

**DRAFT GUIDELINE:  
COMMUNITY AND CUSTODIAL  
SENTENCES**

## Community Orders

### Introduction

1. Community orders 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.
2. A community order must not be imposed unless the offence is 'serious enough to warrant such a sentence'.<sup>1</sup>
  - 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;
  - where an offender is being sentenced for a non-imprisonable offence, the court may not make a community order.<sup>2</sup>
3. Community orders consist of one or more of the following requirements:
  - rehabilitation activity requirement;
  - unpaid work requirement;
  - programme requirement;
  - prohibited activity requirement;
  - curfew requirement;
  - exclusion requirement;
  - residence requirement;
  - foreign travel prohibition requirement;<sup>3</sup>
  - mental health treatment requirement;
  - drug rehabilitation requirement;
  - alcohol treatment requirement;
  - alcohol abstinence and monitoring requirement (in pilot areas);<sup>4</sup>
  - in a case where the offender is aged under 25, attendance centre requirement (where available).
4. Where a court makes a community order it must include at least one requirement imposed for the purpose of punishment and/or impose a fine in addition to the community order.<sup>5</sup> Which requirements amount to punishment is a matter for the court to decide in each case.
5. The court must ensure that the restriction on the offender's liberty is commensurate with the seriousness of the offence and that the requirements are the most suitable for the offender.<sup>6</sup> Where two or more requirements are included, they must be compatible with each other.<sup>7</sup>

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<sup>1</sup> Criminal Justice Act 2003, s.148

<sup>2</sup> *ibid.*, s.150A as amended by the Criminal Justice and Immigration Act 2008, s.11(1)

<sup>3</sup> *ibid.*, s.206A as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.72

<sup>4</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.77

<sup>5</sup> 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)

<sup>6</sup> Criminal Justice Act 2003, s.148(2)

<sup>7</sup> *ibid.*, s.177(6)

### **Community order ranges**

6. 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 there 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. The examples focus on punishment in the community; other requirements of a rehabilitative nature may be more appropriate in some cases.

**NOTE: \*To ensure order is punitive one requirement MUST be imposed for the purpose of punishment and/or a fine imposed in addition to the community order**

Comment [C1]: New wording

Comment [C2]: Additional wording

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"> <li>• 40 – 80 hours unpaid work</li> <li>• Curfew requirement within the lowest range (e.g. up to 16 hours per day for a few weeks)</li> <li>• Exclusion requirement, without electronic monitoring, for a few months</li> <li>• Prohibited activity requirement</li> <li>• Attendance centre requirement (where available)</li> </ul>	Suitable requirements might include: <ul style="list-style-type: none"> <li>• Greater number of hours of unpaid work (e.g. 80 – 150 hours)</li> <li>• Curfew requirement within the middle range (e.g. up to 16 hours for 2 – 3 months)</li> <li>• Exclusion requirement lasting in the region of 6 months</li> <li>• Prohibited activity requirement</li> </ul>	Suitable requirements might include: <ul style="list-style-type: none"> <li>• 150 – 300 hours unpaid work</li> <li>• Curfew requirement up to 16 hours per day for 4 – 12 months</li> <li>• Exclusion order lasting in the region of 12 months</li> </ul>
* If order does not contain punitive requirement, suggested fine levels are indicated below:		
BAND A FINE	BAND B FINE	BAND C FINE

7. The particular requirements imposed within the range must be suitable for the individual offender and will be influenced by a wide range of factors including the stated purpose(s) of the sentence, the risk of re-offending, the ability of the offender to comply, and the availability of the requirements in the local area. Sentencers must ensure that the sentence strikes the right balance between proportionality and suitability. The resulting restriction on liberty must be a proportionate response to the offence that was committed.

## 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 this should be provided to the National Probation Service in written form<sup>8</sup> and, if the sentence is to be adjourned to a future date, 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.<sup>9</sup> 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.

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<sup>8</sup> This may be in electronic form

<sup>9</sup> Criminal Justice Act 2003, ss.177(3) and 177(4)

## Custodial Sentences

### The custody threshold

1. 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'.<sup>10</sup> Guidance regarding this threshold and the approach to the imposition of custodial sentences is set out in the Sentencing Guidelines Council's definitive guideline *Overarching Principles: Seriousness*, published 16 December 2004.
2. The guideline emphasises that:
  - 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 (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime;
  - however, when dealing with either way offences, where the offending is so serious that the 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<sup>11</sup> notwithstanding that 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);
  - the approach to the imposition of a custodial sentence should be as follows:
    - (a) Has the custody threshold been passed?
    - (b) If so, is it unavoidable that a custodial sentence be imposed?
    - (c) 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.)
    - (d) If not, impose a sentence which takes immediate effect for the shortest term commensurate with the seriousness of the offence.<sup>12</sup>

### Pre-sentence report

3. 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<sup>13</sup>. **Magistrates: Consult your legal adviser before deciding to sentence to custody without a pre-sentence report.**

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<sup>10</sup> Criminal Justice Act 2003, s.152(2)

<sup>11</sup> Powers of Criminal Courts Sentencing Act 2000, s.3

<sup>12</sup> *ibid.*, s.153(2)

<sup>13</sup> Criminal Justice Act 2003 ss156(3) and 156(4)

## **Suspended sentences**

1. The following considerations are paramount in considering whether to suspend a custodial sentence;

- i) Has the custody threshold been passed? If not, a suspended sentence **cannot** be passed.
- ii) If so, is it unavoidable that a custodial sentence be imposed?
- iii) 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.)

**Full consideration should be given to the circumstances of the offender. Are there circumstances which would prevent activation of the sentence in the event of a breach? Particular considerations are whether the offender is a primary carer or has mental health or substance misuse issues. In such cases, the Court should 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.**

**Comment [C3]:** New wording

If a custodial sentence (suspended) is appropriate the following must be noted:

2. 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**;

**Comment [C4]:** Wording in MCSG but given prominence

- 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

3. The requirement to obtain a pre-sentence report at paragraph X above, applies to suspended sentence orders.

4. If the court imposes a term of imprisonment between 14 days and 2 years (6 months in magistrates court),<sup>14</sup> it may suspend the sentence for between 6 months and 2 years ('operational period').<sup>15</sup>

**Comment [C5]:** Amended from MCSG to be applicable for all courts

5. 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 months<sup>16</sup>.

6. When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community.<sup>17</sup> The requirements are identical to those available for community orders on page X.

7. A custodial sentence that is suspended should be for the same term that would have applied if the sentence was to be served immediately;

8. 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;

9. When the court imposes a suspended sentence with community requirements, it may also order that the sentence be reviewed periodically at a review hearing.<sup>18</sup>

<sup>14</sup> *ibid.*, s.189(1) as amended by art.2(2)(a) of the Criminal Justice Act 2003 (Sentencing) (Transitory Provisions) Order 2005

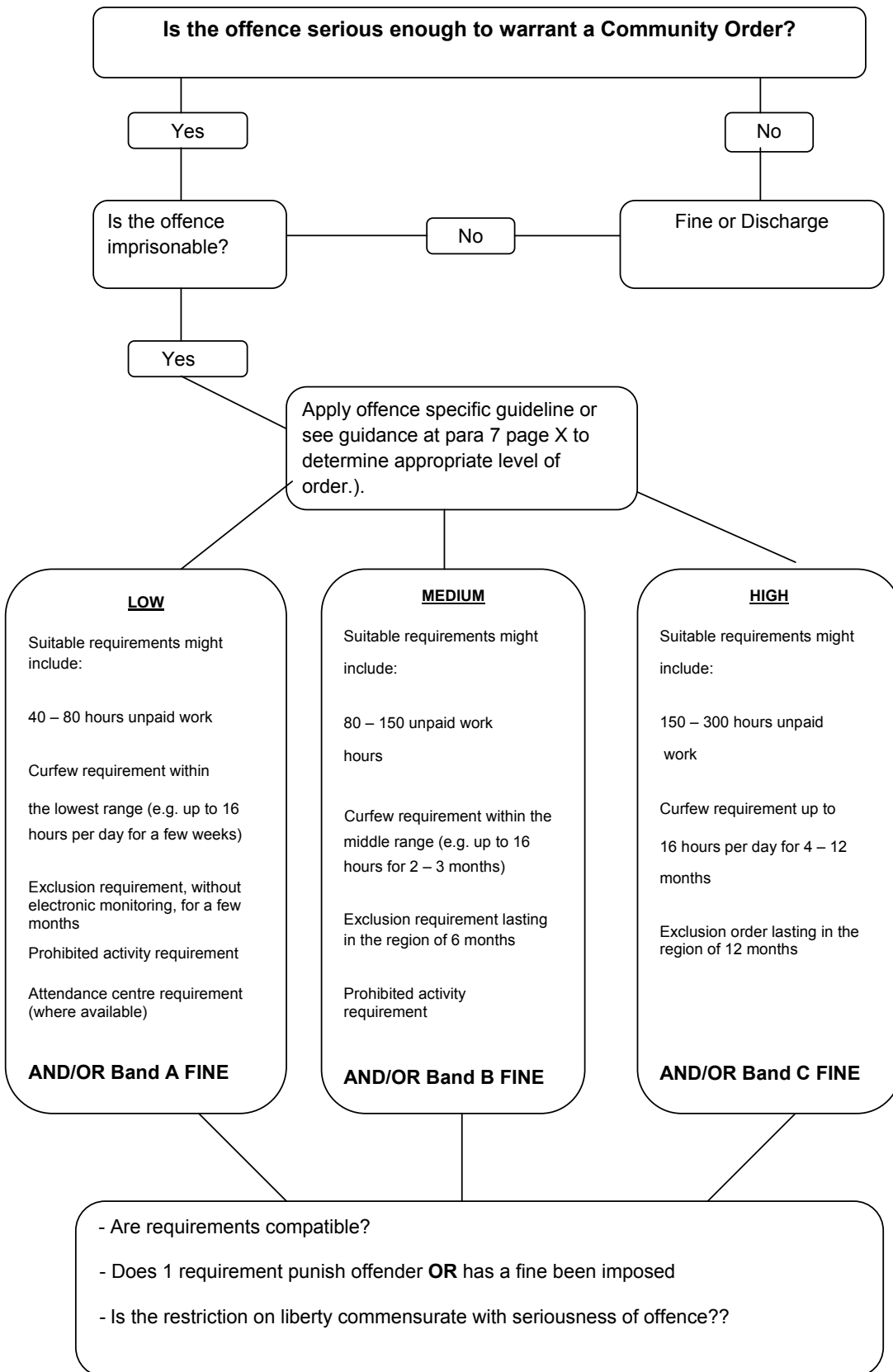
<sup>15</sup> *ibid.*, s.189(3)

<sup>16</sup> *ibid.*, s.189(2) as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.68(2)

<sup>17</sup> *ibid.*, s.189(1A) as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.68(1)

<sup>18</sup> *ibid.*, s.191;

**IMPOSING A COMMUNITY ORDER – FLOWCHART**



**IMPOSING A SUSPENDED SENTENCE ORDER - FLOWCHART**

**IMPOSING A SUSPENDED SENTENCE – FLOWCHART**

