



Justice Committee

The Rt Hon. Lord Justice William Davis

Chairman, Sentencing Council

By email only

28 March 2024

Dear William,

The Committee welcomes the opportunity to contribute to the Sentencing Council's consultation on the revisions to the Imposition of community and custodial sentences guideline ("imposition guideline"). We would also like to thank the Council for sharing a selection of the responses to the consultation with the Committee. The Council has received a larger number of consultation responses than for a typical offence specific guideline. We wish to recognise the effectiveness of this consultation exercise, both in terms of the quality of the responses received and the way that the Council has engaged with stakeholders. Overall, we are supportive of the changes proposed by the Council which will make the imposition guideline more comprehensive in its nature and should encourage sentencers to better tailor the sentence to the individual offender, which will hopefully lead to positive outcomes in terms of rehabilitation and the likelihood of re-offending.

The Committee welcomes the decision to revisit the imposition guideline, which came into force in 2017. The guideline is a significant one as it is the overarching guideline for the general principles around imposing community orders and custodial sentences and therefore it is right that the Council should re-examine it in light of the increasing amount of sentencing research and evidence in recent years, as well as changes to policy and new case law. Whilst we note that the revisions have not taken into account the provisions of the Sentencing Bill currently progressing through Parliament (as it



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would not be appropriate to do so until Royal Assent has been gained), there is a clear alignment between the aims of the revision and the Government's attempt to reduce the use of short sentences.

Overall, the Committee considers that the proposed revisions represent a valuable and considered set of changes that will encourage sentencers to consider whether an immediate custodial sentence or a community sentence would best meet the purposes of sentencing in each case. However, we would stress that the approach envisaged by the draft guideline will only be effective if (i) HM Prison and Probation Service is provided the resources required, in particular to produce more quality pre-sentence reports, and (ii) sentencers are provided with effective and timely training as to its use.

The Committee decided to hold a roundtable meeting on the changes proposed by the Council in order to inform its response. Accordingly, on 20 March 2024, with the Sentencing Council in attendance, we heard from representatives from Birth Companions; HMPPS; Faster, Fairer Justice; Level Up; the Magistrates' Association; Revolving Doors; the Sentencing Academy; and HHJ Cooper, Resident Judge at Aylesbury and Amersham Crown Courts. Following the helpful discussion, the Committee has a number of observations and suggestions on the draft guideline.

Structure and introductory text

The Committee supports the proposed approach to the structure of the guideline. We recognise the point made by Janet Carter that every effort should be made to structure the Guideline in such a way that makes it suitable for use in busy magistrates' courts. It is important that the Council considers how the guideline and the flowchart will appear on screen to those who will be using it in court. As discussed at the roundtable, consideration could be given to using the flow chart to develop an interactive decision-making aid to assist sentencers with the various steps which they ought to consider.



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We agree with the suggestion made by the Sentencing Academy that the guideline would benefit from some introductory text that explains its purposes and sets out how it relates to the offence specific guidelines. It would also assist sentencers if the guideline contained text that set out when the imposition guideline should be consulted, as well as a reminder of the purposes of sentencing (as per the submission made by the Howard League for Penal Reform).

We have also made a suggestion below on the structure concerning where the section on 'Deferred Sentences' sits.

Thresholds

The Committee notes that in the Council's consultation document it refers to the explanation for the statutory aggravating factor of previous convictions in the offence specific guidelines, which sets out:

"both that previous convictions might indicate an underlying problem that could be addressed more effectively in the community, but also that previous significant persistent offending may warrant crossing the community or custodial threshold even if the current offence normally warrants a lesser sentence".

Whereas the revised guideline limits the role previous convictions may play in sentencing decisions to "relevant" previous convictions, that "(g)reat caution must be exercised before the existence of relevant previous convictions is used as the sole basis to justify the case passing the custody threshold", and that "(n)umerous and frequent previous convictions might indicate an underlying problem...that could be addressed more effectively through a community order with relevant requirements and will not necessarily indicate that a custodial sentence is necessary".

The Committee understands that the Council is trying to clarify the situation on what role previous convictions should (or should not) play when considering thresholds. The



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Committee supports the inclusion of the proposed guidance that sentencers should exercise “great caution” when previous convictions are used as the sole basis for a case passing the custody threshold. We would support the point made by the HM Council of District Judges (Magistrates’ Court) that if this guidance is adopted then the offence specific guidelines may need to be revised to ensure consistency.

The inclusion of the reminder that frequent previous convictions might indicate an underlying problem that could be more effectively addressed through a community order is a useful reminder and we note this is supported by the Magistrates’ Association as well as organisations such as Advance, Birth Companions, LandWorks, Prison Reform Trust, the Probation Service, Revolving Doors and Transition to Adulthood.

The Committee recognises the point made by Janet Carter that this aspect of the guideline would benefit from stricter alignment with the legislation. As she notes, the first duty on the sentencers is to follow the guideline (specific or general) to determine what sentencing level is reached (e.g. custody, varying levels of community orders, or a fine) unless it is contrary to the interests of justice to do so. If a custody level is reached, the second duty arises as to whether a community order or a fine can be justified instead and does this meet the purpose(s) of sentencing.

Pre-Sentence Reports

The direction in this section referring sentencers to the cohorts for whom a pre-sentence report (PSR) may be particularly important is likely to increase, potentially quite significantly, the number of requests for PSRs. Whilst the resource assessment acknowledges that there may be “some increase in requests for the preparation of PSRs...which is anticipated to require some probation resource”, we are concerned that this may understate the impact and thus require additional resource considerations from probation. Whilst the Committee is generally supportive of this aspect of the guideline, and agrees with Hodge Jones & Allen’s and LandWorks’



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submissions that the section on the indication to probation should help with the potential resourcing implications of this section, we are concerned that the overall positive impact that the increased use of quality reports may have could be diluted over time if the Probation Service is not properly resourced for this change (see also the Law Society, Humankind and Professor Peter Hungerford-Welch's submissions). HM Prison and Probation Service's submission also concludes that the changes in the guideline are likely to lead to an increase in a demand for probation resource more broadly. We would call upon the Government to give a specific commitment to provide additional resource to HM Prison and Probation Service to ensure that changes envisaged in this guideline can be effective. The Magistrates' Association's submission raises a concern that the increased requirement for PSRs to be requested may put pressure on sentencers to find sentencing options which do not require a PSR – presumably as they are also considering the impact on other resources such as the CPS and legal advisers in court if there are many more adjournments.

The Committee hopes that the "Pathfinder to Improved Pre-Sentence Advice" project which has been developed by the Probation Service will lead to improvements in the way that PSRs are delivered and used.

The Committee notes the concerns outlined in the submissions from Birth Companions and the Prison Reform Trust that in practice PSRs are not always given sufficient consideration. If, as recognised by Sir Anthony Bottoms, the direction in travel from both the Government (referencing the 2020 White Paper: *A Smarter Approach to Sentencing*) and the Sentencing Council is to increase both their number and quality, it would be logical to include guidance within this guideline on how the PSR should be used. It is vital that sentencers are wholly responsible for deciding on the appropriate sentence in each case. However, we do accept that, given the evidence that sentencers do not always make reference to PSRs, the imposition guideline should therefore state that sentencers should ordinarily refer to the PSR when sentencing.



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When no reference to the PSR is made by the sentencer, this can give the impression that the PSR and the offender's personal circumstances were not considered. This would also align with the legislation which states that the PSR requirements apply to the court in relation to forming its opinion on (not) passing a custodial sentence (s.230(2), (6) & (7) Sentencing Act 2020. Accordingly, the Committee would welcome an amendment to direct sentencers accordingly.

The Committee agrees with the point made in several of the consultation responses that it should be made clear that the list of cohorts for whom a PSR may be particularly important is a non-exhaustive list as this should not restrict professional judgment (see, for example, the submissions made by Level Up, Prison Reform Trust, The Law Society, Howard League for Penal Reform, LandWorks, Transition to Adulthood, and Professor Peter Hungerford-Welch) .

The Committee also recognises the point made by Revolving Doors that the need for a PSR may only become apparent during the process of producing the report itself. The Council should consider whether it should be worth including a reminder beneath the list of specific cohorts that even if an offender does not appear to fall in any of the relevant cohorts, a PSR may nonetheless be valuable. For example, the Committee is concerned that it may be difficult for a sentencer to establish if an offender is a sole or primary carer for dependent relatives and therefore whether to order a PSR on that basis. There is a problem with the lack of data collection on this particular point at present, and the Committee would ask that the Council considers whether the guidance could remind sentencers that they should ask offenders whether they are the sole or primary carer for a dependent relative before deciding whether to request a PSR.

The Committee supports the suggestion made by the HM Prison and Probation Service submission that the first bullet point in the list of specific cohorts should be amended



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to include a reference to “any reduction for a guilty plea”. We would also support the addition of the further bullet points to capture those who commit sexual and domestic abuse offences and those at risk of a custodial sentence of more than 2 years and who have not previously received an immediate custodial sentence.

Specific cohorts: female offenders

The Committee is supportive of the inclusion of the drop-down section on female offenders in light of the research on women in the criminal justice system and the reports published in recent years concerning the care of pregnant women and their children in prisons.

The Committee notes the “Miscellaneous amendments to sentencing guidelines” published by the Council on 18 March 2024 and the wording adopted there in respect of pregnancy, childbirth and post-natal care for the offence specific guidelines, including the express reference to this guideline. The Committee considers that similar wording should be adopted across this guideline when it comes to pregnant defendants to ensure consistency: notably the inclusion of the postnatal period (which is silent in the revision to this guideline). The Committee notes that the consultation on the miscellaneous amendments refers to there having been consensus that post-natal should be defined as the period of 12 months from birth. A significant number of the consultation responses for the imposition guideline which we have seen suggest the post-natal period should be clarified as meaning up to 24 months from birth. In light of the work that the Government has done on the critical ‘first 1001 days’, the Committee suggests the Council consider whether all references to pregnancy and birth are extended to include the post-natal period being the period covering the 24 months from birth.

In light of recent case law, the Committee wishes to draw attention to the point made by Level Up in their revised submission (and supported by the other organisations



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representing female offenders such as Birth Companions and One Small Thing), as well as a similar point made in the Law Society's submission, that even "where a mandatory custodial sentence applies, pregnancy may, when taken together with other features of the case, justify a departure from the minimum sentence". The Council may wish to consider whether the draft guideline should include guidance to reflect this point, in order to give sentencers more confidence to take pregnancy into account in all cases.

Deferred sentencing

The Committee welcomes the inclusion of the new section on deferred sentencing, noting that it is the first reference to deferred sentencing in any of the sentencing guidelines. Whilst it is not a point that we have seen raised in any of the consultation responses, we would ask that the Council considers whether it might more appropriately in the section on the "Imposition of custodial sentences" or after the section on "Suspended sentence orders"?

The Committee agrees with the various submissions made, in particular by Professor Peter Hungerford-Welch, which suggest the section would read better if it started by referencing that deferring a sentence can be a valuable tool, including why and how it may be beneficial or appropriate to defer sentencing in particular cases. It could then highlight the statutory restrictions that apply before setting out, with an explanation, why it may only be appropriate in "limited circumstances". In respect of this latter point, we support the submission made by the Sentencing Academy (and supported by the Centre for Justice Innovation and Transition to Adulthood) that "there is greater scope for the use of [deferred sentences] than at present" and therefore the use of the word "very" is overly restrictive.

The Committee considers it would be helpful to clarify by way of a non-exhaustive list examples of what the Council means by "those who are in transitional life



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circumstances” (examples that we have noted from the submissions, and generally support as being profiles for whom a deferred sentence may be appropriate, include: pregnant and post-natal women; those with dependent children thus allowing harm to them to be minimised to allow time for arrangements to be made; those in need of treatment for addiction or mental health problems). We agree with the Centre for Justice Innovation’s point that deferred sentences “can provide just the window of opportunity to give [...] low-risk but high-need individuals the opportunity to change their lives around, and stop them returning to court.”

The Committee would welcome a direction in the section that where the offender complies with all the requirements and/or conditions attached to the period of deferment, the sentence (which is identified at the time of deferment) should be lower on the hierarchy of sentences (as per the Sentencing Academy’s 2022 report entitled “The Use of Deferred Sentencing in England and Wales”) in order to incentivise compliance. Furthermore, as suggested in the abovementioned report, the Committee considers that the guideline could benefit from further guidance on what the Court should do where the outcome of the deferment is not a clear success or failure (e.g. where there has been partial compliance), given the likelihood of such cases. This should help ensure more consistency of approach across the courts.

Suspended sentences

The Committee welcomes the revised guidance on suspended sentences. It is vitally important that the guidance makes clear that a suspended sentence is a custodial sentence and not a more severe form of community order. The Committee would encourage the Council to monitor the use of suspended sentences and to evaluate to what extent the revised guidance is being taken into account by sentencers once it is in force.



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As noted above clause 6 of the Sentencing Bill, which would impose a duty to suspend custodial sentences of 12 months or less, would have a significant effect on the use of suspended sentences if it were to be enacted. Should the Sentencing Bill receive Royal Assent, we would encourage the Government to work with the Council to ensure that any revisions to the guidance are made in a timely fashion. We would also remind the Government to consider the resource implications for HM Prison and Probation Service should there be a significant increase in the use of suspended sentences if the Sentencing Bill were to be enacted. Accordingly, I have also copied this letter to the Minister for Prisons, Parole and Probation, the Rt Hon Edward Argar MP.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'R Neill', with a large, stylized initial 'R'.

Sir Robert Neill KC (Hon) MP
Chair
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