

Sentencing Council meeting:
Paper number:
Lead Council member:
Lead official:

22 July 2022
SC(22)JUL08 – Imposition
Jo King
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 more¹. 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.