

Consultation on draft guideline for Imposition of Community & Custodial sentences

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Introduction

What is the Council consulting about?

The Sentencing Council is proposing to issue a new definitive guideline for imposition of community and custodial sentences.

The Sentencing Council is therefore seeking feedback from sentencers, justices' clerks, legal advisers, prosecutors, defence representatives and other interested parties on proposals to replace the *New Sentences - Criminal Justice Act 2003* definitive guideline¹ with a guideline for the Imposition of Community and Custodial Sentences. The draft guideline can be found here: [link to website] or at Annex B.

The consultation runs for six weeks from 14 January 2016 to 25 February 2016. This is a shorter period than is customary for Sentencing Council consultations. The reasons for this are:

- the consultation relates to a concise, technical guideline and;
- we want to deliver improvements as soon as possible.

We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish. We may also share responses with the Justice Committee of the House of Commons. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – we will disregard automatic confidentiality statements generated by an IT system.

Please complete the online version at xxxxxxxxxx or respond by email to:

Impositionconsultation@sentencingcouncil.gsi.gov.uk. Please use the same email address for any queries you may have about the consultation.

The Sentencing Council will review the responses to the questions and will use these to produce a definitive guideline.

You may find it helpful to have a copy of the draft guideline open as you work through this document. This can be found on our website [Link] or at Annex X. A list of the questions is at Annex X and can also be found on the website: [Link]

¹ Reference to SGC guideline

The Council has a statutory duty, under section 127 of the Coroners and Justice Act 2009, to produce a resource assessment which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services. The resource assessment for the draft guideline can be found at annex X.

Current position

The Sentencing Guidelines Council issued the definitive guideline, *New Sentences - Criminal Justice Act 2003* in December 2004, which contains guidance on community and custodial sentences.²

The guideline is now out of date as a result of legislative changes since 2004. Given the frequency of imposition of community and custodial sentences, the Council considers that it would be highly beneficial for sentencers to have up to date guidelines for imposing these sentences. There is no current Council-issued guidance for these sentences for Crown Court sentencers, although Council-issued guidance for imposing these sentences is available for magistrates' courts in the Magistrates' Courts Sentencing Guidelines (MCSG). The MCSG is regularly reviewed and updated, and much of this has therefore been used as the basis for the new guideline the Council is proposing. The new guideline has also been prompted by work the Council is undertaking to produce a guideline on breach of orders. This has revealed some evidence of inconsistency in the imposition of suspended sentences, which the Council is keen to address prior to issuing a guideline for breach of these orders.

General proposals for the guideline

The Council has consolidated and updated existing guidance to produce a more concise, up to date and functional guideline, which is applicable in all courts.

The new guideline is suitable for use by all sentencers, which will promote consistency in imposing these sentences across the justice system. The Council has reviewed the existing Sentencing Guidelines Council (SGC) and MCSG guidance in developing the guideline, and many of the principles underpinning these sentences remain unchanged.

The content of the MCSG guidance has largely been adopted for the new guideline,

² <http://www.sentencingcouncil.org.uk/publications/item/new-sentences-criminal-justice-act-2003-definitive-guideline/>

although amendments have been made to ensure it is also suitable for use in the Crown Court, and to clarify some important considerations to be made in imposing these sentences. For this reason much of the guidance will look familiar to magistrates and district judges.

The Council has avoided including extensive legislative references, and has focused on providing concise guidance covering the most important issues that must be considered by sentencers. The Council has retained but updated specific guidance regarding particular aspects of these sentences, such as pre-sentence reports and electronic monitoring requirements.

A notable difference from the SGC guideline is that this draft guideline does not include guidance for dealing with breaches of community and suspended sentences. The Council is in the process of developing a guideline on breach of orders which it intends to issue for consultation later this year.

The specific proposals relating to the imposition of community and custodial sentences are explained in detail in the following pages. Where changes or amendments to the existing MCSG or SGC guidance have been made, these are highlighted.

Applicability of guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this draft guideline. Following consultation, when a definitive guideline is produced, it will apply to all offenders aged 18 and older, who are sentenced on or after the date it comes into force, regardless of the date of the offence.

Section 125(1) of the Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court –

- (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and
- (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”

This guideline applies only to offenders aged 18 and older. General principles to be considered in the sentencing of youths are in the SGC’s definitive guideline, *Overarching Principles – Sentencing Youths*.

The proposals – Guidance on Imposition of Community Orders

Much of the existing SGC guidance for community sentences sets out their specific legislative provisions and the approach to be taken in imposing these sentences. The Council considers that much of this information is superfluous as the legislation is now familiar to sentencers, and legislative changes in respect of these sentences render much of the information provided in the SGC guideline out of date.

The guidance on imposing community orders first sets out the general principles for community orders. These are well established and have been replicated from the SGC and MCSG guidance for these sentences. The Council considers that it will be useful for these principles to be contained within consolidated guidance for use by all sentencers.

Community orders fulfil all of the purposes of sentencing. In particular, they have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.

A community order must not be imposed unless the offence is 'serious enough to warrant such a sentence'. Where an offender is being sentenced for a non-imprisonable offence, the court may not make a community order.

Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty.

The court must ensure that the restriction on the offender's liberty is commensurate with the seriousness of the offence and that the requirements imposed are the most suitable for the offender.

Sentencers must also ensure the sentence strikes the right balance between proportionality and suitability. The resulting restriction on liberty must be a proportionate response to the offence committed.

Question 1: Do you agree with the general principles for community orders? Please highlight any additional principles you believe should be included.

Guidance on community order sentence levels is also included. This is largely unchanged from the existing guidance and reflects existing principles, although it has been updated to include guidance on new provisions for these orders. This includes the principle that at least one requirement must be punitive or a fine be imposed while stating the exception available to this rule. The requirement to ensure a community order includes a punitive element was introduced by an amendment made to section 177 Criminal Justice Act 2003 by the Crime

and Courts Act 2013, and therefore postdates the SGC guidance. The proposed new guidance cannot define which requirements are punitive as the legislation governing these sentences does not provide a definition. The table within the community order guidance therefore provides some non-exhaustive examples of requirements a court may consider to be punitive.

The guidance maintains the current position that the level of the order imposed should be identified in accordance with the seriousness of the offence, which reflects existing principles. The guidance will assist where no offence specific guideline is available to identify the appropriate level of order, but will also provide further guidance where offence specific guidance specifies the level of community order to be imposed.

The seriousness of the offence should be the initial factor in determining which requirements to include in a community order. Offence guidelines refer to three sentencing levels within the community order band based on offence seriousness (low, medium and high). The culpability and harm present in the offence(s) should be considered to identify which of the three sentencing levels within the community order band (low, medium and high) is appropriate. See below for **non-exhaustive** examples of requirements that might be appropriate in each (the full list of requirements is at page 5).

The examples focus on punishment in the community; other requirements of a rehabilitative nature may be more appropriate in some cases. To ensure the order is punitive, at least one requirement **MUST** be imposed for the purpose of punishment and/or a fine imposed in addition to the community order **unless there are exceptional circumstances which relate to the offender that would make it unjust in all the circumstances to do so.**

A table is included to provide guidance on each level of community order. This is currently provided in the MCSG guidance, and only minor amendments have been effected to update it. As in the MCSG guidance, the first row within the table indicates which type of offence would attract each level of community order. The second row then specifies how many requirements would usually be appropriate based on the order level, with the third row suggesting suitable requirements and ranges where appropriate. As in the existing MCSG guidance, examples of requirements which may be considered punitive are included. A new feature of the table is that where no punitive requirement is to be imposed, the guideline indicates appropriate fine bands to be imposed in place of a punitive requirement, dependent on the level of order.

| Low | Medium | High |
|--|---|--|
| Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender's record means that a discharge or fine is inappropriate | Offences that obviously fall within the community order band | Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances |
| In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary | | More intensive sentences which combine two or more requirements may be appropriate |
| <p>Suitable requirements might include:</p> <ul style="list-style-type: none"> • 40 – 80 hours unpaid work • Curfew requirement within the lowest range (e.g. up to 16 hours per day for a few weeks) • Exclusion requirement, for a few months • Prohibited activity requirement • Attendance centre requirement (where available) | <p>Suitable requirements might include:</p> <ul style="list-style-type: none"> • Greater number of hours of unpaid work (e.g. 80 – 150 hours) • Curfew requirement within the middle range (e.g. up to 16 hours for 2 – 3 months) • Exclusion requirement lasting in the region of 6 months • Prohibited activity requirement | <p>Suitable requirements might include:</p> <ul style="list-style-type: none"> • 150 – 300 hours unpaid work • Curfew requirement up to 16 hours per day for 4 – 12 months • Exclusion order lasting in the region of 12 months |
| * If order does not contain a punitive requirement, suggested fine levels are indicated below: | | |
| BAND A FINE | BAND B FINE | BAND C FINE |

Question 2: Is the guidance on how to identify the level of community order clear? Please highlight any additional information you believe should be included.

Page 5 of the guideline sets out the requirements available for a community order. Additional, new guidance is provided on Rehabilitation Activity Requirements, to highlight the purpose of these requirements and to ensure that sentencers understand that these should not be imposed in place of other requirements which are available to support rehabilitation of offenders.

Requirements

Community orders consist of one or more of the following requirements:

- unpaid work requirement;
- drug rehabilitation requirement;
- alcohol treatment requirement;
- programme requirement;
- prohibited activity requirement;
- curfew requirement;
- exclusion requirement;
- residence requirement;
- foreign travel prohibition requirement;
- mental health treatment requirement;
- alcohol abstinence and monitoring requirement (where available);
- in a case where the offender is aged under 25, attendance centre requirement (where available);
- rehabilitation activity requirement (RAR).

(RARs provide flexibility for responsible officers in managing an offender's rehabilitation post sentence. When allocating a RAR the court does not prescribe the activities to be included but will specify the maximum number of activity days the offender must complete. The offender's Responsible Officer will decide the activities to be undertaken. Where appropriate this requirement should be made in addition to, and not in place of, other requirements listed above.)

Question 3: Is the list of requirements clear and comprehensive? Please highlight any additional information you believe should be included.

The guideline also provides a list of specific considerations to be made when determining which requirements to impose as part of the order. These are currently included in the MCSG guidance in a narrative format, but are listed in the new guideline for ease of reference.

Specific considerations in determining requirements

i) At least one requirement must be imposed for the purpose of punishment and/or a fine imposed in addition to the community order. Which requirements amount to punishment is a matter for the court to decide in each case.

ii) Where two or more requirements are included, they must be compatible with one another.

iii) The particular requirements imposed must be suitable for the individual offender and will be influenced by a range of factors, including:

- the stated purpose(s) of the sentence;
- the risk of re-offending;
- the ability of the offender to comply;
- the availability of the requirements in the local area.

Question 4: Are the specific considerations to be made when determining requirements of a community order clear and comprehensive? Please highlight any additional information you believe should be included.

Page 6 of the guideline provides guidance for sentencers on pre-sentence reports and electronic monitoring of community orders. This has been updated from existing guidance to make it clear that the pre-sentence report should be completed on the same day where possible to ensure adjournments are avoided.

Pre-sentence reports

In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a community order and, if so, whether particular requirements or combinations of requirements are suitable for an individual offender. Whenever the court reaches the provisional view that a community order may be appropriate, it should usually request a pre-sentence report. It may be helpful to indicate to the National Probation Service the court's preliminary opinion as to which of the three sentencing levels is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case. If an adjournment cannot be avoided, the information should be provided to the National Probation Service in written form and a copy retained on the court file for the benefit of the sentencing bench. 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.

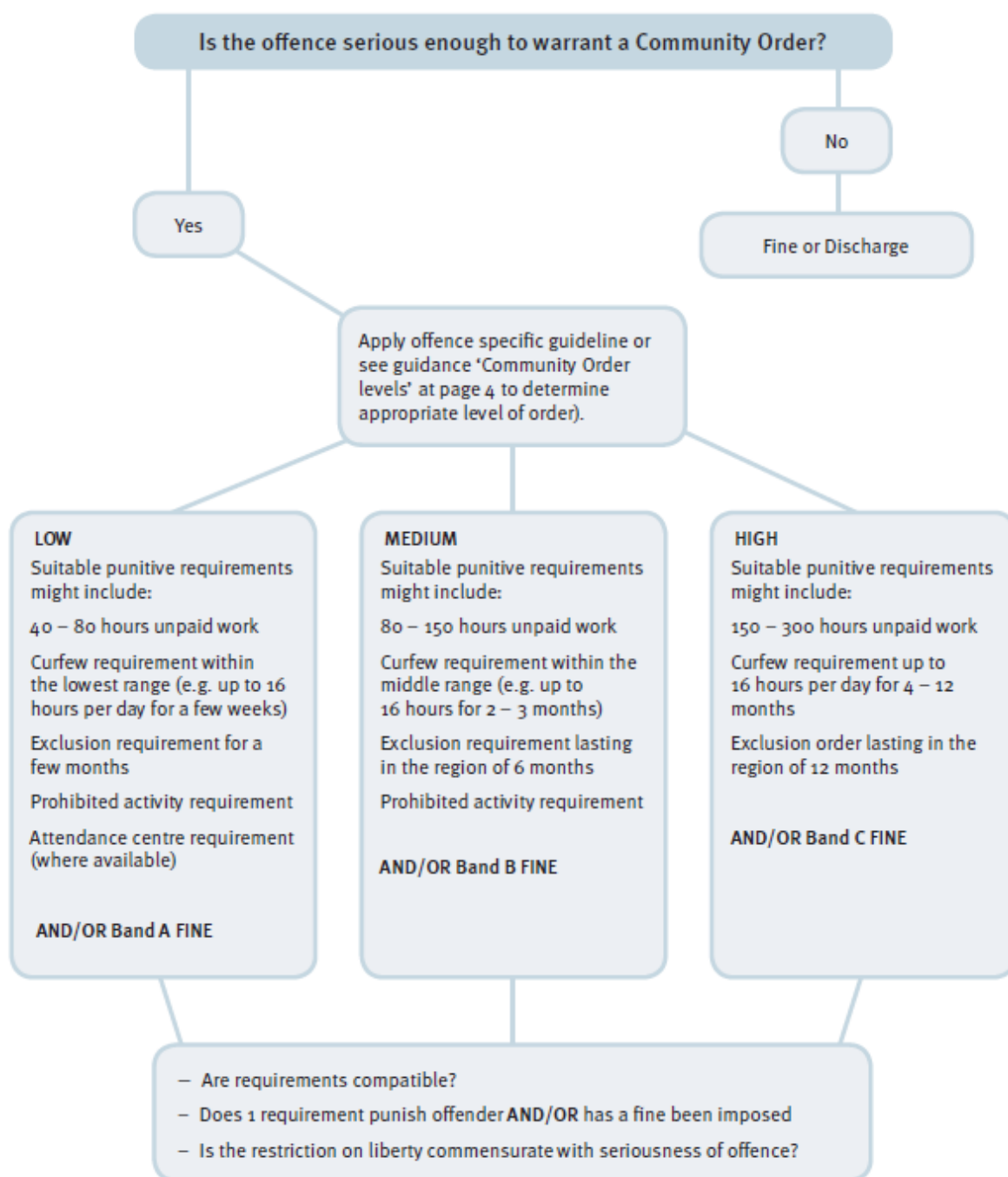
Electronic Monitoring

Subject to limited exceptions, when available the court must impose an electronic monitoring requirement where it makes a community order with a curfew or exclusion requirement, and may do so in all other cases. Electronic monitoring should be used with the primary purpose of promoting and monitoring compliance with other requirements, in circumstances where the punishment of the offender and/or the need to safeguard the public and prevent re-offending are the most important concerns.

Question 5: Is the guidance on pre sentence reports and electronic monitoring clear and comprehensive? Please highlight any additional information you believe should be included.

A flowchart is also included at the end of the guideline on imposition of community orders:

Imposing a Community Order



Question 6: Do you agree with the structure and content of the flowchart for imposition of community orders? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.

Question 7: Do you agree with the overall proposed guidance on imposition of community orders? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.

The proposals – Guidance on Imposition of Custodial Sentences

The guidance first sets out the general principles to be observed when imposing custodial sentences. These are presented as questions the court must ask before imposing a custodial sentence, which is the approach taken in the current MCSG guidance.

General Principles

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

- 1) Has the custody threshold been passed?
- 2) If so, is it unavoidable that a custodial sentence be imposed?
- 3) Can the sentence be suspended? See page 9.
- 4) What is the shortest term commensurate with the seriousness of the offence?

Specific considerations:

The custody threshold

A custodial sentence must not be imposed unless the offence 'was so serious that neither a fine alone nor a community sentence can be justified for the offence'. The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences.

Passing the custody threshold does **not** mean that a custodial sentence should be deemed inevitable; custody can still be avoided in light of offender mitigation or where there is a suitable intervention in the community which provides sufficient restriction on the offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.

Pre-sentence report

Before deciding whether:

- the custody threshold has been passed; and, if so
- the length of imprisonment which represents the shortest term commensurate with the seriousness of the offence;

the court should obtain a pre-sentence report, unless the court considers a report to be unnecessary. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case.

Magistrates: consult your legal adviser before deciding to sentence to custody without a pre-sentence report.

Committal for Sentence

For either way offences, where the offending is so serious that a magistrates' court is of the opinion that the Crown Court should have the power to deal with the offender, the case should be committed to the Crown Court for sentence even if a community order may be the appropriate sentence (this will allow the Crown Court to deal with any breach of a community order, if that is the sentence passed).

Question 8: Do you agree with the approach to imposing custodial sentences? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included in this section of the guidance.

The proposals – Guidance on Suspending Custodial Sentences

The Council has considered data for suspended sentences, and noted a trend for decreasing volumes of community orders and increasing volumes of suspended sentence orders, rather than a decrease in volumes of immediate custodial sentences, which was the expected consequence of introducing the suspended sentence provisions in 2005. Evidence has indicated that a potential reason for this is that, in some cases, suspended sentences are being imposed as a more severe form of community order where the offending has not crossed the custody threshold. In light of this the Council considers it important to clarify the circumstances in which suspension of a custodial sentence may be appropriate for the following reasons:

- Without a change in practice, any subsequent guideline on breach of suspended sentence orders would result in an increase in the number of activations of suspended custodial sentences for cases where it was never intended that a custodial sentence be served; and
- If suspended sentences are imposed, but not subsequently activated upon breach, they will not act as a deterrent.

The guideline first sets out the questions a court must ask when considering whether to suspend a custodial sentence. The Council considers that it is paramount that sentencers answer the questions set in the order they are presented to be absolutely clear that custody is the intended and appropriate sentence for the offender. A reminder is included that a suspended sentence must not be imposed as a more severe form of community order.

Suspending a Custodial Sentence

A suspended sentence is a sentence of imprisonment. The following questions are paramount in deciding whether to suspend a custodial sentence. A court considering whether to suspend a custodial sentence must answer the following questions in the following order:

- 1) Has the custody threshold been passed? If not, a suspended sentence **cannot** be passed.
- 2) If so, is it **unavoidable** that a custodial sentence be imposed? If not, a suspended sentence **cannot** be passed.
- 3) If so, can that sentence be suspended? Sentencers should be clear that they would have imposed an immediate custodial sentence if the power to suspend had not been available.

A suspended sentence **MUST NOT** be imposed as a more severe form of Community Order.

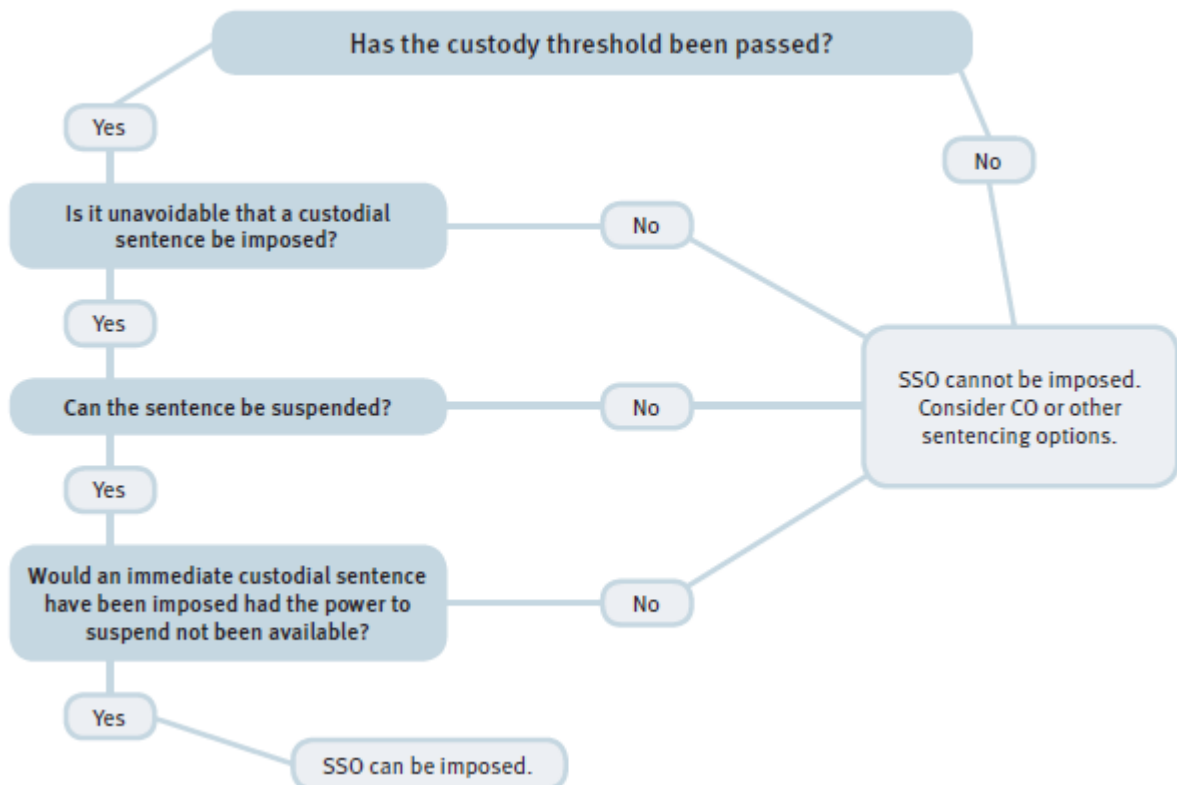
Specific considerations

The imposition of a custodial sentence is both punishment and a deterrent. To ensure that the overall terms of the sentence are commensurate with offence seriousness, requirements imposed as part of the sentence should generally be less onerous than if a community order had been imposed. A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate.

**Question 9: Do you agree with the approach to suspending custodial sentences?
Please give your reasons if you do not agree and/or highlight any additional
information you believe should be included in this section of the guidance.**

A flowchart is also included on suspending a custodial sentence:

Imposing a Suspended Sentence Order



Question 10: Do you agree with the structure and content of the flowchart for imposing a suspended sentence order? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.

Question 11: Do you agree with the overall proposed guidance on imposition of suspended sentences? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.

General comments

The Council would like to hear any further comments you may have about the guideline or suggestions as to how it could be improved.

Question 12: Please provide any additional comments or suggestions that you have about the proposals.

About you

In order for us to evaluate the responses to this consultation it would be helpful to know the role of respondents.

Question 13: What is your name?

Question 14: What is your role and organisation?

Thank you very much for your time. Your answers will be very valuable in revising the draft guideline.