

Sentencing Council meeting:
Paper number:
Lead Council member:
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SC(23)MAR03 – Imposition
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1 ISSUE

1.1 This paper considers the *custodial sentences* section of the Imposition guideline, including *suspended sentence orders*, and by virtue of a discussion at the first Imposition working group, a first draft of a new '*Purposes and Effectiveness of Sentencing*' section.

1.2 While these two sections are not strictly related, the consideration of the findings of the Effectiveness literature review are relevant and considered in both, so while questions posed below are separate, members should read the entire paper before forming views.

2 RECOMMENDATION

2.1 It is recommended that the Council agrees to:

- I. Amendments to the suspended sentence order section;*
- II. Amendments to the sentencing flow chart;*
- III. Inclusion of a new section on '*Purposes and Effectiveness of Sentencing*'.*

3 CONSIDERATION

I. Amendments to the Custodial Sentences & Suspended Sentence Orders Section

3.1 As members are aware, a significant driver behind the initial development of the Imposition guideline was to ensure that suspended sentence orders (SSOs) were only being imposed as a custodial sentence that was suitable to be suspended, not as a more severe form of a community order (CO) for cases that had not passed the custodial threshold. It is difficult to ascertain whether the Guideline has addressed this issue; the Imposition guideline evaluation found evidence that showed the anticipated increase in the proportion of COs and a corresponding decrease in the proportion of SSOs after the issuing of a letter to the judiciary by the then Chairman in April 2018 (reminding sentencers of the principles contained in the guideline which was in force from February 2017). However, initial data analysis as part of the ongoing breach evaluation shows that after a breach of an SSO, the proportion of custodial sentences activated remained very similar before and after the introduction of the guideline. *(N.B. This alludes to sentencing data from the magistrates' courts data collection from November 2017 to March 2018, capturing pre-letter data, and*

April 2019 to September 2019, capturing post-letter data. This evaluation is in the relatively early stages and will come to Council later in the year.) This is despite the Breach of SSOs Guideline stating that the custodial sentence should be always activated, unless it is a breach resulting from a further offence that does not require a custodial sentence, or it would be unjust in all the circumstances to activate it. Initial analysis found that the most frequently cited reasons for not activating the custodial sentence were that the offender had a realistic prospect of rehabilitation (50 per cent), or strong personal mitigation (40 per cent), and there was little difference between the reasons pre- and post-guideline.

3.2 This data questions whether the Imposition guideline has indeed resolved the issue of SSOs being imposed as more severe forms of COs where the custodial threshold has not been passed, especially given the high proportion of reasons given being a realistic prospect of rehabilitation or strong personal mitigation, which may have made a CO an appropriate initial sentence. In addition, published offender management data between 2010-2021 shows that sentencers generally impose more requirements on SSOs than on COs, and this has not changed since the introduction of the guideline, despite the Imposition guideline specifying “*A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate*”. **Annex A** shows this data in a table with the mean number of requirements imposed on COs (1.6 in 2021) as compared to SSOs (1.8 in 2021). Stakeholders in MoJ Sentencing Policy contributed that this lack of distinction between COs and SSOs may be further compounded due to the fact that sentencers can give COs with a duration of up to 3 years in length, compared to an SSO which can only be up to 2 years.

3.3 The *custodial sentences* section of the guideline has been reviewed with these considerations in mind. The first Imposition working group discussed whether guidance currently provided for sentencers to consider a) when a potential custodial sentence should be brought down to a CO and b) when a custodial sentence should be suspended, are distinctive enough from each other. The group also considered whether they were content that similar factors are suggested to sentencers to consider both for the imposition of COs and suspended custodial sentences, such as a realistic prospect of rehabilitation, strong personal mitigation and impact on dependants.

3.4 As part of this discussion, I posed that the difficulty distinguishing between the determinations for these difference sentence outcomes may risk leading to potential unconscious bias in this decision making, for example different factors being considered for either of the decisions depending on the offender’s individual characteristics or background.

3.5 The working group considered an amended sentencing flow chart that attempted to define the two different intended thought processes for the imposition of a CO (especially when the custodial threshold was initially passed), and the decision to suspend a custodial sentence. However, it was concluded that the original sentencing flow chart was more aligned with the direction the working group felt the guideline should be giving, and that the factors to consider both whether a sentence can be brought down to a CO or suspended are necessarily similar, as they should be decided on the individual facts and circumstances of the offence and the offender.

3.6 Instead of defining a different thought process for sentencers to go through, given the possibility that SSOs may still be being imposed in unsuitable cases, it is recommended that amendments are made to the SSO section of the guideline. The potential amendments discussed by the working group are broadly:

- a) Inclusion of reference to the purposes of sentencing**
- b) Highlighting that COs can be punitive**
- c) Defining ‘short custodial sentence’ rather than ‘cusp of custody’ as sentencers perception of the latter differs between magistrates’ courts and the Crown Court, and including findings from the Effectiveness review highlighting potential detrimental impact of short custodial sentences**
- d) Considering the weight of previous convictions on eventual sentence**

3.7 Further potential amendments that were not discussed in detail by the working group but that I have included in this paper are:

- e) Removal of the first question on thresholds and adding an introductory line to custodial sentencing**
- f) Reference to considerations for sentencing pregnant offenders**
- g) Inclusion of reference to assessments done by Probation**
- h) Addition of factors and detail to the factors indicating it would not, or may be, appropriate to suspend**
- i) Reference to suspending sentences for offences with statutory minimum terms**
- j) Inclusion of reference to requirements on community orders**

3.8 I have provided some detail after each of these potential amendments in turn below, however the full proposed new *custodial sentences* section, without changes highlighted as they are within the paper below, can be seen in **Annex B**.

Please note: Proposed amendments to the guideline are in **bold** and **red**:

a) Inclusion of reference to the purposes of sentencing

3.9 Based on the agreement in a previous meeting to include the five purposes of sentencing in the guideline (more on this below), it was considered useful to also make reference to all these purposes in the *custodial sentences* section when advising courts that COs can still be imposed even if a case has passed the custodial threshold.

Passing the custody threshold does not mean that a custodial sentence is inevitable. Custody should not be imposed where **the purposes of sentencing could be achieved by** a community order **(for example, 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).

b) Highlighting that COs can be punitive

3.10 The working group had a significant discussion about the reality of COs being quite punitive, particularly for offenders who may struggle with the rigidity of imposed requirements that can often involve offenders needing to attend a particular place at a particular time, with consequences if they do not. A line has therefore been drafted to make this clear under the question '*Is it unavoidable that a sentence of imprisonment be imposed?*' to make this fact clear to sentencers so this can be considered, particularly when thinking about offenders on the 'cusp' of a custodial sentence.

Community orders can be punitive; they last longer than a short custodial sentence and can restrict an offender's day to day liberties, as well as provide a strong rehabilitative effect, especially imposed on an offender who may find regular attendance at a specific place or time a challenge to manage around their personal life.

c) Defining 'short custodial sentence' rather than 'cusp of custody' as sentencers perception of the latter differs between magistrates' courts and the Crown court, and including findings from the Effectiveness review highlighting potential detrimental impact of short custodial sentences

3.11 Initiated by a conversation on pre-sentence reports, the working group agreed that court and sentencer processes can be quite different in magistrates' courts compared to the Crown Court, and that this guideline must ensure it captures this breadth. Due to this difference, what is meant by 'cusp of custody' for sentencers in the magistrates' and Crown courts may differ considerably. It was therefore concluded that it is more useful to refer to

'short custodial sentences', which can be defined, rather than 'custody', which is different, and cannot easily be defined, in the section on SSOs. (*This is a different matter to the custodial threshold, which is dealt with in a different section of the guideline, and which courts will have already considered prior to getting to this section.*) I have suggested defining 'short custodial sentences' at 12 months given that this is the measure that the Effectiveness review used in their concluding remarks about their findings (below):

"The evidence strongly suggests that short custodial sentences under twelve months are less effective than other disposals at reducing re-offending. There is little evidence demonstrating any significant benefits of such sentences. Indeed, there is a reasonable body of evidence to suggest short custodial sentences can make negative outcomes (such as reoffending) worse."

3.12 I have therefore drafted a paragraph that takes this into account and directs sentencers to consider these findings when thinking about short custodial sentences. Please note that general reference to findings in the Effectiveness review are also included in the new Purposes of Sentencing and Effectiveness section, included later in this paper.

If the court is considering an immediate custodial sentence of up to 12 months after all calculations have been completed (e.g. reduction for a guilty plea), it should take into account that research suggests that short custodial sentences of less than 12 months are less effective than other disposals at reducing reoffending, that there is little evidence demonstrating any significant benefits to short custodial sentences, and that there is a reasonable body of evidence to suggest that short custodial sentences can lead to negative outcomes. Short custodial sentences can disrupt potential employment or accommodation and interfere with relationships with friends and family. Courts must be confident if they are imposing a custodial sentence of less than 12 months that it is absolutely necessary to do so.

d) Considering the weight of previous convictions on eventual sentence

3.13 Some members of the working group discussed how, in their experience, short custodial sentences can often be given to offenders who have previously been given COs but have reoffended (and hence are back in court), even if the offence being sentenced would not necessarily pass the custodial threshold.

3.14 While the guideline currently states that sentences should not necessarily escalate from one CO range to the next on each sentencing occasion (currently in the *Community Orders: General Guidance* section earlier in the guideline), it does not state this for escalating between COs and custodial sentences. This view is, however, currently contained within the expanded explanation for the statutory aggravating factor of Previous convictions, which can be seen in full at **Annex C**, excerpt below:

“6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence.”

3.15 The Council may want to encourage sentencers to think more broadly, and creatively, across the possibilities that different requirements imposed as part of a CO can bring, rather than automatically ‘ratcheting up’ to a custodial sentence when faced with an offender with multiple previous convictions, especially if the offence does not necessarily pass the custodial threshold on its own. This is particularly pertinent given the Effectiveness review outlines that a short custodial sentence is not likely to be any more successful in reducing the offender’s risk of reoffending and is more likely to lead to negative outcomes.

3.16 Further, depending on location/area of the case, Probation is now able to offer a broader variety of support and services against an individual offender’s needs. Since unification in 2020 services newly include referrals to, where available, organisations that support a variety of accommodation, addiction, health, employment, and other personal issues. If an offender’s needs are changing or changed, advice from Probation or a pre-sentence report can recommend alternative and more unique requirements or services, that are available in the local area, that may be able to meet the offender’s needs better than a short custodial sentence, with the intention of reducing the risk of further reoffending.

3.17 This consideration and approach is already used in the expanded explanation for the statutory aggravating factor of Previous Convictions:

“5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary.”

3.18 It is therefore recommended that this is included in the *custodial sentences* section of the Imposition guideline. The following draft paragraph is proposed to come directly after the above proposed paragraph on short custodial sentences of up to 12 months.

This also applies in relation to an offender with previous convictions. If an immediate custodial sentence is considered due to the prior imposition of community sentences for previous convictions, the court should consider whether alternative requirements can be imposed instead of escalating to a custodial sentence. Advice from Probation may be helpful to the court in considering suitable alternative requirements that may be more successful in engaging the offender than requirements imposed previously, and whether Probation considers the offender safe to be managed in the community.

3.19 Of course, there will be cases in which it will be necessary for sentencers to impose a custodial sentence in the face of multiple previous convictions, and the expanded explanation for the statutory aggravating factor of Previous Convictions allows for this:

“7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally warrants a lesser sentence. If a custodial sentence is imposed it should be proportionate and kept to the necessary minimum.”

3.20 Further potential amendments that were not discussed in detail by the working group but that I have included are:

e) Removal of the first question on thresholds and adding an introductory line to custodial sentencing

3.21 As agreed in the October Council meeting, a new section on Thresholds has been drafted which is currently at the top of the guideline as section 1. This section and the rest of the draft will be presented to Council at a later date once all sections have been considered separately. Text on thresholds in the *custodial sentences* section in the current version of the guideline, including the first question ‘Has the custody threshold been passed’ has therefore been moved to this new section.

3.22 To present information in the guideline more clearly, as requested by some Council members, some of the text from the *Suspended sentences: general guidance* has been moved and amended to introduce the *custodial sentences* section. This includes a new addition of reference to the fact that sentencers will normally use the offence specific or general guideline to determine whether a custodial threshold has been passed, which was discussed in the Imposition working group. This new paragraph is currently drafted as follows:

Imposition of custodial sentences

A custodial sentence should only be considered where the court is satisfied that the seriousness of an offence and all circumstances of the offence mean that no other sentence is suitable. A custodial sentence can be immediate or suspended. If the custodial threshold has been passed according to the sentencer’s determination using the offence specific guideline (or general guideline where no offence specific guideline exists), the court should ask the following questions before committing an offender to an immediate custodial sentence:

~~The approach to the imposition of a custodial sentence should be as follows.~~

Is it unavoidable that a sentence of imprisonment be imposed?

f) Reference to considerations for sentencing pregnant offenders

3.23 The Council has received multiple letters on the subject of sentencing pregnant offenders in the last few months, including in reference to recent and multiple deaths of babies in custody. According to the organisation No Births Behind Bars, Ministry of Justice figures show that the number of pregnant women in prison is rising – in 2021/22, there were 50 births to women in custody, and NHS data last year found that pregnant women in prison are five times more likely to suffer a stillbirth than women in the community.

3.24 While the expanded explanation for Sole Carer currently states that “*when sentencing an offender who is pregnant relevant considerations may include: any effect of the sentence on the health of the offender and any effect of the sentence on the unborn child*”, the Imposition guideline could say more on this topic. The following amendments have been suggested to lines under the subheading ‘Is it unavoidable that a sentence of imprisonment be imposed’:

~~For offenders on the cusp of custody, Imprisonment should not be imposed where there would be an impact on dependants,~~ **including on unborn children where the offender is pregnant**, which would make a custodial sentence disproportionate to achieving the aims of sentencing. **In particular, courts should avoid the possibility of an offender giving birth in prison unless the imposition of a custodial sentence is absolutely necessary due to public protection concerns.**

g) Inclusion of reference to assessments done by Probation

3.25 Under the question ‘Can the sentence be suspended’, I have suggested a line about the fact that the court can benefit from assessments done by Probation. This takes into account the importance of Probation’s assessment of whether an offender can be safely managed in the community, proposed to be added to the factors below, and aligns with the current working draft of the pre-sentence report section (not yet seen by Council in full).

3.26 I have also proposed that it is specified that this list is non-exhaustive, as this was a question posed by the Sentencing and Probation Policy teams in the MoJ. These words can be removed if Council intends this list to be exhaustive. This is currently drafted as:

The court will benefit from Probation’s assessment of any relevant circumstances (such as dependents), whether the offender can be safely managed in the community, and in weighing the ~~The following,~~ **non-exhaustive** ~~factors should be weighed in considering whether it is possible~~ **appropriate** to suspend the sentence.

h) Addition of factors and detail to the factors indicating it would not, or may be, appropriate to suspend

3.27 Based on the discussion at the working group, some additions and amendments have been suggested to the table of factors indicating that it would not be, or may be, appropriate to suspend a sentence. These include the importance of Probation’s assessment of whether the offender can or cannot be safely managed in the community, whether or not the offender presents a high risk of reoffending or harm (which is also assessed by Probation), reference to the seriousness of the offence being the primary factor in considering whether appropriate punishment can only be achieved by immediate custody and giving possible examples of personal mitigation. Finally, based on the discussion mentioned above on encouraging sentencers to think about alternative requirements on COs for offenders who have previously had COs imposed and reoffended, the removal of ‘history of poor compliance with COs’, so that sentencers are given more discretion to potentially be creative with imposing different requirements on a potential SSO, supported by any assessments by Probation.

Factors indicating that it would <u>not</u> be appropriate to suspend a custodial sentence	Factors indicating that it <u>may</u> be appropriate to suspend a custodial sentence
Offender presents a risk/danger to the public	Realistic prospect of rehabilitation
Probation assess that the offender cannot be safely managed in the community	Offender does not present high risk of reoffending or harm
The seriousness of the offence means that appropriate punishment can only be achieved by immediate custody	Strong personal mitigation such as age, mental disorders, remorse, etc
History of poor compliance with court orders	Immediate custody will result in significant harmful impact upon others

i) Reference to suspending sentences for offences with statutory minimum terms

3.28 When the Council discussed the revised minimum term sections of the bladed articles guidelines as part of the miscellaneous amendments consultation, the case law

Where a statutory minimum term for an offence is 24 months or lower, the court may lawfully impose a suspended sentence order, but in practice this will only be appropriate in rare cases.

around the suspending of sentences for offences that have a statutory minimum term of 24 months or lower was discussed. It was suggested that the Imposition guideline could consider directing sentencers on this point. Therefore, the following line has been suggested:

j) Inclusion of reference to requirements on community orders

3.29 Based on the information provided above about data showing that more requirements are imposed on SSOs than on COs, I have suggested a few additional lines in the *Requirements on a SSO* subsection. This includes suggesting that requirements on a SSO should usually be more rehabilitative in nature, given that an SSO is a custodial sentence and by definition a punitive sentence. I have suggested that this section also refers back to the main Requirements section (yet to be discussed in detail by the Council).

Requirements on a Suspended Sentence Order

When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community. The requirements that may be considered are identical to those available for community orders. The court must follow the guidance in the requirements section of this guideline (*link up*), including ensuring that any requirements imposed are the most suitable for the offender, and where multiple requirements are imposed, they are compatible with each other.

Requirements imposed as part of a suspended sentence order are more likely to be predominantly rehabilitative in purpose, as the imposition of a custodial sentence, **whether immediate or suspended,** is itself both a punishment and a deterrent. To ensure that the overall terms of the suspended sentence are commensurate with offence seriousness, care must be taken to ensure requirements imposed are not excessive. A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate.

Question 1: Does the Council agree with the above amendments proposed, resulting in an updated version of the *custodial sentences* section, seen in full in Annex B? What revisions would Council like to be made?

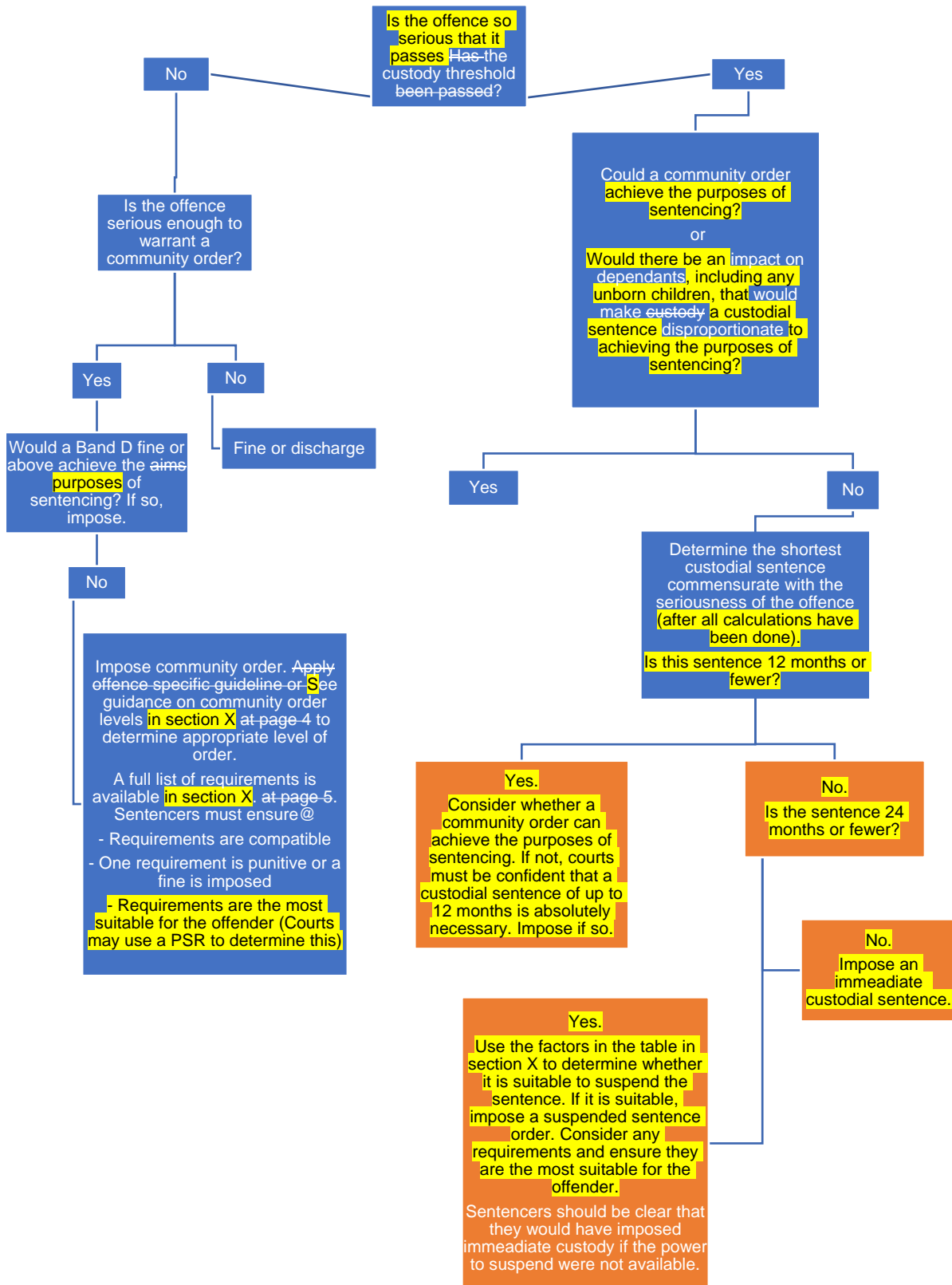
- a) Inclusion of reference to the purposes of sentencing
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II. Sentencing Flow Chart

3.30 The current version of the sentencing flow chart can be seen at **Annex D**. Even if no substantive amendments are made, the flowchart still needs to be updated due to the references to pages that no longer exist.

3.31 A more detailed version of the flow chart was discussed by the Imposition working group, although it was concluded by most members that the current version of the flow chart is more aligned with the intention of the Council for the thought process that sentencers go through when considering whether to impose a CO, custodial sentence or an SSO. Based firmly on the suggested amendments to the *custodial sentences* section above, proposed amendments have been made to the flow chart which can be seen below. However, if proposed amendments to the *custodial sentences* section are not agreed, it may be unnecessary to consider this flow chart at this point.

Please note: The boxes in *blue* exist in the current version of the sentencing flow chart. New text that has been proposed is *highlighted*, with subtractions in *strike through*, and new boxes that are proposed are in *orange*.



Question 2: Does the Council agree with the proposed amendments to the sentencing flow chart? What revisions would Council like to be made?

III. Inclusion of a new section on 'Purposes and Effectiveness of Sentencing'.

3.32 In the December meeting, Council agreed to include the five purposes of sentencing in the Imposition guideline. There was a discussion on how the guideline could include an overview of each of these purposes, initiated by the Council's intention that the guideline includes information on the importance of rehabilitation, stimulated by the findings in the Effectiveness literature review.

3.33 After consideration of various options to give an overview of each purpose of sentencing within the guideline, given their breadth and overlap, it has been concluded that it would be more impactful to include a more general line about all the purposes, and specifically the fact that both a community and custodial sentence can fulfil all the purposes of sentencing. This is currently drafted as follows. In this example, the non-bold black text is not currently in the guideline, but has been provisionally agreed by the Council in a previous meeting. The bold red text simply highlights the newly proposed lines since this agreement:

The court must have regard to the five purposes of sentencing when determining sentence. **The weighting each purpose should be given will vary from case to case, however both community and custodial sentences can achieve all the purposes of sentencing.**

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

The court must ensure that any restriction on the offender's liberty is commensurate with the seriousness of the offence. A restriction on liberty can be achieved by a community or a custodial sentence.

3.34 The Effectiveness literature review was discussed in the October meeting in which it was agreed that the Imposition guideline should be one of the main vehicles in which the Council notes the findings of the work, specifically that "*the evidence strongly suggests that short custodial sentences under twelve months are less effective than other disposals at reducing re-offending*", and that "*there is little evidence demonstrating any significant benefits of such sentences. Indeed, there is a reasonable body of evidence to suggest short custodial sentences can make negative outcomes (such as reoffending) worse.*" A 'step back step' was preliminarily agreed to be included to ask courts to review whether the sentence it has initially arrived at fulfils the purposes of sentencing, noting the findings of the review.

3.35 These proposals have all been pulled together into a new section entitled 'Purposes and Effectiveness of Sentencing'. This can be seen in full at **Annex E**. This section currently comes third, after an initial note on deferring sentences, a first section on thresholds and a second section on pre-sentence reports. (As mentioned earlier, a full first draft will be presented to Council at a later date, once all separate sections have been discussed).

3.36 While Council has seen a variation of all of the paragraphs in this section, these have been updated following the discussion.

Question 3: Does the Council agree with the proposed new section on Purposes and Effectiveness of Sentencing?

Question 3: What amendments would the Council make to the current version of the draft of the section on Purposes and Effectiveness of Sentencing at Annex E?

4 EQUALITIES

4.1 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.

5 IMPACT AND RISKS

There are some risks 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.

ANNEX A: Offender Management Statistics quarterly: Number of requirements imposed on Suspended Sentence Orders (SSO) and Community Orders (COs) between 2017-2021

	2017	2018	2019	2020	2021	% for 2021
Community order	77,810	75,750	73,871	52,937	60,884	100%
1	47,391	43,574	40,396	29,093	31,822	52%
2	25,483	26,253	26,768	18,813	23,007	38%
3	4,571	5,503	6,158	4,646	5,558	9%
4	339	392	522	358	469	1%
5 or more	26	28	27	27	28	<0.5%
Mean no. of requirements	1.5	1.5	1.6	1.6	1.6	
Suspended sentence order						
Suspended sentence order	42,520	34,257	31,613	26,801	33,068	100%
1	21,146	16,016	13,849	11,742	13,454	41%
2	17,096	14,264	13,462	11,333	14,770	45%
3	3,877	3,583	3,870	3,297	4,333	13%
4	378	377	413	404	480	1%
5 or more	23	17	19	25	31	<0.5%
Mean no. of requirements	1.6	1.7	1.7	1.7	1.8	

Source: Offender Management Statistics Quarterly: October to December 2021

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1094743/Probation_2021-revised.ods

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ANNEX B: Proposed Amended Version of Imposition of Custodial Sentences

Section of the Imposition Guideline (Amendments not highlighted)

Imposition of custodial sentences

A custodial sentence should only be considered where the court is satisfied that the seriousness of an offence and all circumstances of the offence mean that no other sentence is suitable. A custodial sentence can be immediate or suspended. If the custodial threshold has been passed according to the sentencer's determination using the offence specific guideline (or general guideline where no offence specific guideline exists), the court should ask the following questions before committing an offender to an immediate custodial sentence:

Is it unavoidable that a sentence of imprisonment be imposed?

Passing the custody threshold does not mean that a custodial sentence is inevitable. Custody should not be imposed where the purposes of sentencing could be achieved by a community order (for example, a community order may provide sufficient restriction on an offender's liberty, by way of punishment, while allowing rehabilitation to take place to prevent future crime.) Community orders can be punitive; they last longer than a short custodial sentence and can restrict an offender's day to day liberties, as well as provide a strong rehabilitative effect, especially imposed on an offender who may find regular attendance at a specific place or time a challenge to manage around their personal life.

Imprisonment should not be imposed where there would be an impact on dependants, including on unborn children where the offender is pregnant, which would make a custodial sentence disproportionate to achieving the purposes of sentencing. In particular, courts should avoid the possibility of an offender giving birth in prison unless the imposition of a custodial sentence is absolutely necessary due to public protection concerns.

If the purposes of sentencing can be achieved by a community order, or any personal mitigation means that a community order may be a more suitable sentence, please see the Imposition of Community orders section.

What is the shortest term commensurate with the seriousness of the offence?

If the court is considering an immediate custodial sentence of 12 months or fewer after all calculations have been completed (e.g. reduction for a guilty plea), it should take into account that research suggests that short custodial sentences of less than 12 months are less effective than other disposals at reducing reoffending, that there is little evidence demonstrating any significant benefits to short custodial sentences, and that there is a reasonable body of evidence to suggest that short custodial sentences can lead to negative outcomes. Short custodial sentences can disrupt potential employment or accommodation and interfere with relationships with friends and family. Courts must be confident if they are imposing a custodial sentence of less than 12 months that it is absolutely necessary to do so.

This also applies in relation to an offender with previous convictions. If an immediate custodial sentence is considered due to the prior imposition of community sentences for previous convictions, the court should consider whether alternative requirements can be imposed instead of escalating to a custodial sentence. Advice from Probation may be helpful to the court in considering suitable alternative requirements that may be more successful in

engaging the offender than requirements imposed previously, and whether Probation considers the offender safe to be managed in the community.

In considering this the court must NOT consider any licence or post sentence supervision requirements which may subsequently be imposed upon the offender's release.

Suspended Sentence Orders

A custodial sentence between 14 days and 2 years may be suspended for between 6 months and 2 years (this is also applicable for the aggregate of the terms where the court imposes two more sentences to be served consecutively.) The time for which a sentence is suspended should reflect the length of the sentence; up to 12 months might normally be appropriate for a suspended sentence of up to 6 months. A custodial sentence that is suspended should be for the same term that would have applied if the sentence was to be served immediately.

Can the sentence be suspended?

If the custodial threshold has been passed, the court may consider whether it is appropriate to suspend that sentence, so that the offender serves their sentence in the community under the supervision of the Probation Service. If the offender reoffends while under supervision, immediate custody will be activated, unless in certain circumstances set out in the [Breach of Suspended Sentence Orders guideline](#) (*link*).

A suspended sentence is a custodial sentence. A suspended sentence **MUST NOT** be imposed as a more severe form of community order. Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available. If not, a non-custodial sentence, such as a community order, should be imposed.

The court will benefit from Probation's assessment of any relevant circumstances (such as dependents), whether the offender can be safely managed in the community, and in weighing the following, non-exhaustive factors in considering whether it is appropriate to suspend the sentence.

Where a statutory minimum term for an offence is 24 months or lower, the court may lawfully impose a suspended sentence order, but in practice this will only be appropriate in rare cases.

Factors indicating that it would not be appropriate to suspend a custodial sentence

Factors indicating that it may be appropriate to suspend a custodial sentence

Offender presents a risk/danger to the public

Realistic prospect of rehabilitation

Probation assess that the offender cannot be safely managed in the community

Offender does not present high risk of reoffending or harm

The seriousness of the offence means that appropriate punishment can only be achieved by immediate custody

Strong personal mitigation that may reduce the seriousness of the offence, such as age, mental disorders, remorse, etc

Immediate custody will result in significant harmful impact upon others

Requirements on a Suspended Sentence Order

When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community. The requirements that may be considered are identical to those available for community orders. The court must follow the guidance in the requirements section of this guideline (*link up*), including ensuring that any requirements imposed are the most suitable for the offender, and where multiple requirements are imposed, they are compatible with each other.

Requirements imposed as part of a suspended sentence order are more likely to be predominantly rehabilitative in purpose, as the imposition of a custodial sentence, whether immediate or suspended, is itself both a punishment and a deterrent. To ensure that the overall terms of the suspended sentence are commensurate with offence seriousness, care must be taken to ensure requirements imposed are not excessive. A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate.

ANNEX C: Expanded Explanation for Previous Convictions

Effective from: 01 October 2019

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

[Guidance on the use of previous convictions](#)

The following guidance should be considered when seeking to determine the degree to which previous convictions should aggravate sentence:

[Section 65 of the Sentencing Code](#) states that:

(1) This section applies where a court is considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more relevant previous convictions.

(2) The court must treat as an aggravating factor each relevant previous conviction that it considers can reasonably be so treated, having regard in particular to— (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the conviction.

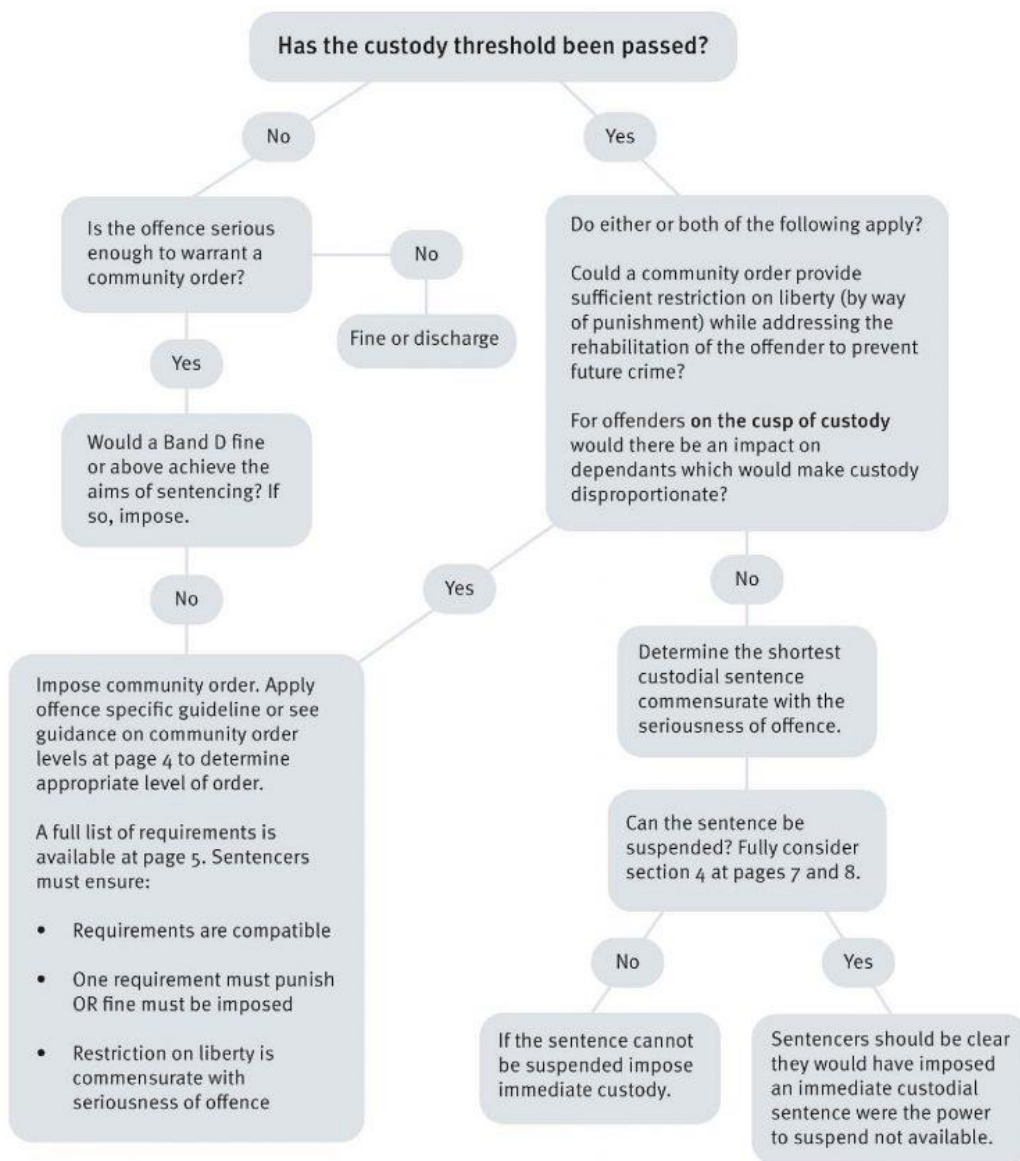
(3) Where the court treats a relevant previous conviction as an aggravating factor under subsection (2) it must state in open court that the offence is so aggravated.

1. Previous convictions are considered at step two in the Council’s offence-specific guidelines.
2. The primary significance of previous convictions (including convictions in other jurisdictions) is the extent to which they indicate trends in offending behaviour and possibly the offender’s response to earlier sentences.
3. Previous convictions are normally **relevant** to the current offence when they are of a similar type.
4. Previous convictions of a type different from the current offence **may** be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders.
5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary.
6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence.
7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally

warrants a lesser sentence. If a custodial sentence is imposed it should be proportionate and kept to the necessary minimum.

8. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant** to the offender's culpability for the current offence and less likely to be predictive of future offending.
9. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise.
10. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.
11. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.
12. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.
13. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence

ANNEX D: Current version of the Sentencing Flow Chart



Effective from 1 February 2017

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ANNEX E: Proposed new section entitled ‘Purposes and Effectiveness of Sentencing’

1. Purposes and Effectiveness of Sentencing

The court must have regard to the five purposes of sentencing when determining sentence. The weighting each purpose should be given will vary from case to case, however both community and custodial sentences can achieve all the purposes of sentencing.

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

The court must ensure that any restriction on the offender’s liberty is commensurate with the seriousness of the offence. A restriction on liberty can be achieved by a community or a custodial sentence.

Effectiveness

The court should ‘step back’, and review whether the sentence it has preliminarily arrived at fulfils the purposes of sentencing. Where relevant, the court should ensure that a rehabilitative sentence has been fully considered, which research has shown can reduce the risk of reoffending when compared to a short custodial sentence, therefore fulfilling other purposes of sentencing, such as reduction of crime and protection of the public, through its sentencing.

The effectiveness of a sentence will be based on the individual offender. The [Equal Treatment Bench Book](#) (*link*) covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. The Council has issued overarching guidelines for consideration in the [sentencing of offenders with mental disorders, developmental disorders, or neurological impairments](#) (*link*).

Courts should review this guideline if it applies to the case.

In addition, courts should be aware that research suggests that female offenders have different criminogenic needs than men, and in particular an immediate custodial sentence may not address these needs. Courts should take into consideration that there are fewer female prisons than male prisons which may mean that female offenders are at a greater risk of being housed further away from their families and communities, and that research suggests that female offenders are at a greater risk of being homeless and unemployed than men after release from prison.

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