the Council content for the five purposes of sentencing to be included in the review of the Imposition Guideline?

4 EQUALITIES

4.1 There are no equalities considerations for the time being as this is a scoping paper for potential areas to be included in a review. The recommendations made simply pose areas to be considered. Equalities will be considered in more detail at the project progresses.

5 IMPACT AND RISKS

5.1 This scoping paper poses many areas to be considered as part of the review of the Guideline. There is a small possibility that the inclusion of these areas may raise expectations that all sections mentioned will eventually be updated. To mitigate this expectation, it should and will be made clear to all stakeholders that any relevant discussions are preliminary only and may not result in any changes.