



**DATE** 26 FEBRUARY 2024

**RESPONSE TO** IMPOSITION GUIDELINE

**ISSUED BY** SENTENCING COUNCIL

**CONTACT** [POLICY@MAGISTRATES-ASSOCIATION.ORG.UK](mailto:POLICY@MAGISTRATES-ASSOCIATION.ORG.UK)

## ABOUT THE MAGISTRATES' ASSOCIATION

The Magistrates' Association (MA) is an independent charity and the membership body for the magistracy.

We work to promote the sound administration of the law, including by providing guidance, training and support for our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the

development and delivery of reforms to the courts and the broader justice system. With over 12,000 members across England and Wales, we are a unique source of information and insight and the only independent voice of the magistracy.

February 2024



## BACKGROUND

### Our response to the draft imposition guideline

We are grateful to respond to this consultation to this vital guideline. This response reflects the Magistrates' Association's view on proposed changes to the imposition guideline. It has been developed in consultation with our adult court committee, and our policy board.

## QUESTION 5

Do you agree with the proposed chronological order of the guideline?  
Would you make any changes?

We agree with the proposed chronological order of the guideline, which is logical and sensible. We are conscious that the addition of useful information on the drop-down boxes makes the guideline much longer, and it is too long to be read in full at court. We would expect that magistrates will be made familiar with the entire guideline through training and will then access parts of the guideline via links from offence guidelines. Magistrates must be provided with training to support the use of the new guideline.

## QUESTION 6

Do you have any comments on the unified threshold section?

This section is helpful, and the additional mention that frequent additional convictions can potentially indicate an underlying problem, is particularly useful.

We also welcome the clearer definition of thresholds, which will be especially useful where the offence guideline includes community order and/or custody within its sentencing range. However, the guideline could still benefit from a definitive definition. We would suggest the following wording:

*“the term threshold is used to determine whether sentencing for an offence has reached a particular level after taking into account the specifics of the offence and the offender.”*

## QUESTION 7

Do you have any comments on the pre-sentence reports section, other than the list of cohorts?

Yes. It is useful to have the information on the need for pre-sentence reports (PSR), especially as numbers being ordered have dropped.

It is important to clarify that shortages of probation resources lead to fewer reports being available on the day and reluctance to adjourn can and does put pressure on to find a sentencing option which does not require a report. It can have negative impacts on defendants and witnesses.

## QUESTION 8

Do you agree with the general inclusion of, and specific cohorts included, in the list of cohorts in the pre-sentence report section?

Yes.

It provides a comprehensive list which is backed up by evidence. It offers sentencers a helpful reminder of which cohorts this section applies to, and why additional information about these defendants may be required. We would also include neurodiverse defendants as a specific and separate cohort within this list.

However, the current list could benefit from additional guidance on how sentencers should approach defendants who fall into two or more of these categories. There is much research on intersectionality which makes clear the negative impact on defendants who are part of two or more of these cohorts. Many of the offenders in the magistrates' court are from at least one of these cohorts, so additional guidance could usefully recognise and explain this.

## QUESTION 9

Do you have any comments on the information in the PSR section on the court giving an indication to Probation, adjournments and on committal?

Yes. We would support giving an indication to probation (while leaving options open to the sentencing bench), allowing probation enough time to produce a good

report, and it is helpful to have a steer on whether to order a report on committal. Having unified advice about ordering PSRs on committal will ensure consistency.

The MA has long supported the reintroduction of the practice of courts giving initial indications to probation. We would recommend that pronouncements are amended to include a suitable form of words to ensure that benches can do this in a consistent and standardised way, and without tying the hands of the sentencing bench.

It is correct that courts should consider carefully whether an adjournment is necessary in the individual case, but a need for information which will inform the eventual sentence must be in the interests of justice.

## QUESTION 10

Do you agree with the inclusion of, and information proposed on deferring sentencing?

Yes. It's essential to recognise that while deferring sentencing exists in the magistrates' courts and can be beneficial in certain circumstances, it's a seldom-used practice. Members reported the extremely rare use of deferred sentences in magistrates' courts but agreed that this section is useful, and it contains relevant guidance if ever needed.

We would suggest that the Sentencing Council works with the Judicial College to develop some training for sentencers on their use. This would ensure consistency, clarity, and understanding among sentencers.

## QUESTION 11

Do you have any comments on the Purposes and Effectiveness of Sentencing section?

It is useful to remind sentencers of all the purposes of sentencing so that they are given equal weight, and this should be part of the pronouncement. It must also be made clear to the probation teams who are writing the report to ensure that all elements noted by magistrates are adequately covered in their report.

## QUESTION 12

Do you have any comments on the new section on young adult offenders?

The information in this section, and the background to young people/young adults, is helpful. The particular issues facing members of these cohorts who are care leavers could be emphasised more as part of this section.

Our [February 2021](#) research found significant variability in the amount and quality of information on maturity found in pre-sentence reports. A focus group conducted with magistrates and other analysis found that maturity was not routinely or regularly raised in magistrates' courts when dealing with young adults, with related issues not consistently identified.

Given current pressures, it will undoubtedly be challenging for probation to take the time to do a more detailed assessment, and the report concludes that magistrates should take responsibility of asking for more information, if it was needed. This section must include more information to help magistrates to do that.

In addition, we would propose consideration of young adults being sentenced by magistrates trained in youth work. The 18-25 cohort are a particular concern in relation to maturity and appropriate outcomes. Although young adults would of course be sentenced as adults, youth magistrates are better placed to understand the implications of lack of maturity.

## QUESTION 13

Do you have any comments on the new section on female offenders?

We welcome this new section on female offenders. Research is clear that they are more likely to fall into more than one of the cohorts in the list of those needing a pre-sentence report, so a separate section emphasises its importance.

The MA has for many years emphasised the need for viable community sentences for women offenders. The increased information on factors which affect many women is welcomed, and the effects of custody on women and families must of course be considered carefully with appropriate input from probation to emphasise the aspects of each individual.

However, we are concerned that without suitable services to underpin alternative sentencing options, it may be difficult where the custody threshold has been passed to create a community order which provides 'sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime'.

## QUESTION 14

Do you have any comments on the imposition of community orders section?

No.

## QUESTION 15

Is the new guidance on determining the length of a community order and how courts should consider time remanded in custody or on qualifying curfew clear?

Yes, and the section on time on remand or curfew, is clear and helpful.

We make some additional suggestions of areas to clarify or emphasise. Firstly, members report varied instructions about the length of orders where curfew is the only requirement. Members queried as to whether the order's length should align precisely with the curfew period or if some leeway should be provided to accommodate potential adjustments to the order, where needed in the future. Clarification on this point as part of this section would be helpful.

It could also usefully remind sentencers of the length of the curfew that qualifies to reduce custody time, rather than having to look somewhere else within the sentencing guidelines for this information.

## QUESTION 16

Do you have any comments on the new information against each of the requirements in the requirements section?

The information summarising the requirements available is a useful summary and reminder. The drop-down boxes present the information in a helpful and accessible way.

As regards the content itself, it would be more helpful to add the more commonly used term for electronic monitoring requirements in brackets or somewhere prominent in the relevant drop-down box heading, as "electronic whereabouts

## Sentencing Council consultation on changes to the imposition guideline

monitoring requirement” is not a widely used term. Reference to “GPS tags” and/or “tagged curfew” would be simpler.

We are pleased that drug rehabilitation requirement (DRR) says, “the offender must participate in court reviews of the orders, as directed by the court.” Use of DRRs has fallen dramatically since the start of the Covid-19 pandemic. Even where DRRs are in use, reviews are not always available and court resources are scarce. Reviews are an essential part of these orders and use of them must be resumed. The MA has long argued that they must be re-established. DRR panels allowed and facilitated meaningful reviews and we support their reintroduction where their use has declined.

It is a matter for the court to decide what amounts to a punishment – this is helpful clarification as there have been conflicting instructions previously as to whether a court can make this decision. Attendance at appointments may be a significant challenge for some and can amount to a punishment although the appointments may be designed for rehabilitative purposes. Means may preclude payment of a financial penalty on top of the £114 surcharge for a community order.

With respect to the unpaid work requirement, it is stated that ‘In some regions, a small proportion of these hours can be spent on education, training or employment activities for eligible offenders.’ At present up to 30 per cent of hours can be used for this purpose, which is more than a small proportion.

RAR: ‘A rehabilitation activity requirement should be imposed when the offender has rehabilitative needs that cannot be addressed by other requirements.’ This would seem to suggest that other requirements would be the norm, whereas in magistrates’ courts the opposite is usually true and other requirements would only tend to be used where RAR is not sufficient to meet the need. This can include use of RAR to underpin voluntary attendance at drug or alcohol rehab centres rather than making a treatment requirement. This wording may suggest to magistrates that this is not appropriate practice.

Finally, on alcohol abstinence and monitoring requirements (AAMR), it would be helpful to fully explain the gaps in the pronouncement for AAMR, which members found rather complicated without further explanation: [Starting now][From .... [insert date]] and whilst you are waiting for your tag to be fitted, you must not [consume alcohol] for a period of .... until ... [insert date] and during that period you must submit to monitoring to check that you are complying.

## QUESTION 17

Do you agree with the new approach to rehabilitative requirements in the Community Order Levels section?

Yes. The new approach deals well with the conflict between sentencing to meet offender need(s) and that to reflect the seriousness of the offence.

## QUESTION 18

Do you have any other comments on the Community Order Levels section?

Yes. It is helpful if probation state explicitly whether needs identified by offenders have been evidenced. We would suggest a change to the following section to reflect this.

Where the section reads “[t]he seriousness of the offence should be the initial factor in determining the requirement imposed for the purpose of punishment and its corresponding intensity. Any requirement(s) imposed for the purpose of rehabilitation should be determined by, and align with, the offender’s needs”, we would suggest an addition of *“...and align with, the offender’s needs as confirmed by Probation.*

Any advice to clarify the use of RARs and flexibility in using curfews is helpful.

Finally, some members commented that the guideline should indicate whether the levels suggested are intended to apply where there is only one requirement.

It currently remains unclear how levels apply when more than one requirement is included. For example, if there is a rehabilitative element on a high-level order and unpaid work hours are to be a second requirement, it is unclear whether it is still appropriate for the level to be 150-300 hours, or whether this would be the level where this was the only requirement.

The chair of our adult court committee, Val Castell, suggested a “building blocks” approach for punitive elements could be more helpful so that one block = Fine A - (25% of Relevant Weekly Income)/40 hours unpaid work requirement/4 weeks curfew.



"Building blocks" approach in practice	
Level	Detail
Low-level order	A low-level order may include one of these as well as any rehabilitative requirement or 2 of these, which could also be 2 of the same type e.g. 80 hours unpaid work requirement (UPW), if it is just designed to be punitive.
Medium-level order	A medium-level order could include 3 of these in addition to a rehabilitative requirement or 6 if just punitive.
High-level order	A high-level order could include 6 of these in addition to rehabilitative requirements or 8-10 if just punitive.  Maxima need to be taken into account of course so UPW hours may need to be reduced to fit.

It should be clear that a financial penalty as a standalone requirement should be at Band D level where the custody threshold had not been passed.

## QUESTION 19

Do you have any comments on the Imposition of custodial sentences section? We welcome comments both on content and format/structure.

The content, which benefits from new inclusions and a better format, is good. Its stepped approach fits with the approach to all sentencing.

We would make some suggestions for clarification.

Firstly, it would be helpful to include guidance on where it is appropriate to impose a Band E fine when the custody threshold has been passed. There is no rehabilitative benefit to such a fine. A financial penalty may be preferred by those who can afford it to a punishment such as a curfew, but care is needed to ensure that those with means cannot buy their way out of justice.

Second, clarification on what is referred to as "significant adverse consequences" of breach would be welcome, including whether this would include custody. If that is so, then it would be helpful to state it clearly or provide some guidance to sentencers as to what they can do instead, especially where there has been little or no compliance.

## QUESTION 20

Do you agree with the restructure and new factor in the table of factors indicating it may or may not be appropriate to suspend a custodial sentence?

Yes.

It would be helpful to include a note similar to that in the section about considering time on remand or on curfew, that there is a presumption of activation of a suspended sentence order (SSO) if it is breached, unless to do so would be unjust. It follows that if the circumstances which would make it unjust pertain at the time of sentence, then an SSO should not be imposed, but a high-level community order made instead.

## QUESTION 21

Do you have any comments on the suspended sentence order section, including the guidance on requirements of a suspended sentence order?

The data shows that requirements on SSOs are more numerous than on community orders. Based on this evidence, the Council could consider strengthening the wording about the requirements and rehabilitation.

It may also be helpful to have an indication as to levels appropriate on SSO so that it is clear how much lower requirements should be than on a high-level community order.

The guidance on requirements is fine.

## QUESTION 22

Is the guidance on determining the operational and supervision periods of a suspended sentence order and how courts should consider time remanded in custody or on qualifying curfew clear?

Yes. It clarifies operational and supervision periods well. This section could also usefully remind readers of what the qualifying curfew period is.

## QUESTION 23

Do you think that the flowchart aligns with the proposed new structure in the guideline, and do you have any comments on the sentencing flow chart?

Members of our adult court committee and policy board have made the following observations and recommendations:

- The flowchart is helpful.
- The word “immediate” is misspelled in two places.
- In the new table the sentencers are asked to consider the factors in section 6 (that needs explaining) to determine the appropriate level. This will include defendant mitigation which is currently not included under the Band D fine section. We would suggest that this is added.
- Some members felt that the Band D fine option being placed ahead of other sentencing requirements on sentencing charts may not be appropriate and queries whether this reflects current sentencing practice.

They suggest that Band D fines should only be considered after other sentencing options have been found unsuitable or impractical, rather than being the default starting point. There was a preference among some to see the Band D fine apply for those occasions when all the other requirements have been considered as not appropriate rather than the starting point.

- The two questions in the second and third boxes on the right need separating out. Separate the two questions in the second and third boxes on the right. It is a flow chart, and it should be one point to consider at a time.
- We would suggest an amendment to the last box on the right: “Sentencers are likely to be clear that they would have imposed custody if there were no powers to suspend the sentence and this needs to be communicated to the defendant”.
- One member felt the first question on the old one of “has the custody threshold been passed” is better than the new top question, as it allows the sentencer to consider other factors such as all the other indicators in the sentencing guidelines e.g. previous convictions, response to previous sentences etc.

## QUESTION 24

Do you have any comments on the resource assessment and/or on the likely impact of the proposals on sentencing practice?

The resource assessment can be found here:

<https://www.sentencingcouncil.org.uk/html-publication/item/consultation-stage-resource-assessment-imposition-of-community-and-custodial-sentences-overarching-guideline/>

While precise impacts on probation resources cannot be estimated, changes in sentencing practices may necessitate adjustments in probation resource allocation, particularly for certain offender groups.

## QUESTION 25

Are there any equalities issues relating to the proposed revised guideline that should be addressed?

Yes. The guideline should make clear that it is not double counting to recognise that the defendant falls into more than one of the cohorts and that the final sentence should take this into account.

## QUESTION 26

Are there any other comments you wish to make on the proposed revised guideline?

No.