Sentencing Council

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14 October 2022

Dear Members

Meeting of the Sentencing Council – 21 October 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 21 October 2022 and will from 9:45 to 14:30**.

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)OCT00
▪ Minutes of meeting held on 23 September	SC(22)SEP01
▪ Action log	SC(22)OCT02
▪ Imposition	SC(22)OCT03
▪ Effectiveness	SC(22)OCT04
▪ Reduction in assistance to the prosecution	SC(22)OCT05
▪ Animal cruelty	SC(22)OCT06
▪ Business plan	SC(22)OCT07

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

21 October 2022
Royal Courts of Justice
Queen's Building

09:45 – 10:00	Minutes of the last meeting and matters arising (papers 1 and 2)
10:00 – 11:15	Imposition - presented by Jessie Stanbrook (paper 3)
11:15 – 11:30	Break
11:30 – 12:30	Effectiveness - presented by Ollie Simpson (paper 4)
12:30 – 13:00	Reduction in assistance to the prosecution - presented by Ruth Pope (paper 5)
13:00– 13:30	Lunch
13:30 – 14:15	Animal cruelty - presented by Zeinab Shaikh (paper 6)
14:15 -14:30	Business plan - presented by Ollie Simpson (paper 7)

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Sentencing Council

MEETING OF THE SENTENCING COUNCIL

23 SEPTEMBER 2022

MINUTES

Members present:	Bill Davis (Chairman) Tim Holroyde Rebecca Crane Rosa Dean Nick Ephgrave Elaine Freer Jo King Stephen Leake Beverley Thompson Richard Wright
Apologies:	Diana Fawcett Juliet May Maura McGowan Max Hill
Representatives:	Claire Fielder for the Lord Chancellor (Director, Youth Justice and Offender Policy) Lynette Woodrow for the Director of Public Prosecutions
Observers:	John Smith, Bail, Sentencing & Release Policy Team, Ministry of Justice
Members of Office in attendance:	Steve Wade Mandy Banks Ruth Pope Zeinab Shaikh

1. MINUTES OF LAST MEETING

1.1 The minutes from the meeting of 22 July 2022 were agreed.

2. MATTERS ARISING

2.1 The Chairman welcomed Richard Wright to his first meeting following his recent appointment as the defence representative member of the Sentencing Council.

2.2 The Chairman thanked Tim Holroyde for the enormous amount of work he had put in as the Chairman of the Council for the last four years – a task he performed with skill, diligence and good humour. He welcomed the fact that he would remain as a member and Vice-Chairman of the Council in his new role as Vice-President of the Court of Appeal Criminal Division.

3. DISCUSSION ON UNDERAGE SALE OF KNIVES – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL

3.1 The Council considered responses to the consultation relating to the guideline for sentencing organisations and also the results of research with sentencers. The Council considered the suggestion from some respondents that the scope of the guideline should be expanded, but decided to maintain the scope of the guideline to cover just the types of cases that actually come before the courts. In the light of the responses, the Council agreed to amend the wording relating to the scope of the guideline to make it clearer.

3.2 The Council considered the various suggestions for changes to the culpability factors and agreed changes to the high culpability factors. The Council discussed at length the proposals from some respondents that there should be more than one level of harm but, taking into account the reality of the cases that are prosecuted, decided to retain just one level.

3.3 Changes to aggravating and mitigating factors and step 3 of the guideline were agreed. The Council also agreed to remove the reference to compensation from step 7 of the guideline as it was not relevant to this offending.

4. DISCUSSION ON PERVERTING THE COURSE OF JUSTICE AND WITNESS INTIMIDATION – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

4.1 This was the first meeting to discuss the draft guidelines since the consultation over the summer. The Council noted that the response to the consultation was generally positive.

4.2 The Council considered the first set of consultation responses pertaining to culpability factors for both perverting the course of justice and witness intimidation offences. After discussion on the suggestions made by respondents, changes to the wording of some of the factors was agreed.

5. DISCUSSION ON ANIMAL CRUELTY – PRESENTED BY ZEINAB SHAIKH, OFFICE OF THE SENTENCING COUNCIL

5.1 This was the first meeting to review responses to the public consultation on the animal cruelty sentencing guidelines. The Council discussed feedback provided on the proposed revisions to the guideline covering section4-8 offences (unnecessary suffering, mutilation, poisoning and animal fighting). It considered whether further revisions to steps 1 and 2 of the guideline, including culpability factors and the sentencing table, were needed as a result.

6. DISCUSSION ON BLACKMAIL,THREATS TO DISCLOSE, KIDNAP AND FALSE IMPRISONMENT – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL

6.1 The Council considered an early draft of a combined false imprisonment and kidnap guideline, as the offences are interlinked. The merits of such a guideline were discussed, as well as the option of separate guidelines for the two offences. Some of the proposed factors were also discussed.

6.2 The Council agreed that further work should be undertaken to develop a combined guideline for both offences, and for that version to be tested by using it to resentence existing cases and then comparing the outcomes. The results of this would then be considered by the Council in order to decide the way forward.

7. DISCUSSION ON AGGRAVATED VEHICLE TAKING – PRESENTED BY ZEINAB SHAIKH, OFFICE OF THE SENTENCING COUNCIL

7.1 This was the third meeting to discuss sentencing guidelines for aggravated vehicle taking without consent. The Council considered further revisions to the harm factors and the sentencing table for the offence of causing vehicle/property damage, to provide clarity to sentencers.

7.2 The Council also discussed how best to present additional information on ancillary orders across the aggravated vehicle taking guidelines.

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Sentencing Council

SC(22)OCT02 October Action Log

ACTION AND ACTIVITY LOG – as at 13 OCTOBER 2022

	Topic	What	Who	Actions to date	Outcome
SENTENCING COUNCIL MEETING 23 September 2022					
1	**False Imprisonment and Kidnap offences**	Mandy to devise a combined false imprisonment and kidnap guideline to be used in a resentencing exercise to test the viability of such a guideline for both offences with one sentence table. Results of this exercise to be discussed at the next meeting for this guideline (March).	**Judicial members (minus Jo king and plus Richard Wright.) to take part in the resentencing exercise**	**ACTION ONGOING:** Mandy devising guideline.	

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Sentencing Council

Sentencing Council meeting:	**21 October 2022**
Paper number:	**SC(22)OCT03 – Imposition**
Lead Council member:	**Jo King**
Lead official:	**Jessie Stanbrook** **jessie.stanbrook@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is the first meeting after the approval of the scope of the project on the overarching guideline: *Imposition of community and custodial sentences*. The recommendations below cover 4 of the areas approved to be in scope of the project. Consideration of the remaining in-scope sections will be presented at the December Council Meeting and following meetings; namely: *suspended sentence orders, thresholds for custodial and community sentences, electronic monitoring, the sentencing flow chart and consideration of new sections on: deferred sentencing, points of principle on issues affecting specific cohorts of offenders* and *the five purposes of sentencing*.

2 RECOMMENDATION

2.2. That the Council considers and agrees:

I. To a new overall structure and a new section on thresholds

II. For the inclusion of a new community requirements table/approach

III. To updates to the community order levels section

IV. To the amendment of the PSR sections

3 CONSIDERATION

3.1 The work on the review of the Imposition guideline (hereafter called, 'the guideline') has spanned a considerable breadth of issues. In addition to sentencers, the most relevant stakeholders to this guideline are the Probation Service, relevant MoJ policy officials, and those with lived experience of the relevant issues. While I have not yet had direct engagement with those with lived experience, I have had discussions with two of the leading organisations who work directly with those with lived experience who have been able to give some input. Assuming the Council agrees, it is intended that I arrange a discussion group directly with those with lived experience who have had experience of pre-sentence reports (PSRs), community orders (CO) and/or suspended sentence orders (or anything else) in advance of the next meetings on this guideline.

4 (I) A NEW OVERALL STRUCTURE

4.1 As mentioned in the scoping paper, the current structure of the Imposition Guideline is not in a sequential order, unlike offence-specific guidelines. Ad hoc feedback from a magistrate suggested that it would be helpful for the guideline to have a similar 'stepped' approach as in the offence-specific guidelines. While an entirely new structure cannot be agreed at this point owing to the number of sections not in the remit of this paper, a general approach to the structure can be agreed for a more specific decision at a later date.

4.2 It is recommended that this general approach is based on the chronology of the first hearing and onwards, and then, as is currently set out, covers COs before custodial sentences. The below structure is an example of how this approach may look (without any new sections that may be agreed) and the following text expands on this suggestion:

1 (or 2)	Pre-Sentence Reports
2 (or 1)	Thresholds
3	Imposition of Community orders (CO)
4	General principles
5	CO Requirements
6	CO Levels/ranges
7	Imposition of Custodial orders
8	General principles
9	Questions about custodial orders
10	Suspended Sentences

Pre-Sentence Report Section

4.3 Considerations of PSRs and thresholds of community and custodial sentences are, or should be, one of the first made by sentencers prior to looking at the detail of CO requirements or questions around custodial sentences in 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"* [of sentence]. PSRs should therefore be requested prior to an opinion of a sentence and should necessarily influence that sentence should information be contained in them that is helpful to the court.

4.4 Similarly, the Adult Court bench book[1] sets out at section 221:

> *"The court may only form an opinion of whether an offence is serious enough for a community penalty or so serious that only custody can be justified **once all the information about the circumstances of the offence has been considered**."*

4.5 A PSR can be key in contributing to the knowledge of all the circumstances of the offence. PSRs will be discussed in depth later in this paper, including most pertinently a

[1] The Adult Court Bench Book (ACBB) provides guidance for magistrates who sit in the adult court dealing mainly with defendants aged 18 or over. It is used for reference at court and to support consistent training.

recommendation to combine the current two sections into one. Pending a decision on this, it is recommended that the PSR section/s move to the top of the guideline, either as the first or second section depending on the Council's views on a section on Thresholds.

Thresholds

4.6 While there is currently no individual section in the guideline on community and custodial thresholds, they are referred to throughout; CO thresholds are in *general principles* and the *levels table* in the CO section, and the custodial sentence threshold are in the *levels table*, in the *questions around custody being unavoidable* and *PSRs* in the custodial sentence section. Despite this, there is no overview of how a sentencer might come to determine whether a case is around or has crossed either of the thresholds.

4.7 It may be valuable to restructure the guideline so that the information about thresholds has its own new section near the top. A final text is not suggested today but could be similar to the below. All the lines below are already in the guideline but have been combined, condensed and restructured. A final draft of this section will be suggested later.

Community and Custodial Thresholds

The circumstances of the offence and the factors assessed by offence-specific guidelines will determine whether the community or custodial threshold may be passed. Where no offence specific guideline is available to determine seriousness, the harm caused by the offence, the culpability of the offender and any previous convictions will be relevant to the assessment.

A community order must not be imposed unless the offence or the combination of the offence and one or more offences associated with it was so serious that a fine cannot be justified.

Even where the threshold for a community sentence has been passed, sentencers must consider all available disposals at the time of sentence as a fine or discharge may still be an appropriate penalty. A community order may only be imposed where an offence is serious enough to warrant the making of such an order and there is no power to make a community order for a non-imprisonable offence. A Band D fine may be an appropriate alternative to a community order.

A custodial sentence must not be imposed unless the offence or the combination of the offence and one or more offences associated with it was so serious that neither a fine alone nor a community sentence can be justified. Prison must only be a punishment for the most serious offences.

Even where the threshold for a custodial sentence has been passed, a custodial sentence should not be imposed where sentencers consider that a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime. For offenders on the cusp of custody, 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.

Community order requirements and levels table

4.8 Another amendment to the structure of the current guideline falls around the CO requirements and the levels table. In the current guideline, the CO levels table appears prior to the full list of CO requirements. While experienced sentencers will not need to remind themselves of the list of possible requirements very regularly, less experienced sentencers may scroll only to the levels table to review and not go any further, and this table offers only 5 out of the possible 14 requirements. The current user testing project will offer more insight into this by conducting observations on how different guidelines are used, but in keeping with the proposed new chronology of the guideline and to reduce any risk that this is happening, it may be reasonable for the Council to agree that the full list of requirements appears before the table of their applicability across the three ranges.

4.9 Finally, it was suggested by magistrates via the feedback tool, that the guideline has numbered sections for ease of reading and searching, and that bullet points could be made better use of to make for easier reading and retaining. Similarly, the use of footnotes should be reconsidered given this was not changed when the guideline moved from paper to digital. If the Council agrees, all these points will be taken on board when a final version of the guideline is presented to the Council for approval before consultation.

Question 1: Does the Council agree to restructure the imposition guideline, broadly for it to begin with PSRs and/or thresholds, for the requirements list to be moved before the levels table and for sections to be numbered, bulleted where appropriate and footnotes to be reconsidered?

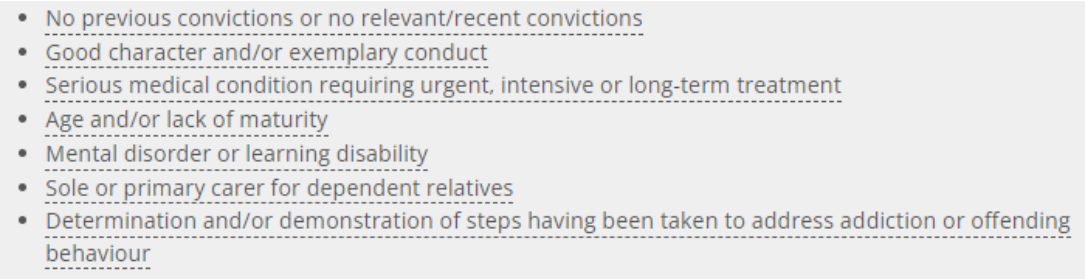
Question 2: Does the Council agree to a specific section on thresholds?

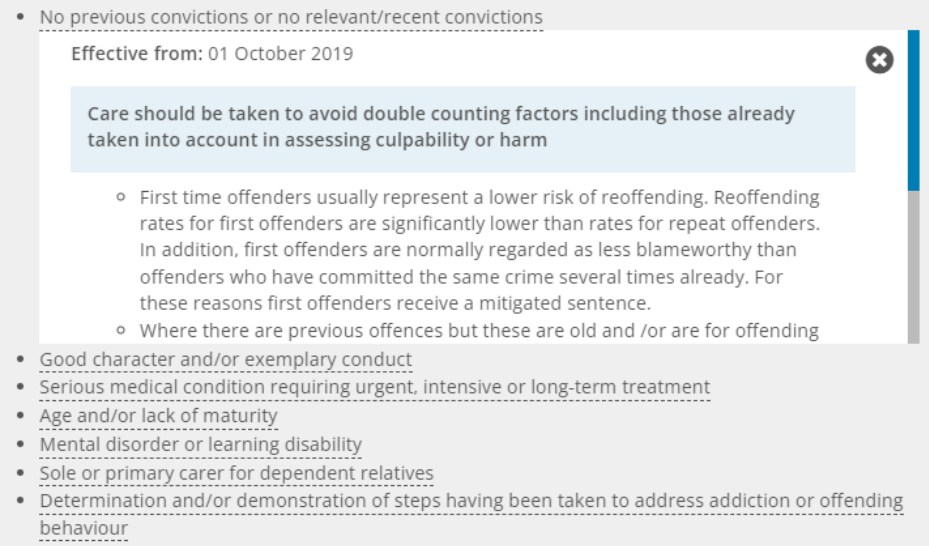
5 (II) INCLUSION OF A NEW COMMUNITY REQUIREMENTS TABLE/APPROACH

5.1 Currently, the information attached to each of the requirements in the list of CO requirements in the guideline is inconsistent. 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. This inconsistency can be seen more starkly at **Annex A**, in which I have categorised the type of information currently contained in the guideline. This table includes a final row of electronic monitoring (in *italics*) that is not currently in the list of requirements despite being listed as two different standalone requirement under legislation (electronic compliance monitoring requirement and the electronic whereabouts monitoring requirement).[2]

[2] Section 201 of the Sentencing Code 2020

5.2 This table is both a visual representation of the gaps in information across the individual requirements, but also one of the possible options for how this section could be amended. Another option for presenting more consistant detail on CO requirements is the use of ‘droppables’ should the Council consider a second table (in addition to the levels table) too untidy. Like aggravating and mitigating factors, the guideline could allow sentencers to expand each requirement to get more comprehensive information. This would keep the core guideline shorter and clearer, and look similar to the below:





5.3 The risk with this option is that for sentencers less comfortable with the digital guidelines and/or inexperienced, the droppable may not be obvious. Both the current user testing project and the expanded explanations evaluation will provide a better understanding on how well used and liked these ‘droppables’ are if the Council wishes to conditionally agree this pending the outcome of this work.

Question 3: Does the Council wish to add more information to the individual requirements to ensure consistency of information across the list of requirements? Is there any further information, other than filling in the identified gaps, that should be added to individual requirements?

Question 4: Does the Council wish to present this list differently, either in a table similar to Annex A or in a droppable as presented above?

6 (III) UPDATES TO THE COMMUNITY ORDER LEVELS SECTION

6.1 The remit of the suggestions for the CO levels section in this paper is, for now, limited to correcting an inconsistency and updating the curfew requirements after the enactment of the Police, Crime and Sentencing Act (PCSC) 2022, in the list of requirements in the dark grey box of the table, pictured below. Consideration of the remaining areas of the levels table and text will be set out in future meetings.

Suitable requirements might include:	Suitable requirements might include:	Suitable requirements might include:
• Any appropriate rehabilitative requirement(s) • 40 – 80 hours of unpaid work • Curfew requirement within the lowest range (for example up to 16 hours per day for a few weeks)** • Exclusion requirement, for a few months • Prohibited activity requirement	• Any appropriate rehabilitative requirement(s) • Greater number of hours of unpaid work (for example 80 – 150 hours) • Curfew requirement within the middle range (for example up to 16 hours per day for 2 – 3 months)** • Exclusion requirement lasting in the region of 6 months • Prohibited activity requirement	• Any appropriate rehabilitative requirement(s) • 150 – 300 hours of unpaid work • Curfew requirement within the highest range (for example up to 16 hours per day for 4 – 12 months)** • Exclusion requirement lasting in the region of 12 months

6.2 The wording in the unpaid work text is not consistent across the three levels. It is recommended that this is amended, to read:

40 – 80 hours of unpaid work	~~Greater number~~ **80-150** hours of unpaid work ~~(for example 80 – 150 hours)~~	150 – 300 hours of unpaid work

Question 5: Does the Council agree to amend the wording in the levels table on unpaid work to make it consistent across the three levels?

6.3 At the July meeting, the ranges in the curfew requirement of the CO requirements list was amended in line with the increased maximum hours and requirement duration as enacted in the PCSC 2022.

6.4 In addition to correcting inconsistencies in framing which has already been done, two options for amending the levels table text on curfew were discussed in the June meeting. The first of these increased the maximum daily curfew hours to the new maximum of 20 hours but kept the ranges of the requirement duration the same (set out in **Option 1**, below);

and the second of these both increased the maximum daily curfew hours to the new maximum and amended the requirement duration in line with the ranges in the exclusion requirement, set out in **Option 2**, as the primary reason for the legislative increase in requirement duration of the curfew requirement was to bring it in line with the exclusion requirement. For this option, it should be noted that the legislative maximum requirement duration for an exclusion zone requirement is 24 months, even though the range in the high level CO band is 'in the region of 12 months'. It was suggested at the June meeting that the maximum weekly hours should also be included and this is reflected in all the options below.

6.5 Another option is to compare the ranges of the requirement with another similar requirement. Unpaid work is another arguably primarily punitive requirement that has listed ranges in the levels table. The suggestions of ranges in **Option 3** are proportionate to those in the unpaid work requirement ranges, to the nearest month, using the new maximum duration of 2 years and also include the new maximum daily curfew hours.

6.6 However, the restrictions and impact on an offender's life of a curfew requirement is arguably much higher than that of an unpaid work requirement, depending on the offender's individual circumstances. Therefore, a final option the Council may wish to consider is simply extending the range of months in the high band to the new maximum, and not amending the other ranges. Similarly, as the primary reason for increasing the requirement duration was to bring it in line with the exclusion zone requirement duration, it would be reasonable for the guideline to make this simple extension that would only apply to those cases in the highest band of community orders. This is set out in **Option 4**.

Options for amendments to curfew requirement in the levels table

Low	**Medium**	**High**
From: *Curfew requirement within the lowest range (for example up to 16 hours per day for a few weeks)* *To:*	*From:* *Curfew requirement within the middle range (for example up to 16 hours for 2 – 3 months)* *To:*	*From:* *Curfew requirement for example up to 16 hours per day for 4 – 12 months* *To:*
Option 1: keeping ranges the same		
Curfew requirement within the lowest range (for example up to 20 hours per day for a few weeks) for a maximum 112 hours in any period of 7 days	Curfew requirement within the middle range (for example up to 20 hours per day for 2 – 3 months) for a maximum 112 hours in any period of 7 days	Curfew requirement within the highest range (for example up to 20 hours per day for 4 – 12 months) for a maximum 112 hours in any period of 7 days
Option 2: aligning ranges with exclusion requirement		

Curfew requirement within the lowest range (for example up to 20 hours per day for a few months) for a maximum 112 hours in any period of 7 days	Curfew requirement within the middle range (for example up to 20 hours per day lasting in the region of 6 months) for a maximum 112 hours in any period of 7 days	Curfew requirement within the highest range (for example up to 20 hours per day lasting in the region of 12 months) for a maximum 112 hours in any period of 7 days
Option 3: aligning proportion of ranges with unpaid work requirement		
Curfew requirement within the lowest range (for example up to 20 hours per day for 4-7 months) for a maximum 112 hours in any period of 7 days	Curfew requirement within the middle range (for example up to 20 hours per day for 7-12 months) for a maximum 112 hours in any period of 7 days	Curfew requirement within the highest range (for example up to 20 hours per day for 12-24 months) for a maximum 112 hours in any period of 7 days
Option 4: keeping ranges the same other than extending the top of the highest range		
Curfew requirement within the lowest range (for example up to 20 hours per day for a few weeks) for a maximum 112 hours in any period of 7 days	Curfew requirement within the middle range (for example up to 20 hours per day for 2 – 3 months) for a maximum 112 hours in any period of 7 days	Curfew requirement within the highest range (for example up to 20 hours per day for 4 – 24 months) for a maximum 112 hours in any period of 7 days

Question 6: Does the Council agree with any of the options for amending the curfew requirement in the levels table?

7 (IV) THE AMENDMENT OF THE PSR SECTIONS

7.1 The PSR sections were in scope of this project for a variety of reasons, including: bringing the two sections together and sequencing more chronologically; consideration of suggestions made by the Justices' Legal Advisers and Court Officers' Service (JLACOS) (formerly the Justice Clerks Society); consideration of the direction the guideline should give sentencers to request a PSR, and the correction of an error.

7.2 Views have now been sought from a variety of different teams[3] and stakeholders[4] in both the MoJ, the Probation Service and externally on the broad variety of issues concerning PSRs and how these are referred to and reflected in the guideline.

7.3 Across the criminal justice system, there is differing and sometimes conflicting guidance on PSRs, specifically across the variety of documents various stakeholders in courts are required to follow. Ultimately the overarching aim should be uniformity of guidance across these documents, for all stakeholders. While the guideline cannot achieve this alone, this aim of uniformity is a major consideration throughout the recommendations.

[3] Workshops have been held with MoJ policy teams (including Female offender policy, Probation policy, Electronic Monitoring Policy, Sentencing Policy) and the Probation Service and HMPPS teams (including the Central Court Team, Reducing Reoffending Team and Probation Reform team)
[4] Discussions have been held with the Prison Reform Trust and Revolving Doors

7.4 There are several recommendations in this section. Please note that some of recommendations are interdependent with an aim to bring a coherence and balance the overall section. Should the Council disagree with any of the recommendations, it is possible that other recommendations may need to be amended and brought back at another time.

To note: references to PSRs throughout this paper include all type of PSRs: oral and on the day PSRs, short format/fast delivery, written and adjourned PSRs, and standard PSRs.

Combining Two Paragraphs

7.5 The guideline currently has two separate paragraphs on PSRs in both the Imposition of Community Orders and the Custodial Sentences sections. The Sentencing Code 2022 sets out that the "*the court must obtain and consider a pre-sentence report before forming the opinion"*[5]*;* PSRs are requested prior to a decision of a sentence and should necessarily influence that sentence should information be contained in them that is helpful to the court.

7.6 In Townsend [2018] EWCA Crim 875, [2018] 2 Cr App R (S) 30 (278), the Court of Appeal upheld the judge's decision to proceed to sentence without the benefit of a PSR, detailing what information should be put forward by the litigator compared to probation:

> *"It is important to remember that it is the role of the litigator and the advocate to put together the mitigation by gathering all the information that the defendant can provide about his or her relevant background, their involvement in the offence, matters that will mitigate the offence and anything else they consider will assist the judge in the sentencing exercise. It is not the role of the Probation Service to do that work. Statements of what a defendant says about his background carry no more weight because they are in a pre-sentence report than if they are put forward by an advocate.* ***The role of the Probation Service is to offer a realistic alternative to custody to deal with issues of dangerousness or to deal with something specific within their area of expertise****."*

7.7 Even though this judgment went some way to limiting the role of probation, a PSR will still be influential in the decision as to whether an offender will be suitable and low risk enough for a CO to be imposed. This is, therefore, still prior to a decision of a sentence.

7.8 Similarly, the guideline currently encourages sentencers to consider whether a sentence of imprisonment is unavoidable if a CO "*could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime*". This is a decision that assessments done by the Probation Service and subsequent information in a PSR could support, in particular probation's expert assessment on what possibility of rehabilitation an offender may have.

[5] Section 30(2)

7.9 The information given to a sentencer in PSRs therefore, should not differ depending on if they are looking at the community or custodial section of the guideline, as this opinion should not yet have been formed. It is therefore recommended that the two separate paragraphs on PSRs are combined into one. JLACOS agreed with this suggestion, noting that it would make information on PSRs clearer and easier to find for sentencers.[6]

7.10 Organisations representing people with lived experience of the justice system also welcomed the suggested restructure of the PSR sections, noting the importance of quality PSRs to offenders, particularly those who may have suffered disadvantage and would particularly benefit from conversations with probation about their circumstances.

Question 7: Does the Council agree to combine the two paragraphs on PSRs into one (amendments to the text/s to be confirmed in a later meeting)?

How directive the guideline should be

7.11 In discussions during the development of the guideline in 2016, the Council considered including more detailed direction on PSRs, but eventually agreed it may be better if this were to be outlined by the Criminal Procedure Rules Committee (CrPRC) or the Criminal Practice Directions (PDs). While this topic has been discussed by the CrPRC over the years, the Criminal Procedure Rules and the PDs still say little about the process for getting a PSR, and nothing about what a PSR should cover, except in the PDs for PSRs requested on committal to the Crown Court.

7.12 The PDs are currently going through review and all amendments made since 2015 will be replaced by a more condensed, complete version. The updated draft PDs went to the CrPRC on the 7 October for consideration but there is not, however, currently any suggestion for any further detail or direction on PSRs.

7.13 An internal MoJ report in 2019/2020 outlined a steady decline in the number of PSR requests over the last 10 years (in 2010, 211,494 reports were requested, but by 2018 this had fallen to 113,228). This report made recommendations on their findings, which the most relevant to the Council are summarised as:

i. *the adoption of a statement of purpose to clarify the purpose and benefits of PSRs that goes beyond a court setting and across the management and rehabilitation of offenders;*
ii. *guidance to balance PSR delivery with avoiding court delay which sets out circumstances in which a court ought to request a report*

[6] This was also the case for the recommendation to bring the pre-sentence report section to the top of the guideline, detailed later.

iii. Alignment between probation, HMCTS and sentencers in courts and probation to have a voice in the listing process[7]

7.14 The MoJ Sentencing White Paper published in September 2020 met this first recommendation, set out the purpose of PSRs:

> *The purpose of a pre-sentence report (PSR) is to facilitate the administration of justice, and to reduce an offender's likelihood of reoffending and to protect the public and/or victim(s) from further harm. A PSR does this by assisting the court to determine the most suitable method of sentencing an offender (Criminal Justice Act 2003, section 158). To achieve this, the National Probation Service provides an expert assessment of the nature and causes of the offender's behaviour, the risk the offender poses and to whom, as well as an independent recommendation of the option(s) available to the court when making a sentencing determination for the offender.*[8]

7.15 After this MoJ report was presented to the CrPRC in 2020, the then Chairman suggested that this was likely to be a matter of concern to the Sentencing Council especially. The Director of Public Prosecutions agreed, reporting that the Council intended to consider PSRs to ensure that adequate assistance for sentencing courts was available.

7.16 A discussion by the Council on this topic is welcomed. The Council could include more robust direction in the guideline that the default is that PSRs are necessary (according to the legislation), and that they would only be unnecessary in certain circumstances. It is recommended that, considering the above, the guideline does remind sentencers of the statutory duty to request PSRs, by adding a line along the lines of (proposed new text underlined):

"The court must request and consider a pre-sentence report before forming an opinion of the sentence unless, in the circumstances of the case, it considers that it is unnecessary to obtain a pre-sentence report."
In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a custodial or community order and, if the latter, whether particular requirements or combinations of requirements are suitable for an individual offender.
or
Courts should, by default, consider a pre-sentence report necessary and request one before forming an opinion of the case. In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a custodial or community order and, if the latter, whether particular requirements or combinations of requirements are suitable for an individual offender.

7.17 Council may consider it unnecessary to reiterate what is set out in legislation, but noting the decline in PSRs, their value as set out in the rest of this paper and the impact that

[7] Ministry of Justice; Pre-Sentence Reports: How can probation advice best assist the court with sentencing? October 2019 (INTERNAL)
[8] 151, A Smarter Approach to Sentencing (White Paper), page 50

such a statement may have, it is suggested that this addition would support a clearer direction that PSRs should always be considered at the first instance.

7.18 Council could also consider going further and set out why a PSR is important, an example of which is below. Should the Council consider this beneficial, an exact text will be brought back at a later date to be approved.

> Courts should, by default, consider a pre-sentence report necessary to ensure consideration of an assessment of the offender's dangerousness and risk of harm, the nature and causes of the offender's behaviour, the offender's personal circumstances and any factors that may be helpful to the court in considering the offender's suitability of different sentences or requirements.

Question 8: Does the Council wish to include text to remind sentencers of the statutory duty to request PSRs?

Question 9: Does the Council wish to include text to outline what a PSR may include?

When a PSR may be 'unnecessary'

7.19 It is useful to note that the purpose (and value) of the PSR, and when one should or should not be ordered, differs according to different sources and stakeholders spoken to. This ranged from PSRs being useful and necessary in all cases, including when custody is inevitable, save for those where a only discharge or fine is likely, to only in cases in which a CO is a likely outcome.

7.20 Case law limits the value of a PSR in cases in which custody is inevitable. Blackstone's Criminal Practice[9] noted about *Jamous*:

> *"The judge's decision to dispense with a report was upheld in Jamous [2015] EWCA Crim 1720, where the judge had presided over the trial and, in full possession of the material facts, had decided that custody was inevitable."*

7.21 As noted above in *Townsend,* the Court of Appeal limited the role of probation to offering "*a realistic alternative to custody to deal with issues of dangerousness or to deal with something specific within their area of expertise*".[10]

7.22 More recently however, the Court of Appeal, in *AYO* & Ors v the King [2022] EWCA Crim 1271, set out that a PSR may support consideration of a wider range of factors than outlined in Townsend to influence an appropriate period for an extended sentence.

> *A fact-specific assessment of the appropriate extension period must therefore be made in each case. Relevant factors are likely to include* ***the number and nature of the offences for***

[9] Paragraph E1.27
[10] Townsend [2018] EWCA Crim 875, [2018] 2 Cr App R (S) 30 (278)

which the offender is being sentenced, and his age, antecedents, personal circumstances and physical and mental health*. The court will also want to consider what can realistically be done within the extension* ***period to secure the offender's rehabilitation and prevent reoffending****: see R v Phillips [2018] EWCA Crim 2008, [2019] 1 Cr App R (S) 11.* ***A pre-sentence report may provide valuable assistance in this regard****.*[11]

7.23 Information in a PSR can also be relevant to factors which may make it appropriate for the custodial sentence to be suspended.

7.24 For cases in which a CO is imposed, emerging findings from ongoing internal work being done in HMPPS on Rehabilitation Activity Requirements (RARs) has found that over half of all RAR days sentenced have not been recommended by a PSR. This includes both RAR requirements sentenced without a PSR or an additional number of RAR days sentenced than recommended by the PSR.

7.25 It is important to note again the statutory provision that an opinion of sentence should not be formed prior to requesting a PSR. Further, the Sentencing Code 2020 sets out that a PSR means a report which *"is made or submitted by an appropriate officer with a view to assisting the court in determining the* ***most suitable method of dealing with an offender****…"*[12]. The legislation therefore alludes to PSRs supporting the court determine suitability of type of sentence, and not simply suitability of requirements on a CO.

7.26 It would be remiss to exclude considerations of probation resource. It is noted that in some courts, legal advisers advise magistrates not to order PSRs due to the lack of resources in probation. It is, however, important to contemplate the cyclical effect of this, with initial resourcing difficulties leading to a decrease in trust in capability of probation to deliver, leading to reduced requests, leading to resources being moved around probation to cover need (for instance in offender management, and out of courts). The Central Court Team have confirmed that more demand for PSRs would increase probation resource.

7.27 On the issue of resource, it is worth noting the strong direction of the Probation Central Court team to encourage requests for PSRs as early as possible in the process. Several Probation initiatives over the last year have made this possible and easier to do; the Before Plea Protocol allows for a legal representative to ask probation to prepare a PSR before plea if the offender will be pleading guilty; a PSR on Committal Pilot in Bristol encourages PSRs to be requested when committing a case to the Crown Court to minimise

[11] To note, in this case the circumstances were various appeals against a very long extended determinate or special custodial sentence and as such the PSR was considered in this regard rather than in a first hearing.
[12] Section 31 of the Sentencing Code 2020

delay, and the MoJ PSR pilot encourages pre-court meetings and defence advocates to request PSRs before the sentencing hearing. This work, and more, is ongoing.

7.28 The guideline could go some way to resolving this conflict of view. I therefore suggest that the PSR section sets out when it may be considered necessary to order a PSR. While the Council may feel that this is not needed, after consideration of the discussions, I believe that any direction will reduce the ambiguity in this space.

7.29 One option for categorising cases in which PSRs may be necessary or unnecessary is the consideration of the suspension of custodial sentences, applicable for all custodial cases of up to 2 years. Probation's assessments of the offender, their dangerousness and their circumstances can be extremely valuable in helping the sentencer determine whether an offender is suitable for a suspended sentence, and importantly whether probation's assessment of the offender concludes what possibility of rehabilitation there is; an important consideration in the decision in whether or not to suspend. Further, following *Townsend*, the 2 years point would be a logical place to put a marker, considering any custodial sentence of up to 2 years would be able to be served in the community, and so risk assessments, and assessments of the likelihood of rehabilitation done as part of a PSR are key.

7.30 Probation felt strongly about the value of a PSR regardless of the outcome of the sentence, save for a discharge or fine. This is because even when custody is inevitable, a PSR can give the sentencer important information on what the impact of custody may be on an offender (for example, highlighting any primary caring responsibilities); an assessment of risk of harm to the victim and community, relevant to the assessment of dangerousness and other issues set out in *AYO*, and imminence of that risk which can helpfully inform both the sentence plan in prison (particularly helpful for Offender Management in Custody (OMIC)[13] journey) and the once the offender is released on licence (particularly helpful for the victim liaison officer); is regularly reviewed by the Parole Board in parole decisions and may be considered by an appellate court on appeal/review of the original courts sentencing decision. As such, the Council may wish to highlight its value even in inevitable custody cases. Any offender receiving a community or custodial sentence, however long, will be on the probation case load, and most will be serving at least half their sentence in the community.

[13] The Offender Management in Custody (OMiC) model was implemented from April 2018 as a framework to coordinate a prisoner's journey through custody and back into the community. OMiC intends to put rehabilitation at the centre of custodial and post-release work to reduce reoffending and promote reintegration. OMiC provides each prisoner with a *key worker*, who is a prison officer, who is there to guide, support, and coach an individual through their custodial sentence. Key workers and Prison Offender Managers work together. Managers produce structured assessments, sentence plans, and facilitate interventions for and with the prisoner. These practitioners are the bridge to community probation services and facilitate resettlement and reintegration activity.

7.31 A 2018 HMMPS Operational and System Assurance Group (OSAG) internal audit found that around three quarters of the offenders sentenced to up to 24 months in prison are sentenced without a PSR being requested by magistrates or judges.[14] HM Inspectorate of Probation highlighted their concern for this, stating in their 2019 Annual Report that "*In a worrying proportion of cases, individuals are being sentenced to prison without the court having the benefit of any presentence report*."

7.32 With all this in mind, relevant text in the guideline could read as follows (exact text to be agreed at a later date):

> A PSR is/may be/will be considered necessary for all cases for which community orders or custodial sentences of under 2 years are a possible outcome. PSRs may still be valuable where a longer custodial sentence is inevitable for risk assessment and management purposes.

Question 10: Does the Council wish to include text on where a PSR may be necessary and unnecessary (exact wording to be agreed at a later date)?

Importance of PSRs for cohorts of offenders

7.33 The importance of PSRs for different cohorts of offenders has been the subject of discussion across the system. For example, the Joint Committee of Human Rights places a particular importance on of PSRs for primary carers[15], HM Inspectorate for Probation for black, Asian and ethnic minority offenders[16], and the Justice Select Committee for women[17].

7.34 The Probation in Courts team highlighted the importance of referencing specific groups when reminding sentencers of the importance of a PSR, particularly those who may have faced discrimination.

Those from ethnic minority backgrounds:

7.35 Analysis to support this guideline review has indicated that the guideline may have had a greater positive impact on White offenders than it has had on Black offenders, regarding redressing concerns over the trend in the proportion of offenders receiving CO and custodial outcomes. Specifically, the proportion of Black offenders receiving a CO continues to be lower than for White offenders, and the proportion of Black offenders receiving immediate custody continues to be higher than White offenders.

[14] Ministry of Justice; Pre-Sentence Reports: How can probation advice best assist the court with sentencing? October 2019 (INTERNAL)
[15] Joint Committee on Human Rights: The right to family life: children whose mothers are in prison; Twenty-Second Report of Session 2017–19
[16] HM Inspectorate of Probation: Thematic Inspection on Race equality in probation: the experiences of black, Asian and minority ethnic probation service users and staff
[17] House of Commons Justice Committee: Women in Prison, First Report of Session 2022–23

7.36 Council members will have a chance to read and input their thoughts on this analysis in due course. In the meantime, while there is no suggestion that the guideline itself is causing this pattern, it is suggested that an updated may be able to say more to address this observed imbalance in the future.

7.37 The Equal Treatment Bench Book currently states:

> *Sentencing decisions need greater scrutiny, but judges must also be equipped with the information they need.* ***Pre-sentence reports may be particularly important for shedding light on individuals from cultural backgrounds unfamiliar to the judge****. This was vital considering the gap between the difference in backgrounds – both in social class and ethnicity – between the magistrates, judges and many of those offenders who come before them. The Review said judges have received guidance discouraging them from using PSRs altogether for some offences which includes drug offences, precisely the area where sentencing discrepancy has been identified.*[18]

Women, including pregnant women:

7.38 Sentencing women and pregnant women has been a matter of considerable public and parliamentary debate in recent years. The Council has committed in its Strategic Objectives 2021-2026 to consider whether separate guidance is needed for female offenders (or young adults) by conducting an evaluation of the relevant expanded explanations. While this is due to start shortly, it should be noted now that currently, there is no direct reference to women or female offenders in the expanded explanations. Most related is a reference to considering the effect of a sentence on the health of the offender and the unborn child when sentencing a pregnant offender within the Sole carer (M14) expanded explanation.

7.39 An open letter written to the Lord Chancellor and Lord Chief Justice this month outlined the particular impact a custodial sentence can have on pregnant women. While this letter did not reference PSRs specifically and requested the Council work towards a guideline for sentencers on risks and factors to be taken into account when sentencing a pregnant women, a PSR is one of the mechanisms to give sentencers a comprehensive assessment of that offender, their risk and the suitability of a CO and various requirements.

Primary carers:

7.40 There has also been significant debate over the years around PSRs for primary carers. The Joint Committee of Human Rights report 'The right to family life: children whose mothers are in prison'[19] highlighted this, and was the basis of several non-governmental amendments to mandate PSRs for all primary carers put forward by its members for the

[18] Equal Treatment Bench Book, page 245
[19] Twenty-Second Report of Session 2017–19

PCSC Bill. The expanded explanation for the mitigating factor 'sole or primary care for dependent relatives' specifies "*When considering a community or custodial sentence for an offender who has, or may have, caring responsibilities the court should ask the Probation Service to address these issues in a PSR*."

7.41 The CrPRC considered this issue in June 2021 but agreed no action would be taken at this point, in part noting an ongoing MoJ PSR pilot which encourages sentencers to request short format PSRs for female offenders, amongst other cohorts. It should be pointed out, however, that the pilot does not mandate PSRs for primary carers, but encourages short format written PSRs for all female offenders who have passed the CO threshold.

Young adults:

7.42 One of the three Scottish Sentencing Council's published guidelines is the Sentencing young people guideline. This guideline asks for particular regard to be had to the maturity of the young person, and that rehabilitation is a primary consideration when sentencing a young person due to the greater potential they have to change. The age and/or lack of maturity expanded explanation has similar considerations and specifies that "*When considering a custodial or community sentence for a young adult the Probation Service should address these issues in a PSR*." It has also been noted widely in the academic community the importance of court practice for young adults, i.e. from 18 years - 25 years, and the detrimental drop-off in support post 18 years, moving from youth to adult courts.

7.43 A PSR allows probation to conduct a maturity assessment which is mandatory in PSRs for all offenders ages 18-25 years according to probation guidance. It is therefore recommended that young people between these ages are included in the direction on the cohorts of offenders where a PSR will be particularly important. For offenders below 18 years of age, the current Sentencing Children and Young People Guideline will apply.

Transgender offenders:

7.44 The Equal Treatment Bench Book specifies that:

> *Pre-Sentence Report ('PSR') writers must consider requesting a full adjournment for the preparation of a PSR where offenders disclose that they are transgender.*[20]

Other cohorts:

7.45 The expanded explanations outline the value of PSRs for a few other specific cohorts of offenders, including offenders with various learning disabilities or mental disorders; offenders who have been the victims of domestic abuse, trafficking or modern slavery;

[20] Equal Treatment Bench Book, page 331

offenders who may have been the subject of coercion, intimidation or exploitation; offenders whose offending was driven or closely associated with drug or alcohol abuse; or where a PSR can support sentencers determine genuine remorse.

7.46 With all of these considerations in mind, it is considered valuable to bring all these different cohorts and issues together in one place and therefore it is recommended that a line is added to the PSR section along the lines of:

> A pre-sentence report will be particularly important if the offender is:
>
> - a young adult (18-25 years)
> - female or a primary carer
> - from a minority ethnic background
> - has disclosed they are transgender
> - has any drug or alcohol addiction issues
> - has a learning disability or mental disorder
> - may have been the victim of domestic abuse, trafficking, modern slavery, and
> - may have been subject to coercion, intimidation or exploitation.

7.47 The exact wording and cohorts do not need to be agreed today, but the Council may wish to agree to the general inclusion of a line specifying particular cohorts.

Question 11: Does the Council wish to include a line specifying cohorts of offenders for which a PSR will be particularly important?

Pre-sentence indications of sentence

7.48 Colleagues in the JLACOS suggested amendments earlier this year to the wording in the PSR sections. The suggestions were posed to the Magistrates Courts Sentencing Guidelines Working Group (MCSGWG) as part of the Miscellaneous Amendments project in February 2022 and while some proposals were agreed with, views were split on others.

7.49 The first suggestion that was agreed with by members of the MCSGWG was to replace the term '*all sentencing options remain open'* to both align it with the Judicial College pronouncement card[21] for better consistency, and to minimise a lack of understanding of what this may mean by both offenders and legal representatives (including minimising the risk of expectations of a certain sentence).

[21] The pronouncement says "*The court may impose any sentence that the law allows including a custodial sentence*"

7.50 This would amend the sentence as below:

> ~~However, the court must make clear to the offender that all sentencing options remain open including, in appropriate cases, committal for sentence to the Crown Court.~~
>
> The court must make clear to the offender that it may impose any sentence that the law allows including a custodial sentence, and the court retains its power of committal for sentence to the Crown Court".

7.51 It should be noted however, that the exact replacement wording may change throughout the process of the Imposition guideline review and as such the decision is more to simply replace the term 'all options remain open'.

Question 12: Does the Council agree to replace the wording 'all options remain open' on pre-sentence indications of sentence?

Type of PSR impacting indications of sentence

7.52 The second suggestion made by colleagues in the JLACOS was that the current direction - on the court's preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil – should be applicable only where the court has requested a PSR is done on the day. They also suggested the inclusion of wording that if an adjournment cannot be avoided, "*the court should not give such an indication*".

7.53 This suggestion is based on if the case is adjourned, it is very likely to be heard by another bench, and therefore the court ordering the report may place the next court in a difficult position by giving a preliminary opinion of the sentencing range.[22] If the PSR is done on the day, it will be the same bench, so this prior indication would remain the same.

7.54 While this divide is pragmatic, it is also problematic for several reasons. The counter view of the MCSGWG was that when a court requests a PSR it doesn't always know if probation will be able to deliver on the day or not so the distinction is not a clear cut one.

7.55 It is useful to note at this point that the terminology surrounding PSRs is not simple. PSRs can be *oral*, *short format* or *standard*, and each of these types of PSRs has a corresponding length of time that probation have allocated resource for based on the depth and breadth of assessments that need to be done. Whether a PSR is done on the day or

[22] Unless that court can say that the earlier court's indication was perverse or unlawful the court is bound to follow it. In Nicholas v Chester Magistrates' Court [2009] EWHC 1504 (Admin); (2009) 173 J.P. 542, it was said that the practice of a magistrates' court adjourning sentence for reports, and, in so doing, giving an indication as to the type of sentence which it would be appropriate to pass, should only be followed where the bench reserved the sentence to itself, or where it was absolutely obvious that a certain type of sentence should be considered or should not be considered.

needs to be adjourned does not equate directly to that report being oral, short format or standard, though oral reports are most often done on the day and short format reports are mostly adjourned. Similarly, the term '*fast delivery'* is also used for a short format report, and the term '*stand down'* report is often used for an on the day report by the courts.

7.56 The type of PSR that will be done on a particular case is generally a probation matter, based both on resources in the court that day and probation's consideration of whether the assessment of the offender may require taking steps that would take longer (e.g. safeguarding assessments that require requests to the police or social services), and whether any specific assessments need to be undertaken to determine an offender's suitability for a particular requirement, such as drug or mental health assessments.

7.57 It would not be fair to probation or offenders to get, or not get, a prior indication of the potential sentencing range based on probation resources or availability of information on a particular day. It is therefore not recommended that the indication of the level of sentence is based on whether the PSR is done on the day.

7.58 On the substantive issue of the importance of giving an indication of sentence to probation, probation felt this was helpful as without such an indication the PSR may not make recommendations in the range that the court considers appropriate. On the other hand, the Adult Court Bench book sets out:

> ***221. The court which orders a PSR is not giving any indication of the sentence which may be imposed by the sentencing court.***[23] ***…***
>
> *224. When requesting a PSR* ***the court may, making it plain that it is not an indication of the sentence which will be imposed****, indicate the following to the Probation Service:*
>
> > *a.* ***any specific requirements in a community order that probation should consider the defendant's suitability*** *for,*
> >
> > *b.* ***whether the report should cover community sentences within the low, medium or high range****,*
> >
> > *c. a short outline of significant facts in the event of a conviction following trial.*

7.59 The current guideline states:

> *It may be helpful to indicate to the Probation Service the court's preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil.*

7.60 It is clear that the Bench book (and current guideline) directs sentencers that while they cannot give any indication of the sentence itself (i.e. community or custodial), they may

[23] Adult Court Bench Book, page 50

indicate to probation, should a community sentence be imposed, whether the low, medium or high range should be considered.

7.61 What may be more useful, however, and minimise the risk of the bench 'tying the hands' of the sentencing bench, is if the guideline directed sentencers to determine their initial view of the seriousness of the offence by setting out the level of *harm* and *culpability* to probation when requesting a report. While information in the report may change this determination, a starting point would allow probation to use the guidelines to determine what the most suitable requirements or level might be according to this indication. The Probation Central Court team are aiming for probation officers to use the guidelines much more when writing PSRs; an observation at a local magistrates' court demonstrated a clear example of probation officers not being aware of the existence of relevant guidelines, including the imposition guideline. The Central Court team are currently developing an updates version of the PSR template with a direct link to the sentencing guidelines, which it did not contain before. Encouraging sentencers to specify their initial view of the level of harm and culpability would encourage PSR authors to be better aligned with the guidelines.

7.62 Finally, the current line in the guideline that says it may be helpful "*to indicate to the Probation Service the court's preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfi*l" is recommended to be removed. As the sentencer, according to the various court guidance, should not have come to an opinion of sentence before requesting the PSR, it seems erroneous for them to already determine that a sentence should be particularly, e.g. punitive. Similarly, arguably the most value probation bring to a potential sentence is exploring the offender's possibility and potential of rehabilitation. I would suggest, therefore, that the purpose of sentence should not be determined prior to requesting a PSR.

7.63 The final suggestion made by colleagues in the JLACOS, which was unanimously agreed with by the MCSGWG, was the inclusion of a direction that the court should highlight, any issues which the court would specifically like to be addressed in the report.

7.64 Probation agreed that directions on issues to focus on were extremely helpful. Therefore, including the issues set out above, a restructured and amended text, aligning better with the Adult Court Bench Book, is suggested below:

~~It may be helpful to indicate to the Probation Service the court's preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil.~~

When requesting a PSR, the court should indicate to Probation the level of harm and culpability it has found for the offence. It may also be helpful to indicate to Probation any specific requirements in a community order that probation should consider the defendant's suitability for, and any issues, if relevant, which the court would specifically like to be considered in the report, e.g. substance misuse or mental health.

Question 13: Does the Council agree not to make an indication of sentence dependant on whether a PSR can be delivered on the day or not?

Question 14: Does the Council wish to replace the lines about what a court should indicate to probation as set out above, including a new line that encourages the court to highlight any specific issues they would like probation to include in the report (exact wording and inclusion of issues can be finalised at a later date)?

Adjourning for pre-sentence reports

7.65 The internal MoJ report mentioned earlier found that between 2010-2018, the number of oral PSRs had increased significantly and the quality of PSRs had decreased significantly. The report states: "*Many sentencers concurred, (particularly in the Crown Court) perceiving the move towards oral reports as a decrease in quality*." After this report, the then Lord Chancellor in the MoJ Sentencing White Paper (September 2020) committed to increasing the number of court disposals which benefit from a PSR and ensuring that probation staff are supported to produce a high standard of reports. The PSR pilot was launched as a result of the report, and pilots short format (rather than oral) PSRs for three cohorts deemed to have more complex needs and so would benefit from a more detailed, and therefore assumed higher quality, assessment. These cohorts are females, young adults and those at risk of a custodial sentence.[24]

7.66 One of the other key findings of the MoJ report was that PSRs were being deprioritised in favour of avoiding delay. At the same time, while PSR volumes declined, the probation caseload increased. This means that, increasingly, individuals being managed by probation will not have had a PSR to support their sentence supervision and planning.

[24] Ministry of Justice; Pre-Sentence Reports: How can probation advice best assist the court with sentencing? October 2019 (INTERNAL)

7.67 Policies to reduce delay and increase court efficiency over the years has affected PSR practice. In particular, Transforming Summary Justice in 2015 which aimed to reform criminal casework to reduce delay and have fewer hearings and more effective trials, and Better Case Management in 2016 which aimed to maximise efficiency by achieving the best use of court time. Academic Gwen Robinson noted that "*the drive to enhance the efficiency of criminal justice processes and to speed up the disposal of criminal cases*" were one of the most significant reasons for the move from written to oral reports over the years.[25] She also noted "*The move toward the speedier delivery of PSRs, and the associated eclipse of the 'traditional' written Standard Delivery Reports, has prompted questions and concerns about the quality of contemporary PSRs, particularly in the magistrates' courts where oral reports now dominate (e.g. du Mont and Redgrave 2017; Napo 2016; HMIP 2017; Centre for Justice Innovation 2018*)."[26]

7.68 The need for efficiency has only intensified as a consequence of the pandemic and the continued court backlogs make speedy justice an understandable concern, in particular for victims. However, noting the importance of a PSR in determining suitability of different sentences or requirements, and risk assessments (including risk to the victim) outlined earlier in this paper, I would welcome a Council discussion on the balance to be struck between efficiency and a sentencer benefiting from an informed and quality assessment of an offender to support the most suitable sentencing outcome.

7.69 The current court guidance, including the current guideline, indicates a preference for PSRs to be done on the day. For magistrates' courts, the PDs outline:

> *3A.8 "Where a defendant pleads guilty or indicates a guilty plea in a magistrates' court the court should consider whether a pre-sentence report – **a stand down report if possible** – is necessary."*

7.70 The PDs also note a preference for on the day PSRs where a PSR is not already prepared at the Plea and Trial Preparation Hearing:

> *3A.18 If at the Plea and Trial Preparation Hearing the defendant pleads guilty and no pre-sentence report has been prepared, if possible th**e court should obtain a stand down report**.*

7.71 At the Crown Court, the BCMH also allude to a preference for efficiency:

> *3.8 Guilty Plea at PTPH*
>
> *In accordance with CrimPR 25.16(7)(9a), if a guilty plea is entered the court must pass sentence at the earliest opportunity. It follows therefore that if a guilty plea is entered at*

[25] Sentencing Academy; Pre-Sentence Reports: A review of policy and practice; Gwen Robinson, p2
[26] Sentencing Academy; Pre-Sentence Reports: A review of policy and practice; Gwen Robinson, p2

PTPH, the judge should seek to sentence the defendant without unnecessary adjournments by making use of oral reports from Probation Officers or stand down pre-sentence reports, if appropriate. … ***Sentencing should not be delayed so that a PSR can be obtained in cases where a PSR is not required or where an oral PSR would suffice.***

Whenever possible, therefore, sentence should take place on the day. *In some cases this may require either putting the case back to later in the day or transferring the case to another judge whose list has finished or whose trial has cracked to give time for consideration of the basis of plea or to consult interested parties or put together any mitigation.*[27]

7.72 It is reiterate that a good quality, well rounded PSR can take a significant amount of time, and this is not always due to lack of probation resource. Whether a report should be adjourned is, as noted previously, often based on probation's consideration of the offender's needs and what particular assessments may need to be conducted (for example, safeguarding assessments or checks with the police or other criminal justice institutions). The number of different assessments probation must conduct as part of a PSR can be seen in some detail in **Annex B**. Without these assessments, the sentencer may not have the most informed view of the offender's circumstances and risks, or an assessment of the offender's suitability for a particular requirement. This risks a sentence that is unsuitable for the offender and their needs, and/or the failure of that sentence not being completed.

7.73 HM Inspectorate of Probation in their report on race equality in probation in 2021 stated that: *"Poorer quality reports that fail to consider all relevant factors run the risk of service users receiving more punitive sentences"*[28]

7.74 A suggestion for an alternative line on adjournments is combined with a suggestion pertaining to the below sub section on PSRs on Committal.

<u>PSRs on Committal</u>

7.75 The PDs outline that where a magistrates' court is considering committal for sentence, or the defendant has indicated an intention to plead guilty in a matter which is to be sent to the Crown Court, the magistrates court should request a PSR for the Crown Court's use if it considers that:

(a) there is a realistic alternative to a custodial sentence; or

(b) the defendant may satisfy the criteria for classification as a dangerous offender; or

(c) there is some other appropriate reason for doing so."[29]

[27] Better Case Management Handbook, page 8-9
[28] Race equality in probation: the experiences of black, Asian and minority ethnic probation service users and staff, HM Inspectorate of Probation; March 2021, page 21
[29] 3A.9 and 3A.18; Criminal Practice Directions General Matters

7.76 These same conditions apply to a court requesting a PSR in the case of a defendant, not having done so before, indicating an intention to plead guilty to his representative after being sent for trial but before the Plea and Trial Preparation Hearing.

7.77 The Better Case Management Handbook (BCMH) sets out these same conditions for PSRs being requested by magistrates on committal to Crown courts, and before a pre-trial preparation hearing (PTPH) where the defendant indicates an intention to plead guilty.

7.78 PSRs on committal were discussed by the CrPRC last year. It was noted that there is differing practice as to how the conditions set out in the PDs for requesting a PSR on committal to Crown court are considered and applied by different legal advisors across the country, but no decision was taken at that point.

7.79 The Probation Service are currently trying to encourage the widest application of these conditions to increase the number of PSRs being requested on committal to the Crown Court. A PSR request on committal to Crown court allows for the report to be available on first appearance, reducing the need for adjournments, and gives probation more time to gather information necessary. This in turn gives probation increased capacity for on the day reports for cases not captured at magistrates' courts, and encourages proactivity rather than reactivity in report writing. Finally, reports done in advance of the first appearance at Crown court allows for a greater chance that the sentencing judge is made aware of any influential circumstances the defendant may not have previously disclosed, such as caring responsibilities or vulnerabilities that would influence the potential type of sentence.

7.80 It is therefore considered beneficial for the guidelines to apply the current PD conditions for committal to Crown Court in the widest sense, by considering that should a) [*there is a realistic alternative to a custodial sentence]* or b) *[the defendant may satisfy the criteria for classification as a dangerous offender]* not apply, then c) [*there is some other appropriate reason for doing so]* could catch a majority of cases by applying the Sentencing Code which requires a PSR to be requested unless considered unnecessary.

7.81 It is worth noting again that the PDs are currently being reviewed, partly in an effort to condense them, with a first draft having been seen by the CrPRC on 7 October. Considerations of PSRs may therefore change over the course of this guideline review, but I will remain working closely with colleagues on this.

7.82 As the PDs already highlight a preference for on the day reports, Council could decide to amend the guideline to be slightly more balanced, taking into account all the considerations on PSRs, the benefits of PSRs being requested on committal, and the relevant suggested additions above. This would advocate for the importance of necessary time to be taken to allow for a proper assessment to be made of the offender and a recommendation to be formed. This could be something similar to the below:

~~Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case.~~

Pre-sentence reports can be verbal or written, and may require an adjournment to allow time for the necessary information to be collected by the Probation Service. Please liaise with probation on whether a quality report can be delivered on the day, and adjourn the case if it cannot be.

Where a case is being committed to the Crown Court, a PSR should be requested on committal to allow probation as much time as possible to prepare a quality report and minimise any delay and reduce the risk of the need to adjourn at the first hearing.

Question 15: Does the Council agree to replace the preference for on the day reports with a line that allows for adjournment where necessary?

Question 16: Does the Council agree to encourage for PSRs to be requested on committal to crown court to reduce delays?

Correction of an error

7.83 In the last Council meeting it was noted there is an error to be corrected in the PSR paragraph in the custodial sentence section. This does not need to be discussed today, but will be, if still relevant, on return to the Council in the next paper.

7.84 A full PSR section is not included within this paper given the number of decisions required. A full version of the PSR section will be brought to the Council in a later meeting for consideration of exact wording and approval.

8 EQUALITIES

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

9 IMPACT AND RISKS

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

Sentencing Council

Sentencing Council meeting:	**21 October 2022**
Paper number:	**SC(22)OCT04 – Effectiveness Literature Review**
Lead Council member:	**N/A**
Lead official:	**Ollie Simpson ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Discussion of the literature review on effectiveness of different sentencing options on reoffending, commissioned by the Council and published on 30 September (attached at **Annex A**).

2 RECOMMENDATIONS

2.1 That Council:

- read the review, noting its conclusions and the limitations it highlights (note: this covering paper provides an overview of these, but is not intended to be an exhaustive summary of the evidence);
- consider the implications of its findings, particularly for the revision of the Imposition guideline; and
- form a view on the extent to which sentencing tables should reflect short custodial sentences in starting points and ranges.

3 CONSIDERATION

3.1 In preparing guidelines the Council has a statutory duty to have regard to:

(a) the sentences imposed by courts in England and Wales for offences;

(b) the need to promote consistency in sentencing;

(c) the impact of sentencing decisions on victims of offences;

(d) the need to promote public confidence in the criminal justice system;

(e) the cost of different sentences and their relative effectiveness in preventing re-offending;

(f) the results of the monitoring [of the effect of guidelines].[1]

The Council also has a mandate to promote awareness of, amongst other things, "the cost of different sentences and their relative effectiveness in preventing reoffending".[2]

3.2 To date, the Council has considered effectiveness internally by considering periodic digests of the available research. However, we have had consistent interest, particularly from academics and penal reform groups to do more work on effectiveness. Following responses to our 2020 consultation 'What Next for the Sentencing Council?', we committed to publishing a review of the available research every two years. This became the subject of two actions under two of our five year strategic objectives[3] published in 2021:

Action: *"Collate the relevant evidence on issues related to effectiveness of sentencing and consider this as part of work to develop and revise guidelines by undertaking and publishing a review of the relevant evidence*"

Action: *"Consider whether any changes are required to highlight to sentencers the need to consider issues relating to effectiveness of sentencing as a result of research work in this area and any work undertaken on the Imposition guideline"*

3.3 To fulfil this commitment, we commissioned Dr Jay Gormley (University of Glasgow), Prof Melissa Hamilton (Surrey) and Dr Ian Belton (Middlesex) to conduct a literature review of the available evidence on effectiveness of sentencing. The full methodology can be found in section 2.3 of the report (pages 10-11). The review was conducted in the spring of this year and peer-reviewed by Professor Julian Roberts.

Findings

3.4 As a literature review, the report is intended to summarise the findings of others, rather than make any of its own policy recommendations. The review does, however, draw conclusions from the academic literature on effectiveness over the past 20 years. As a high level summary, some of the most notable of these are (paraphrasing only slightly):

- short custodial sentences (of under 12 months) are less effective than other disposals at reducing reoffending [and] there is a reasonable body of evidence to

[1] Section 120, Coroners and Justice Act 2009
[2] Section 129, Coroners and Justice Act 2009
[3] Strategic objective 2 (ensure that all our work is evidence based and work to enhance and strengthen the data and evidence that underpin it) and strategic objective 4 (consider and collate evidence on effectiveness of sentencing and seek to enhance the ways in which we raise awareness of the relevant issues)

suggest short custodial sentences can make negative outcomes (such as reoffending) worse, including by encouraging criminal behaviour (page 6 and part 3);

- there is evidence on what is effective in certain circumstances such as where an offender has addiction and mental health issues, – and 'that increasing the length of immediate prison sentences' is not an effective way of reducing reoffending (page 7 and section 5);
- certain requirements of community sentences or suspended sentences may be more effective at promoting positive outcomes than others (and further research would be beneficial here) (page 7 and part 3);
- the effects of imprisonment for women are different than for men and there are differences in how best to address offending (page 7 and part 7);
- at present, there is little evidence to justify increasing a sentence…purely for the purposes of deterrence….however, a key area of interest in terms of specific deterrence is suspended sentences (page 28 and part 4).

3.5 The report says that "the evidence against the effectiveness of short custodial sentences is amongst the most robust" and this forms the core of the findings. This may therefore be a topic to explore in greater depth in discussion.

Limitations

3.6 The report is clear that there are limits and caveats on the information and data available, and there are important questions of interpretation. Most importantly, much of the available data does not take account of the many factors which may affect an offender's propensity to reoffend (including their criminal histories, their age and their family and social circumstances); "the possibility that any of these other factors explain (to whatever degree) the apparent relationship between a sentence and reoffending is the main threat to the validity of a study's findings" (page 30, section 5).

3.7 The report explores what is meant by "reoffending" and points out this is subject to a degree of variation. "Desistance" could mean stopping offending altogether, or for a certain period of time, it could mean reducing the amount of offending, or the severity of offending. Rehabilitation and reintegration are also broad terms, and could involve complex questions of how the offender sees themselves (pages 12 -15).

3.8 A fundamental question is that of what effectiveness means. The report correctly follows the statutory obligation in considering this in light of reoffending (i.e. a forward-looking or "consequentialist" focus). But the report acknowledges that effectiveness can be

measured in broader ways (for example, in terms of punishment or “retributivist” aims; see for example pages 47-8).

What does this mean for the Council?

3.9 Council may wish to consider what to do with the evidence presented, having commissioned the review and committed to further reviews every two years. This would fulfil the second action mentioned at paragraph 3.2 above. We are likely to see a close interest in how we respond to this evidence: as an early example, Transform Justice published a response piece on its website on 7 October, ‘The myth that tough sanctions deter crime – revealed by the Sentencing Council’.

3.10 The further work hinted at by the Conclusions which involve the Council working with MoJ and others to reduce reoffending (see page 60, section 8.2) would likely go beyond the Council’s remit and available resource.

3.11 However, the Imposition guideline is in the process of being revised, and this presents a logical opportunity to provide information or a steer to sentencers on the relative effectiveness of disposals, whether this were done explicitly or in broad terms. In particular this could ask sentencers in cusp-of-custody cases to consider the relative merit, or effectiveness of a community order or a suspended sentence order with requirements compared to a custodial sentence. The Imposition guideline could also highlight the particular challenges faced by female offenders and the ways in which their response to a custodial sentence might differ from male offenders.

3.12 Whatever is decided for inclusion in the Imposition guideline (if anything) could also be replicated in offence specific guidelines at a logical place, perhaps after the sentencing table, to remind the courts to consider the relative effectiveness of different sentencing options.

3.13 In this context, Council members may recall the suggestions made in response to the ‘What Next for the Sentencing Council?’ consultation in relation to highlighting to sentencers the purposes of sentencing. It was suggested that there could be a “step back” step after aggravation and mitigation to consider whether the sentence arrived at would serve the purposes of sentencing and/or would be “effective” for the offender. Something similar exists in the health and safety guidelines. In principle, one could point to the research on effectiveness, although this is unlikely to be of much practical use during a real sentencing exercise.

3.14 In the past, Council has reached an informal position that sentencing tables should not generally contain custodial starting points and range limits that are under six months except where it is unavoidable for some summary only offences. This means that even though a custodial sentence of under six months may be within a range (e.g. starting point: medium level CO, range: low level CO – six months' custody) there is no mention of a custodial sentence of under six months on the face of the guideline. We may take the opportunity now to consider whether this should continue to be the Council's position, and/or whether it (or a variation on it – noting the report's focus on sentences under 12 months) becomes a stated, formal policy.

3.15 The report highlights some areas which may be valuable for further research, including:

- the relative effectiveness of suspended sentence orders and community orders which carry different requirements;
- comparative studies with other jurisdictions (most obviously Scotland); and
- the impacts of custody on women and effectiveness for different sections of the population.

Equally, or in addition, the Council may consider there is scope to consider evidence on effectiveness of sentencing in a broader context than reoffending.

Question 1: how (if at all) do you want to reflect the findings of the literature review in the review of the Imposition guideline?

Question 2: do you want to refresh and/or formalise the prohibition on starting points and category range limits of under six months/12 months in sentencing tables?

Question 3: do you want to reconsider the proposal for a new "step back" step, asking sentencers to consider whether a sentence will be effective for a particular offender?

Question 4: do you want to take forward any suggestions for further areas of effectiveness to explore, including in future biennial literature reviews?

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Sentencing Council

Sentencing Council meeting:	**21 October 2022**
Paper number:	**SC(22)OCT05 – Reduction in sentence for assistance to the prosecution**
Lead official:	**Ruth Pope** **Ruth.pope@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Under sections 73 and 74 of the Serious Organised Crime and Policing Act 2005 (SOCPA), and under sections 74 and 388 of the Sentencing Act 2020, a reduced sentence can be awarded to an assisting offender (usually called a SOCPA Agreement).

1.2 The Serious Fraud Office (SFO) has written to the Council to ask that consideration be given to the development of new guidelines to provide greater certainty as to the amount of that reduction and thereby encourage offenders to cooperate with law enforcement.

1.3 The letter setting out the request is at Annex A

2 RECOMMENDATION

2.1 The Council is asked to consider the request from the SFO and decide whether to add the development of a Reduction in sentence for assistance to the prosecution guideline to its workplan.

3 CONSIDERATION

Background

3.1 Officials were approached by the SFO in August 2021 for advice on how to make the case to the Council to develop a guideline for reducing sentences for assisting the prosecution. We directed them to the published criteria and invited them to submit a case. We suggested that it would be helpful if they could include an estimate of the number of cases a guideline would relate to. We pointed out that the Council has a full programme of work and even if the Council were persuaded of the need for a guideline it may be some time before work could begin and that the typical guideline development process takes 18 months to two years.

3.2 In July 2022 the SFO submitted the letter attached at Annex A. We have acknowledged receipt of the letter and explained that it would be considered by the Council when there was time on the agenda.

3.3 This is not the first time that the Council has been asked to develop a guideline for SOCPA agreements. In 2015 Siobhain Egan of Lewis Nedas Law Solicitors wrote to the

Council suggesting that a guideline 'would enable defence solicitors to advise their clients with some certainty about the outcome of cooperation with the authorities'. She sought the support of the then Director of the SFO David Green. He responded in a letter copied to the Council:

> It seems to me that the sentencing regime and any associated guidance must cater for myriad outcomes. Every case is different and the degree of mitigation afforded by co-operation must necessarily be a matter for the sentencing judge who is uniquely placed to assess the weight it should be given. The case of Dougall [2010] EWCA Crim 1048 is of considerable interest in this regard.
>
> Having regard to the vast range of different circumstances which might come into play around engagement with section 73 of the Act, I therefore do not believe that the Sentencing Council would be able, or likely to give any further guidance to that already given by the Court of Appeal, and therefore I do not feel that I can support your proposal.

The rationale for developing a guideline

3.4 As can been seen from the SFO letter, they argue that the greatest barrier to securing the assistance of an offender is the lack of certainty regarding the sentence reduction. They suggest that a level of certainty similar to that provided by the Reduction in sentence for a guilty plea guideline would encourage more offenders to enter into arrangements with investigators.

3.5 They say (with reference to the guilty plea guideline): 'It would be interesting to understand whether the number of guilty pleas increased following the production of these guidelines'. The answer to that is that it did not – but it was not the Council's intention that it should. What the guilty plea guideline was designed to do was to encourage offenders who were going to plead anyway to do so earlier in the court process. The evidence does not show that happening – the reasons for this are not clear.

3.6 The SFO set out the positive impact that could be achieved by a guideline:

a) Impact on law enforcement agency resource: this change could see significant positive impacts on the length of investigations, the number of cases that law enforcement agencies take on, and the outcome of relevant cases.
b) Public confidence: through the effective use of assisting offenders to secure wins in complex cases, we will see an increase in public confidence in the criminal justice system.
c) Fairness: guidelines will make the application of SOCPA Agreements more clear, fair and consistent, going further than existing case law.

d) International impact: this will also allow the UK to keep up with other jurisdictions which offer greater support to assisting offenders. The US allows payments to assisting offenders. While we do not propose making payments to assisting offenders, this does make the US a more attractive place to enter into such arrangements. In multi-jurisdictional cases, would-be assisting offenders may prefer to assist foreign law enforcement, reducing the UK's ability to police its own citizens and businesses. By taking steps to encourage offenders to provide intelligence and evidence in their own cases, the UK can better police crimes which took place within its jurisdiction.

e) Prison places: by increasing the number of assisting offenders in economic crime cases, it can reasonably be expected that a greater number of offenders will have reduced custodial sentences, therefore reducing the impact on prison places. The Sentencing Council may wish to consider the greater application of non-custodial sentences for assisting offenders in economic crime cases, which would further reduce the pressure on prison places.

3.7 Point e) above overlooks the fact that if successful in encouraging more agreements a guideline could lead to more successful prosecutions and therefore more offenders being sentenced resulting in an increased demand for prison places. However, it is to be assumed the numbers involved (in either direction) would be relatively small.

3.8 It should be noted that the letter is sent on behalf of the SFO and the National Economic Crime Centre, the Crown Prosecution Service, the City of London Police, the Financial Conduct Authority and HM Revenue & Customs. The focus of the request is on economic crime. If the Council were to develop such a guideline a decision would have to be made as to whether it should cater for all offence types.

The current position

3.9 Every offence specific guideline includes a step (usually step 3) which says:

> Step 3 – Consider any factors which indicate a reduction, such as assistance to the prosecution
>
> The court should take into account section 74 of the Sentencing Code (reduction in sentence for assistance to prosecution) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

3.10 No further guidance is currently provided. The letter references several Court of Appeal judgments[1] to which courts presumably refer at present in the absence of a guideline. The information given in the SFO letter is that the CPS has agreed 56 SOCPA agreements in the period 1 May 2016 to 30 April 2021.

[1] R v A [2006] EWCA Crim 1803, R v P; R v Blackburn [2007] EWCA Crim 2290, R v Z [2007] EWCA Crim 1473, R v D [2010] EWCA Crim 1485

Next steps

3.11 If the Council is persuaded that the case for developing a guideline is made out, further work will be done to look at the options for the scope of the project and to estimate when it could be accommodated in the Council's work plan.

Question 1: Does the Council wish to develop a guideline for reduction in sentence for assistance to the prosecution?

4 EQUALITIES

4.1 A guideline would improve transparency and consistency which would be relevant to avoiding disparity in the application of the reduction. However, due to the sensitive nature of SOCPA agreements and the low numbers it will be very difficult demonstrate whether any disparity exists and, if so, how a guideline could address it.

5 IMPACT AND RISKS

5.1 There are risks associated with developing this guideline: the limited evidence base may make it difficult to develop an effective guideline and the Council could be criticised for devoting some of its limited resources to such a 'niche' guideline. Equally there are risks associated with not developing it: it is an area of sentencing that is referenced in all guidelines but without any clear guidance and the Council could be criticised for being unresponsive.

Sentencing Council

Sentencing Council meeting:	**21 October 2022**
Paper number:	**SC(22)OCT06 – Animal Cruelty**
Lead Council member:	**Rosa Dean**
Lead official:	**Zeinab Shaikh** **zeinab.shaikh@sentencingcouncil.gov.uk**

1 ISSUE

1.1 This is the second meeting to discuss responses to the public consultation on the revised animal cruelty sentencing guidelines. While the first meeting considered the guideline covering offences contrary to sections 4-8 of the Animal Welfare Act 2006 (unnecessary suffering, mutilation, poisoning and animal fighting), this meeting will focus on the guideline for the section 9 offence (failure to ensure animal welfare).

1.2 A further meeting is scheduled for November to consider consultation responses on equalities and other issues, with the intention of publishing the final guidelines in spring 2023.

2 RECOMMENDATIONS

2.1 That the Council:

- agrees to amend the culpability factors to provide more guidance to sentencers;
- approves minor changes to the aggravating factors.

3 CONSIDERATION

Background

3.1 In our public consultation, we included two questions on the standalone guideline for the s.9 offence (the guideline as consulted on is included at Annex A), which remains summary-only, with a statutory maximum sentence of six months' custody. While this is similar to the existing animal cruelty guideline, in the consultation we proposed changes to culpability, aggravating and mitigating factors. We did not propose any changes to harm factors or to the sentencing table.

3.2 The s.9 offence focuses on the failure of the person responsible for an animal to ensure its welfare. The Act outlines the necessary requirements to ensure an animal's needs, including providing a suitable environment and diet, allowing it to exhibit normal behaviour patterns, to be housed with – or apart from – other animals as necessary, and to protect it from suffering and disease. Examples of s.9 offences are included at Annex B.

Culpability

3.3 We received 78 responses to our proposals on culpability for the s.9 guideline. 45 respondents agreed with the changes, including the Justices' Clerks' Society, the Legal Committee of the Council of District Judges, the Criminal Sub-Committee of the Council of Circuit Judges and the Magistrates' Association. 24 respondents provided substantive recommendations for change.

Recommended changes

3.4 Two respondents called for a new aggravating factor to be added where the offender has coerced, intimidated or exploited others to offend. Refuge similarly called for more consideration of how victims of domestic abuse may be forced by abusers to neglect animals. In line with changes to the s.4-8 guideline, and to mirror the low culpability factor of "involved through coercion, intimidation or exploitation", we recommend adding a new high culpability factor on this issue. The inclusion of the lower culpability factor suggests that this is a common aspect of s.9 cases, and so it seems right to reflect this in higher culpability, to make clear that this type of offending is of the highest severity. This would cover instances where offenders have compelled others to neglect animals, but where the harm caused is not significant enough to tip over into the s.4 offence, such as where offenders coerce their partners into neglecting a family pet, or prevent them from providing high quality feed to their animals.

Question 1a: Do you agree to include a high culpability factor on involving others through intimidation, coercion or exploitation?

3.5 For consistency with the wording used in the animal cruelty guideline, four respondents, including Battersea Dogs and Cats Home, called for the widening of the lower culpability factor of "brief lapse in judgement", to include a momentary lapse. As this is unlikely to unintentionally widen the scope of cases falling under low culpability, with these terms broadly being interchangeable, we recommend making this amendment.

Question 1b: Do you agree to include a momentary lapse in judgement within low culpability?

A High Culpability	• Prolonged or deliberate ill treatment or neglect • Ill treatment or neglect in a commercial context • Leading role in illegal activity • Involvement of others through coercion, intimidation or exploitation

B Medium culpability	• Cases that fall between categories A or C because:
	  ○ Factors are present in A and C which balance each other out, and/or,
	  ○ The offender's culpability falls between the factors as described in A and C

C Lower culpability	• Well-intentioned but incompetent care • Momentary or brief lapse in judgement • Involved through coercion, intimidation or exploitation • Mental disorder or learning disability, where linked to the commission of the offence

Areas of no change

3.6 Respondents made a number of suggestions for new culpability factors, such as the hoarding of animals, refusing to comply with an improvement notice, or deliberately exposing the animal to a high risk of suffering.

3.7 West London Magistrates' Bench called for factors on financial gain to be included across the table. Rather than include this in culpability, at paragraph 3.22 we have recommended adding it as a new aggravating factor, to allow sentencers more nuance when considering this issue.

3.8 The RSPCA called for consideration of whether the offender failed to provide adequate shelter or housing for the animal. While this is the type of circumstance that is intended to be covered by the s.9 guideline, the proposed table already adequately allows for this to be included within all categories. One can imagine extreme instances of a failure to provide adequate shelter falling under the high culpability factor of "prolonged or deliberate ill treatment or neglect", while lesser cases may be captured by the lower culpability wording of "well-intentioned but incompetent care".

> We suggest that a specific culpability factor should be accommodating animals in an unsuitable environment, which is a common issue in many section 9 AWA cases. This not only has an impact on the animal(s) but in many cases there can be wider public health impacts, for example pest infestations affecting others, and of course the impact on the public purse due to multi-agency approaches needed to deal with these situations. As such we feel there should be a high culpability where there is a 'consistently inadequate environment that impacts on the health and welfare of the animal, or others'. *(RSPCA)*

3.9 There were also calls to define the terms used within culpability, or to provide examples, in line with the feedback received on the s.4-8 guideline. In addition, the RSPCA called for the high culpability factor of prolonged or deliberate ill treatment/neglect to be more clearly distinguished from the s.4 offence, by adding the wording "(falling short of causing suffering)". It is unclear why this clarification would be necessary, however, and it is our view that the proposed wording for the different guidelines – and the associated sentences available – are clearly distinct.

3.10 For consistency with the s.4-8 guideline, a small number of respondents wanted the s.9 culpability table to include a failure to seek treatment (called for by Battersea, with the Magistrates' Association instead arguing that this should be an aggravating factor). We do

not believe this additional clarification is necessary and, in any event, a failure to seek treatment could fall under any culpability category depending on whether this was due to incompetence or deliberate neglect. The proposed wording for factors is framed broadly enough to already allow sentencers to consider this issue.

> 'Prolonged or deliberate ill treatment or neglect' should clarify that this includes failure to provide appropriate veterinary care for animals when it is very clear that the animal's suffering could have been avoided. *(Battersea)*

Question 2a: Do you agree to retain the proposed wording for these culpability factors?

3.11 Similarly, the National Farmers' Union (NFU) and the Justice Select Committee called for consistency in the weighting of the factor "ill treatment in a commercial context" across the two guidelines. In the s.4-8 guideline, this factor sits in medium culpability, while in the s.9 guideline, we have placed it in high culpability. While the desire for consistency across the guidelines is understandable, we do not recommend moving this into medium culpability as the threshold for this offence is lower. It is right that those running commercial operations should be held to high standards given the number of animals they have responsibility for, and that they stand to gain financially. The statutory maximum for this offence is also comparatively low, and so moving this down into medium culpability may impact on sentencing practice.

> (We) would like to see more equivalence between the definitions in the animal cruelty guideline and the failure to ensure animal welfare guideline. For example, ill treatment in a commercial context is a category A factor in the failure to ensure animal welfare guideline and a category B factor in the animal cruelty guideline. We query if there is justification for this disparity and would suggest that it should be a category B factor in both cases, since the commerciality of an operation should not prejudice it to harsher penalties. *(NFU)*

Question 2b: Do you agree to retain "ill treatment or neglect in a commercial context" within high culpability?

3.12 In the s.9 guideline, we proposed keeping the medium culpability category as a catch all. The Chief Magistrate, however, suggested that specific factors be added, to provide clarity to sentencers:

> The potential difficulty is that medium level culpability can become a catch all, particularly with sentencers being reminded of the ability of culpability factors in A and C to cancel each other out and it may be of greater assistance to sentencers to have articulated medium culpability. The cancelling out defaulting into medium approach can also bring cases into medium that perhaps ought not be there, so care will have to be taken to assess if factors really do cancel each other out.

3.13 While we have adopted this principle in the s.4-8 guideline, we do not believe there is a need to add further detail to the s.9 guideline. This disparity can be justified due to the comparatively low statutory maximum for s.9 offences, with a narrower range of sentences available and a smaller likelihood of significant variation in the sentences handed down.

3.14 If, however, the Council is minded to provide further guidance on medium culpability, factors could be drafted which would stand as less severe versions of those in high culpability, such as "repeated incidents of neglect" (as opposed to "prolonged or deliberate ill treatment or neglect").

Question 2c: Do you agree to retain medium culpability as a catch-all category?

Harm

3.15 In the consultation, we did not propose any changes to the two-tier harm table. Despite this, six respondents provided their views on this aspect of the guideline. West London Magistrates' Bench called for a separate consultation on the harm factors, while four respondents, including the Chief Magistrate and the NFU, argued for a three-tier harm table, citing the additional nuance this would allow sentencers to consider.

> Whilst we understand the desire of the SC to keep things simple… we have mentioned in previous responses to other SC consultations how having a three-level categorisation of harm is preferable and makes it easier to place a particular case into the appropriate harm level. *(West London Magistrates' Bench)*

> Whilst there is a simplicity to this approach and it echoes what is hinted at in culpability, it leaves each option, high and low, having to cover a broader range of instances than a three-box structure would, so sentencers will have to be alive to making appropriate adjustments within range once a sentencing category has been identified… including a third box for medium harm may be of more assistance. *(Chief Magistrate)*

3.16 Given the low statutory maximum for this offence, and the broad wording of the existing harm factors, we do not believe it is necessary to include an additional category of harm. Adding further gradation, when the top of the sentencing table is capped at six months' custody, would add unnecessary complexity and may, in fact, make it more challenging for sentencers to identify the most severe cases of neglect or ill treatment.

Question 3: Are you content to retain two categories of harm for this offence?

Factors indicating greater harm	• Death or serious injury/harm to animal • High level of suffering caused
Factors indicating lesser harm	• All other cases

Statutory maximum

3.17 Both the NFU and the Chief Magistrate asked for clarity on the statutory maximum for the s.9 offence, citing the increase in magistrates' sentencing powers:

> The NFU seeks clarity on the maximum penalty for the section 9 offence. Section 32(2) of the Animal Welfare Act 2006 states a person guilty of an offence under section 9 shall be liable on summary conviction to (a) imprisonment for a term not exceeding 51 weeks, or (b) a fine not exceeding level 5 on the standard scale, or both. Whereas the failure to ensure animal welfare draft guideline states that the maximum penalty is imprisonment for a term not exceeding 6 months and/or an unlimited fine. *(NFU)*
>
> The maximum suggested sentence on the draft guideline is only 6.5 months (the draft guidelines were no doubt developed before the increase to sentencing powers in the Magistrates' Court was announced). This still leaves a lot of headroom between the guideline and statutory maxima. *(Chief Magistrate)*

3.18 We believe this confusion arises from the wording on the face of the Animal Welfare Act, which outlines, at s.32, that the statutory maximum is 51 weeks' custody. However, the limit of six months is imposed by s.224 of the Sentencing Act, which remains unchanged following the increase in magistrates' sentencing powers (which is limited to either way offences).

3.19 To avoid any further confusion, and to clarify that this is not an arbitrary limit imposed by the Council, we would suggest explicitly responding to this feedback. Rather than clarifying this on the face of the guideline, we believe it would be most appropriate to include a short explanation for the six month statutory maximum in the formal consultation response. We can also use this opportunity to explain that a level five fine is unlimited for offences committed after March 2015.

Question 4: Are you content with this approach to clarify the statutory maximum sentence for this offence?

Aggravating and mitigating factors

3.20 We received 76 responses to our proposals for aggravating and mitigating factors for the s.9 guideline. 31 respondents agreed with the changes, including the Blue Cross and the Criminal Sub-Committee of the Council of Circuit Judges.

Recommended changes

3.21 In line with what the Council has provisionally agreed for the s.4-8 guideline, we recommend including a caveat for the aggravating factor of "offender in position of professional responsibility for animals", to prevent double counting alongside the culpability

factor covering ill treatment in a commercial context. This reflects feedback from the Chief Magistrate and the Legal Committee for the Council of District Judges.

3.22 In addition, we also suggest including a new aggravating factor to consider where the offending was motivated by financial gain, but which would not be captured by the high culpability factor of ill treatment/neglect in a commercial context. This is intended to cover instances such as a pet owner breeding from their own dog with the intention of selling the puppies. This aligns with the new factor agreed for the s.4-8 guideline ("motivated by significant financial gain"), which aims to cover off activities leading up to dog fights. For the s.9 offence, however, we have suggested a lower threshold as the amounts of money involved are likely to be lower by comparison.

Question 5a: Do you agree to add a new aggravating factor on financial gain and to caveat factors to avoid double counting?

Other aggravating factors
• Failure to comply with current court orders • Offence committed on licence or post sentence supervision • Significant number of animals involved • Allowing person of insufficient experience or training to have care of animal(s) • Ignores warning/professional advice/declines to obtain professional advice • Offender in position of professional responsibility for animals (where not already taken into account at step 1) • Motivated by financial gain (where not already taken into account at step 1) • Animal requires significant intervention to recover • Animal being used in public service or as an assistance dog • Distress caused to owner where not responsible for the offence

Areas of no change

3.23 Suggestions for new aggravating factors included consideration of whether the offending occurred within the wider context of domestic abuse, where the offender failed to meet the needs of multiple animals or was previously issued an improvement notice, or where the offending was intended as retaliation against the owner. Many of these are already captured under the proposed culpability and aggravating factors, however, or would risk widening the scope of aggravating factors beyond what the Council originally intended.

3.24 The Magistrates' Association suggested a new mitigating factor, to consider where severe financial distress has made it difficult for the offender to get help or to provide better conditions. While this is likely to be a common aspect of s.9 cases, we do not feel there is a strong justification for including this on the face of the guideline. One can imagine instances where an offender is in financial distress but has chosen to ignore warnings or has refused to rehome their animals, leading to ongoing neglect and suffering.

3.25 Four respondents, including the RSPCA and Refuge, called for the inclusion of factors reflecting whether the offending occurred in the presence of others, particularly children, or where children were involved in the offending. Given the kinds of cases that will fall under the guideline, it is difficult to see how this would apply to the s.9 offence, whether it would be intended to include cases of children simply seeing neglected animals, or would include cases where children were encouraged to provide poor care to animals. This offence stands apart from s.4-8 offences, where there is more active cruelty committed and where it is right to include consideration of the impact on children or others. On balance, we believe this is unlikely to be a common aspect of s.9 cases, and so we do not recommend acting on this feedback.

3.26 A few respondents also called for more consideration of whether the offender was a professional working with animals: one respondent suggested consideration of whether offender is a para-professional, such as a hoof trimmer, with another suggesting a new factor for cases where the offender holds an animal licence. One animal charity also argued for the factor to be widened to include offenders who are unlicensed or untrained, but who portray themselves as professionals. We do not recommend making these changes as they go beyond what the Council intended in proposing this factor.

Question 5b: Are you content to retain all other aspects of aggravating and mitigating factors as consulted on?

4 IMPACTS AND RISKS

4.1 As the suggested revisions to the s.9 guideline are minimal and primarily focus on providing greater clarity to sentencers, they are not anticipated to have an impact on prison or probation resources. A full resource assessment will be shared with the Council alongside the finalised guidelines for sign off.

Sentencing Council

Sentencing Council meeting:	**21 October 2022**
Paper number:	**SC(22)OCT07 – Business Plan In Year Update**
Lead Council member:	**N/A**
Lead official:	**Ollie Simpson ollie.simpson@sentencingcouncil.gov.uk**

1 ISSUE

1.1 Publishing an in-year update to the Council's 2022-23 Business Plan.

2 RECOMMENDATIONS

2.1 That Council agrees the in-year update to the Business Plan attached at **Annex A.**

3 CONSIDERATION

3.1 The 2022/23 business plan published earlier in the year, like previous business plans, commits us to "review the plan in the autumn and publish updates, as appropriate, on our website." We believe enough changes have been made to our planned timescales to merit an update this year.

3.2 As with previous in-year updates, the proposed update consists of a one-page summary of what has changed since publication of the full business plan (and why) and an updated version of the guideline workplan.

3.3 There are a variety of reasons why the timelines for some of the guidelines and other projects have moved this year. There were some changes to consultation publication dates early in the year to avoid there being too many publications at once, which have had a knock on effect on consultation response times and publication of definitive guidelines. The underage sale of knives guidelines is an example of a consultation which has thrown up complex issues which will require further time to consider.

3.4 The motoring guidelines publication date has moved back by a month as the planned timescales for post-consultation consideration have become clearer, and we are planning to tie publication of the revised child cruelty guidelines with this year's miscellaneous amendments, which has adjusted the publication date for those. The Totality revision was delayed by the period of National Mourning and will now close after Christmas.

3.5 With all these changes, even a small delay to one part of the process can result in in-force dates being put back, as we align these with common commencement dates (1 January, 1 April, 1 July and 1 October) and will generally want a decent period of time (six weeks to two months at least) to elapse between publication and coming into force.

3.6 Although research publications and projects are not mentioned in the workplan, there are various publications which have been delayed by resource issues in the team, and the draft update mentions the delay to the data collection which has been caused by the Bar strike.

3.7 We do not expect any adverse reaction to the publication. We have discussed the content in general terms at official level with the MoJ and will share a copy of the update with them shortly ahead of publication.

Question: are you content with the draft 2022-23 business plan at Annex A?