

Sentencing Council

Sentencing Council meeting: 20 November 2015
Paper number: SC(15)NOV05 – Imposition of
Community and Custodial Sentences
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1 ISSUE

- 1.1 The Council is asked to review and agree a draft guideline for the imposition of community and custodial sentences. As discussed at the Council meeting in October, subject to its approval, a short targeted consultation on the guideline will commence in January 2016.

2 RECOMMENDATION

- 2.1 That the Council agrees and signs off for consultation the draft guideline at **Annex A**. The Council are asked to;
- note the limitations to including a definition of ‘punitive requirement’;
 - note the limitations to including guidance regarding Rehabilitation Activity Requirements and agree the suggested approach;
 - agree to include a specific instruction that an SSO should not be imposed as a more severe alternative to a CO;
 - review the list of revisions at **Annex B**;
 - note the impact and risks associated with the imposition guideline.

3 CONSIDERATION

- 3.1 The Council reviewed the first draft of an imposition guideline at the October meeting. A final draft guideline has now been prepared for the Council to consider and is attached at **Annex A**. The format of the guideline is in keeping with other Council guidelines, and the amendments suggested in

October have been incorporated. A number of issues raised by the Council in October have not been included, and these are summarised below. A number of other minor amendments have been made which the Council is asked to consider.

3.2 Definition of 'punitive requirement' in a Community Order

At the October meeting the Council discussed whether the guideline could provide more definition of which requirements are considered punitive, as the legislation states 'which requirements amount to punishment is for the court to decide in each case'.¹ During the Council discussion, reference was made to guidance on punitive requirements issued by the Justices' Clerks Society and it was suggested that this could prove helpful in providing guidance for sentencers in this respect. Officials have reviewed the guidance issued by the JCS, which was as follows;

'Part 1 amends Section 177 Criminal Justice Act 2003 so as to require a Court imposing a community order either to include at least one requirement that is imposed for the purpose of punishment or to impose a fine (or to do both) unless there are exceptional circumstances that would make that unjust. For the avoidance of doubt, this is an amendment to legislation which applies only to adults.'

*Arguably any requirement, because it involves a restriction on an offender's liberty, has a punitive effect, but this would not satisfy the wording of the Schedule. The requirement must be imposed for the purpose of punishment and not merely have punishment as a by-product. The legislation does not specify what punitive requirement the Court should impose. It is expected that they would generally represent a recognisable sanction, for example unpaid work, electronically monitored curfew, exclusion or prohibited activity. As an alternative or in addition to a requirement imposed for the purpose of punishment, a fine may be imposed. This would be at a level fixed at the court's discretion with regard to the offender's means. We do not anticipate that a guideline will be issued by the Sentencing Council in this respect.'*²

¹ Criminal Justice Act 2003, s177 as amended by Part 1 Crime & Courts Act 2013

² JCS News Sheet No 13/2013, 9th November 2013.

- 3.3 The Council will note that the JCS guidance does not specify which requirements are considered punitive, but rather gives an indication. The table included at page 5 of the draft guideline does highlight that the examples included within the table focus on punishment, and these also align with the requirements highlighted by the JCS as likely to be considered punitive. However, further guidance options are limited given the broad wording of the legislation. It is suggested that it would not be possible to include any further guidance on this point.

Question 1 – Does the Council agree that sufficient guidance is included regarding punitive requirements, given the limitations for doing so due to the wording of the legislation?

3.4 Rehabilitation Activity Requirements (RAR's)

A further issue the Council asked officials to explore following the October meeting was the inclusion of guidance regarding Rehabilitation Activity Requirements (RARs), which were introduced by the Offender Rehabilitation Act 2014. S200A of ORA states;

'(1)In this Part "rehabilitation activity requirement", in relation to a relevant order, means a requirement that, during the relevant period, the offender must comply with any instructions given by the responsible officer to attend appointments or participate in activities or both.

(2)A relevant order imposing a rehabilitation activity requirement must specify the maximum number of days for which the offender may be instructed to participate in activities.'

- 3.5 Officials have identified that the intention of this requirement was to allow maximum flexibility for responsible officers in managing an offender's rehabilitation post sentence, and the court is therefore limited to specifying the number of activity days an offender must complete. Due to this being prescribed by legislation, sentencers cannot specify which activities should be undertaken under a RAR. The draft guideline clarifies this for sentencers.

- 3.6 Requirements available under a RAR are intended to cover wider elements of rehabilitation, such as education and employment training, anger

management courses, etc. However, the flexibility of the provision allows other issues to be addressed by the RAR if these become apparent post sentence. There are some suggestions that Probation services are recommending RARs with a broader scope than may have been intended, which sometimes include programmes, such as alcohol treatment programmes, which should be covered by separate requirements available to sentencers. Inclusion of these requirements within a RAR could impact upon the quality of the offender's rehabilitation if sufficient days are not available for the completion of all activities required, so it is important that the court is utilising the full range of requirements available.

- 3.7 The draft guideline addresses this by inviting sentencers to consider all requirements available and highlighting that RARs should not be imposed in place of other available requirements.

Question 2 – Is the Council content with the wording included within the guideline in relation to RARs?

- 3.8 Other changes

As the Council is aware, a primary objective of this guidance is to reverse any inappropriate sentencing behaviour where an SSO may be imposed as a more severe form of a CO. However, the draft guidance reviewed by the Council in October did not directly address that point. In order to ensure the guideline is effective in achieving this objective, it is suggested that this should be clearly stated within the guideline. Wording to this effect has been included at page 9 of the draft guideline which contains guidance for suspending custodial sentences.

Question 3 – Does the Council agree to include a direct instruction within the guideline that an SSO must not be imposed as a more severe form of Community Order?

- 3.9 **Annex B** contains a list of other revisions to the draft guideline requested by the Council at the October meeting. The Council is invited to review the list to agree the revisions.

4 IMPACT

- 4.1 The guideline is intended to have the effect of reversing inappropriate impositions of SSO's. If it is effective, SSO volumes should decrease and CO's would increase. A resource assessment will accompany the consultation guideline and is likely to anticipate a neutral impact, as the number of overall sentences will remain unchanged and those that are imposed will still all be community focused. Any activation of SSO issues will be addressed in the breach resource assessment which is separate to this guideline.
- 4.2 The issuing of up to date guidance for these orders is likely to have a positive reputational impact for the Council. The guideline will also provide clarification for sentencers on RARs and some guidance on requirements which may be considered punitive.

5 RISK

- 5.1 There is a risk that the guideline will not be as effective as hoped, and will not adequately address sentencing behaviour to achieve the desired impact. The consultation document will clearly set out what the guideline is seeking to achieve in order to mitigate this risk.

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IMPOSITION OF COMMUNITY AND CUSTODIAL SENTENCES Draft Guideline

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IMPOSITION OF COMMUNITY AND CUSTODIAL SENTENCES GUIDELINE

Applicability of guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders aged 18 and older, who are sentenced on or after (TBC), 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 Sentencing Guidelines Council’s definitive guideline, *Overarching Principles – Sentencing Youths*.

Imposition of Community Orders

General Principles

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'.¹ 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.²

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.

¹ Criminal Justice Act 2003, s.148

² Criminal Justice Act 2003, s.148(2)

Community order ranges

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 ranges within the community order band based on offence seriousness (low, medium and high).

Where no offence specific guideline is available, the culpability and harm present in the offence(s) should be considered to identify which of the three sentencing ranges 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. (Full list of requirements at page 6). **The examples focus on punishment** in the community; **other requirements of a rehabilitative nature** may be more appropriate in some cases.

NOTE: 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.

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
Suitable requirements might include: <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) 	Suitable requirements might include: <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 	Suitable requirements might include: <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

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;³
- mental health treatment requirement;
- alcohol abstinence and monitoring requirement (where available);⁴
- 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 offenders 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 offenders 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).

³ Criminal Justice Act 2003, s.206A as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.72

⁴ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.77

Specific considerations in determining requirements

i) At least one requirement must be imposed for the purpose of punishment and/or a fine be imposed in addition to the community order.⁵ 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.⁶

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

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

⁵ Criminal Justice Act 2003, s.177(2A) as added by the Crime and Courts Act 2013 Sch. 16(1) Para.2 (applies to offences committed on or after 11 December 2013)

⁶ *ibid.*, s.177(6)

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 ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil. Ideally the Court should request a stand down report to avoid adjourning the case.

If an adjournment cannot be avoided, the information should be provided to the National Probation Service in written form⁷ and, a copy retained on the court file for the benefit of the sentencing bench. However, the court must make clear to the defendant that all sentencing options remain open including, in appropriate cases, committal for sentence to the Crown Court.

Electronic Monitoring

Subject to limited exceptions, 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.⁸ 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.

⁷ This may be in electronic form

⁸ Criminal Justice Act 2003, ss.177(3) and 177(4)

IMPOSITION OF CUSTODIAL SENTENCES

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) What is the shortest term commensurate with the seriousness of the offence.⁹

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'.¹⁰

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 offenders 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;
- 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.¹¹

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

Allocation consideration

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).

⁹ Criminal Justice Act 2003, s.153(2)

¹⁰ Criminal Justice Act 2003, s.152(2)

¹¹ Criminal Justice Act 2003 ss156(3) and 156(4)

Suspending a Custodial Sentence

A suspended sentence is a sentence of imprisonment. The following considerations are paramount in considering whether to suspend a custodial sentence;

- 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?
- 3) If so, can that sentence be suspended? Sentencers should be clear that they would have imposed a 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.

Where an offender has breached a suspended sentence, there is a presumption that the suspended prison term will be activated in full or in part. Full consideration should therefore be given to the circumstances of the offender. Careful consideration to imposing a suspended sentence should be given where there are circumstances which would make activation of the custodial sentence undesirable or impractical in the event of a breach. In such cases, the Court may consider imposing a suitably onerous Community Order, to avoid imposing a custodial sentence which a subsequent court is likely to consider it is unjust to activate in the event of a breach or further conviction.

Suspended Sentences: General guidance

- i) The requirement to obtain a pre-sentence report for custodial sentences applies if suspending custody.
- ii) If the court imposes a term of imprisonment between 14 days and 2 years (6 months in magistrates court),¹² it may suspend the sentence for between 6 months and 2 years (the 'operational period').¹³
- iii) Where the court imposes two or more sentences to be served consecutively, the court may suspend the sentence where the aggregate of the terms is between 14 days and 12 months¹⁴. (Magistrates may only impose aggregate sentences of more than 6 months where there are two or more either way offences).
- iv) When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community.¹⁵ The requirements are identical to those available for community orders on page 5.
- v) A custodial sentence that is suspended should be for the same term that would have applied if the sentence was to be served immediately.
- vi) 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.
- vii) When the court imposes a suspended sentence with community requirements, it may also order that the sentence be reviewed periodically at a review hearing.¹⁶

¹² Criminal Justice Act 2003, s.189(1) as amended by art.2(2)(a) of the Criminal Justice Act 2003 (Sentencing) (Transitory Provisions) Order 2005

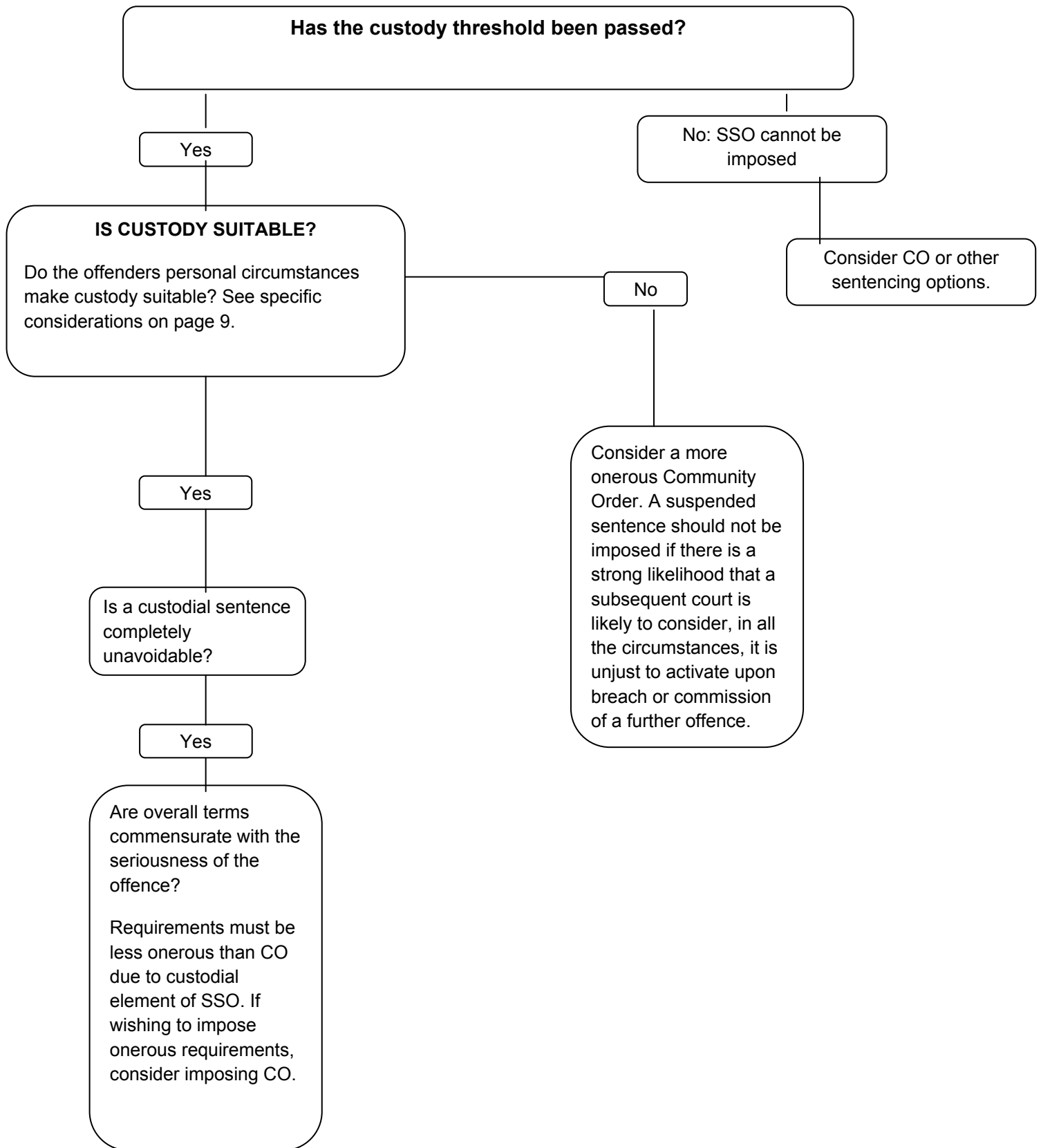
¹³ *ibid.*, s.189(3)

¹⁴ *ibid.*, s.189(2) as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.68(2)

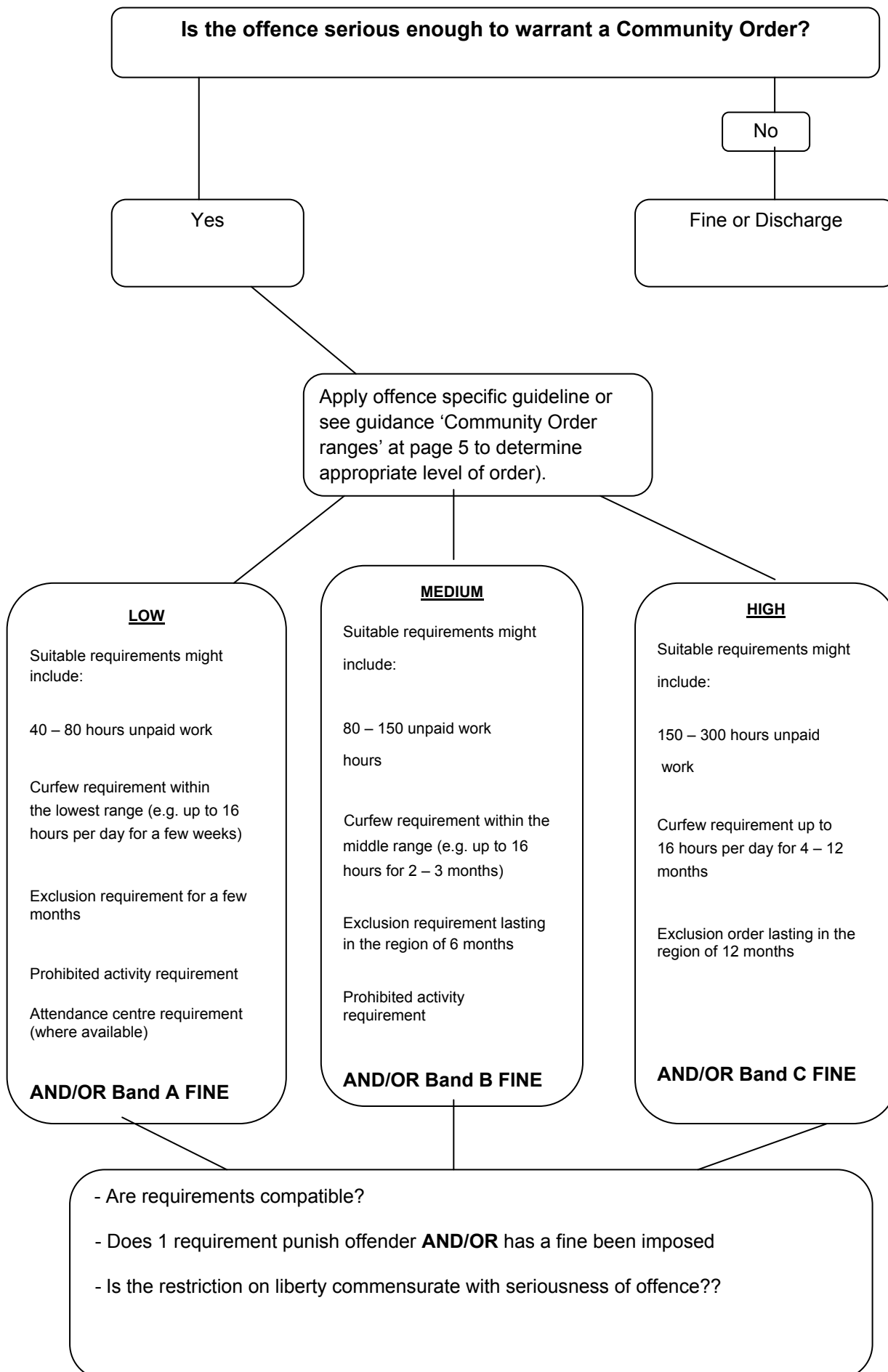
¹⁵ *ibid.*, s.189(1A) as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.68(1)

¹⁶ *ibid.*, s.191;

IMPOSING A SUSPENDED SENTENCE
ORDER - FLOWCHART



**IMPOSING A COMMUNITY ORDER –
FLOWCHART**



Summary of changes agreed to Imposition Guideline in October

Provide further guidance on punitive requirements (review JCS guidance on subject)
See para 3.2 of paper

Add further guidance in relation to RAR's; ie; which activities are available.
See para 3.4 of paper

Community Orders

- Prominence to requirements in table being non-exhaustive and focus on punishment
- Inclusion of exceptional circumstances exception to punitive requirement
- PSR's - Reference to stand down report included.

Community Order flowchart;

- Question 'is the offence imprisonable' removed.

Custodial sentences;

- Reference to 'Overarching Principles: Seriousness' removed
- Wording aligned with allocation guideline.
- Approach to imposing custodial sentence; wording amended from first draft.

Suspended Sentences

- Wording amended for 'particular considerations'
- Points restructured.

Suspended Sentence flowchart

- Reference to specific offender issues removed

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