



Sentencing Guidelines Council

**New Sentences:
Criminal Justice Act 2003**

Guideline

FOREWORD

In accordance with the provisions of section 170(9) Criminal Justice Act 2003, the Sentencing Guidelines Council issues this guideline as a definitive guideline. By virtue of section 172 of the Act, every court must have regard to a relevant guideline.

The Council was created in 2004 in order to frame Guidelines to assist Courts as they deal with criminal cases across the whole of England and Wales.

This guideline relates to the new sentencing framework introduced by the Criminal Justice Act 2003, which affects the nature of community and custodial sentences. Only those sentences and related provisions which are expected to come into force by April 2005 are dealt with in this guideline. It will be followed by further guidelines in due course. This is an unusual guideline since it covers a range of sentences outside the context of individual offences and does so in readiness for the coming into force of the statutory provisions creating the sentences. It is designed with the object of ensuring a consistent approach when the sentences become available.

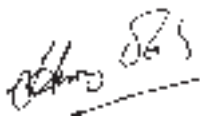
This guideline applies only to sentences passed under the sentencing framework applicable to those aged 18 or over.

The guideline is divided into two sections:

- ❑ Sections 1 covers the practical aspects of implementing the non-custodial powers namely the new community sentence and the new form of deferred sentence;
- ❑ Section 2 deals with the new custodial sentence provisions relating to suspended sentences, prison sentences of 12 months or more, and intermittent custody.¹

The Act also contains an extensive range of provisions to protect the public from dangerous offenders. These will be dealt with separately.

The Advice of the Sentencing Advisory Panel to the Council (published on 20th September 2004) has been broadly accepted by the Council and forms the basis of this guideline. Further information on the issues covered in this guideline can be found in that Advice or in the discussion document that preceded it. All these documents are available on www.sentencing-guidelines.gov.uk or from the Sentencing Guidelines Secretariat.



Chairman of the Council
December 2004

¹ References to the Probation Service reflect current roles and responsibilities. By the time these provisions come into force, some or all of those roles and responsibilities may be those of the National Offender Management Service (NOMS).

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SECTION 1 PART 1 – COMMUNITY SENTENCES

A. Statutory Provisions

(i) The Thresholds for Community Sentences

1.1.1 Seriousness – Section 148 Criminal Justice Act 2003:

- (1) A court must not pass a community sentence on an offender unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant such a sentence.

1.1.2 Persistent Offenders – Section 151 Criminal Justice Act 2003:

(1) Subsection (2) applies where –

- (a) a person aged 16 or over is convicted of an offence (“the current offence”),
- (b) on three or more previous occasions he has, on conviction by a court in the United Kingdom of any offence committed by him after attaining the age of 16, had passed on him a sentence consisting only of a fine, and
- (c) despite the effect of section 143(2), the court would not (apart from this section) regard the current offence, or the combination of the current offence and one or more offences associated with it, as being serious enough to warrant a community sentence.

- (2) The court may make a community order in respect of the current offence instead of imposing a fine if it considers that, having regard to all the circumstances including the matters mentioned in subsection (3), it would be in the interests of justice to make such an order.

(ii) The Sentences Available

1.1.3 Meaning of Community Sentence – Section 147 Criminal Justice Act 2003

- (1) In this Part “community sentence” means a sentence which consists of or includes –

- (a) a community order (as defined by section 177), or
- (b) one or more youth community orders.

1.1.4 Offenders aged 16 or over – Section 177 Criminal Justice Act 2003:

- (1) Where a person aged 16 or over is convicted of an offence, the court by or before which he is convicted may make an order (in this Part referred to as a “community order”) imposing on him any one or more of the following requirements –

- (a) an unpaid work requirement (as defined by section 199),
- (b) an activity requirement (as defined by section 201),
- (c) a programme requirement (as defined by section 202),
- (d) a prohibited activity requirement (as defined by section 203),
- (e) a curfew requirement (as defined by section 204),
- (f) an exclusion requirement (as defined by section 205),

- (g) a residence requirement (as defined by section 206),
- (h) a mental health treatment requirement (as defined by section 207),
- (i) a drug rehabilitation requirement (as defined by section 209),
- (j) an alcohol treatment requirement (as defined by section 212),
- (k) a supervision requirement (as defined by section 213), and
- (l) in a case where the offender is aged under 25, an attendance centre requirement (as defined by section 214).

(2) Subsection (1) has effect subject to sections 150 and 218 and to the following provisions of Chapter 4 relating to particular requirements –

- (a) section 199(3)(unpaid work requirement),
- (b) section 201(3) and (4)(activity requirement),
- (c) section 202(4) and (5)(programme requirement),
- (d) section 203(2)(prohibited activity requirement),
- (e) section 207(3)(mental health treatment requirement),
- (f) section 209(2)(drug rehabilitation requirement), and
- (g) section 212(2) and (3)(alcohol treatment requirement).

(3) Where the court makes a community order imposing a curfew requirement or an exclusion requirement, the court must also impose an electronic monitoring requirement (as defined by section 215) unless –

- (a) it is prevented from doing so by section 215(2) or 218(4), or
- (b) in the particular circumstances of the case, it considers it inappropriate to do so.

(4) Where the court makes a community order imposing an unpaid work requirement, an activity requirement, a programme requirement, a prohibited activity requirement, a residence requirement, a mental health treatment requirement, a drug rehabilitation requirement, an alcohol treatment requirement, a supervision requirement or an attendance centre requirement, the court may also impose an electronic monitoring requirement unless prevented from doing so by section 215(2) or 218(4).

(iii) Determining Which Orders to make & Requirements to Include

1.1.5 Suitability – Section 148 Criminal Justice Act 2003

(2) Where a court passes a community sentence which consists of or includes a community order –

- (a) the particular requirement or requirements forming part of the community order must be such as, in the opinion of the court, is, or taken together are, the most suitable for the offender, and
- (b) the restrictions on liberty imposed by the order must be such as in the opinion of the court are commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it.

1.1.6 Restrictions on liberty – Section 149 Criminal Justice Act 2003

- (1) In determining the restrictions on liberty to be imposed by a community order or youth community order in respect of an offence, the court may have regard to any period for which the offender has been remanded in custody in connection with the offence or any other offence the charge for which was founded on the same facts or evidence.

1.1.7 Compatibility – Section 177 Criminal Justice Act 2003

- (6) Before making a community order imposing two or more different requirements falling within subsection (1), the court must consider whether, in the circumstances of the case, the requirements are compatible with each other.

(iv) Electronic Monitoring

1.1.8 Section 177 Criminal Justice Act 2003

- (3) Where the court makes a community order imposing a curfew requirement or an exclusion requirement, the court must also impose an electronic monitoring requirement (as defined by section 215) unless –
 - (a) it is prevented from doing so by section 215(2) or 218(4), or
 - (b) in the particular circumstances of the case, it considers it inappropriate to do so.
- (4) Where the court makes a community order imposing an unpaid work requirement, an activity requirement, a programme requirement, a prohibited activity requirement, a residence requirement, a mental health treatment requirement, a drug rehabilitation requirement, an alcohol treatment requirement, a supervision requirement or an attendance centre requirement, the court may also impose an electronic monitoring requirement unless prevented from doing so by section 215(2) or 218(4).

B. Imposing a Community Sentence – The Approach

1.1.9 On pages 8 and 9 of the Seriousness guideline the two thresholds for the imposition of a community sentence are considered. Sentencers must consider all of the disposals available (within or below the threshold passed) at the time of sentence, and reject them before reaching the provisional decision to make a community sentence, so that even where the threshold for a community sentence has been passed a financial penalty or discharge may still be an appropriate penalty. Where an offender has a low risk of re-offending, particular care needs to be taken in the light of evidence that indicates that there are circumstances where inappropriate intervention can increase the risk of re-offending rather than decrease it. In addition, recent improvements in enforcement of financial penalties make them a more viable sentence in a wider range of cases.

1.1.10 Where an offender is being sentenced for a non-imprisonable offence or offences, great care will be needed in assessing whether a community sentence is appropriate since failure to comply could result in a custodial sentence.

1.1.11 Having decided (in consultation with the Probation Service where appropriate) that a community sentence is justified, the court must decide which requirements should be included in the community order. The requirements or orders imposed will have the effect of restricting the offender's liberty, whilst providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.

The key issues arising are:

- (i) which requirements to impose;**
- (ii) how to make allowance for time spent on remand; and**
- (iii) how to deal with breaches.**

(i) Requirements

1.1.12 When deciding which requirements to include, the court must be satisfied on three matters –

- i. that the **restriction on liberty is commensurate with the seriousness** of the offence(s);²
- ii. that the **requirements are the most suitable** for the offender;³ and
- iii. that, where there are two or more requirements included, they are **compatible with each other**.⁴

1.1.13 Sentencers should have the possibility of breach firmly in mind when passing sentence for the original offence. If a court is to reflect the seriousness of an offence, there is little value in setting requirements as part of a community sentence that are not demanding enough for an offender. On the other hand, there is equally little value in imposing requirements that would 'set an offender up to fail' and almost inevitably lead to sanctions for a breach.

In community sentences, the guiding principles are proportionality and suitability. Once a court has decided that the offence has crossed the community sentence threshold and that a community sentence is justified, the initial factor in defining which requirements to include in a community sentence should be the seriousness of the offence committed.

1.1.14 This means that "seriousness" is an important factor in deciding whether the Court chooses the low, medium or high range (see below) but, having taken that decision, selection of the content of the order within the range will be determined by a much wider range of factors.

² Criminal Justice Act 2003 section 148(2)(b)

³ *ibid* section 148(2)(a)

⁴ *ibid* section 177(6)

- ❑ **Sentencing ranges must remain flexible enough to take account of the suitability of the offender, his or her ability to comply with particular requirements and their availability in the local area.**
- ❑ **The justification for imposing a community sentence in response to persistent petty offending is the persistence of the offending behaviour rather than the seriousness of the offences being committed. The requirements imposed should ensure that the restriction on liberty is proportionate to the seriousness of the offending, to reflect the fact that the offences, of themselves, are not sufficiently serious to merit a community sentence.**

(a) Information for Sentencers

1.1.15 In many cases, a pre-sentence report⁵ will be pivotal in helping a sentencer decide whether to impose a custodial sentence or whether to impose a community sentence and, if so, whether particular requirements, or combinations of requirements, are suitable for an individual offender. The court must always ensure (especially where there are multiple requirements) that the restriction on liberty placed on the offender is proportionate to the seriousness of the offence committed.⁶ The court must also consider the likely effect of one requirement on another, and that they do not place conflicting demands upon the offender.⁷

1.1.16 The Council supports the approach proposed by the Panel at paragraph 78 of its Advice that, having reached the provisional view that a community sentence is the most appropriate disposal, the sentencer should request a pre-sentence report, indicating which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is required to fulfil. Usually the most helpful way for the court to do this would be to produce a written note for the report writer, copied on the court file. If it is known that the same tribunal and defence advocate will be present at the sentencing hearing and a probation officer is present in court when the request for a report is made, it may not be necessary to commit details of the request to writing. However, events may change during the period of an adjournment and it is good practice to ensure that there is a clear record of the request for the court. These two factors will guide the Probation Service in determining the nature and combination of requirements that may be appropriate and the onerousness and intensity of those requirements. A similar procedure should apply when ordering a pre-sentence report when a custodial sentence is being considered.

1.1.17 There will be occasions when any type of report may be unnecessary despite the intention to pass a community sentence though this is likely to be infrequent. A court could consider dispensing with the need to obtain a pre-sentence report for adult offenders –

- ❑ where the offence falls within the **LOW** range of seriousness (see pp9–10) and
- ❑ where the sentencer was minded to impose a single requirement, such as an exclusion requirement (where the circumstances of the case mean that this would be an appropriate disposal without electronic monitoring) and

⁵ Under the Act, a pre-sentence report includes a full report following adjournment, a specific sentence report, a short format report or an oral report. The type of report supplied will depend on the level of information requested. Wherever it appears, the term “pre-sentence report” includes all these types of report.

⁶ Criminal Justice Act 2003 section 148(2)

⁷ *ibid* section 177(6)

- ❑ where the sentence will not require the involvement of the Probation Service, for example an electronically monitored curfew (subject to the court being satisfied that there is an appropriate address at which the curfew can operate).

(b) Ranges of Sentence Within the Community Sentence Band

1.1.18 To enable the court to benefit from the flexibility that community sentences provide and also to meet its statutory obligations, any structure governing the use of community requirements must allow the courts to choose the most appropriate sentence for each individual offender.

1.1.19 Sentencers have a statutory obligation to pass sentences that are commensurate with the seriousness of an offence. However, within the range of sentence justified by the seriousness of the offence(s), courts will quite properly consider those factors that heighten the risk of the offender committing further offences or causing further harm with a view to lessening that risk. The extent to which requirements are imposed must be capable of being varied to ensure that the restriction on liberty is commensurate with the seriousness of the offence.

1.1.20 The Council recognises that it would be helpful for sentencers to have a framework to help them decide on the most appropriate use of the new community sentence. While there is no single guiding principle, the seriousness of the offence that has been committed is an important factor. Three sentencing ranges (low, medium and high) within the community sentence band can be identified. It is not possible to position particular types of offence at firm points within the three ranges because the seriousness level of an offence is largely dependent upon the culpability of the offender and this is uniquely variable. The difficulty is particularly acute in relation to the medium range where it is clear that requirements will need to be tailored across a relatively wide range of offending behaviour.

1.1.21 In general terms, the lowest range of community sentence would be for those offenders whose offence was relatively minor within the community sentence band and would include persistent petty offenders whose offences only merit a community sentence by virtue of failing to respond to the previous imposition of fines. Such offenders would merit a 'light touch' approach, for example, normally a single requirement such as a short period of unpaid work, or a curfew, or a prohibited activity requirement or an exclusion requirement (where the circumstances of the case mean that this would be an appropriate disposal without electronic monitoring).

1.1.22 The top range would be for those offenders who have only just fallen short of a custodial sentence and for those who have passed the threshold but for whom a community sentence is deemed appropriate.

1.1.23 In all three ranges there must be sufficient flexibility to allow the sentence to be varied to take account of the suitability of particular requirements for the individual offender and whether a particular requirement or package of requirements might be more effective at reducing any identified risk of re-offending. It will fall to the sentencer to ensure that the sentence strikes the right balance between proportionality and suitability.

There should be three sentencing ranges (low, medium and high) within the community sentence band based upon seriousness.

It is not intended that an offender necessarily progress from one range to the next on each sentencing occasion. The decision as to the appropriate range each time is based upon the seriousness of the new offence(s).

The decision on the nature and severity of the requirements to be included in a community sentence should be guided by:

- (i) the assessment of offence seriousness (LOW, MEDIUM OR HIGH);**
- (ii) the purpose(s) of sentencing the court wishes to achieve;**
- (iii) the risk of re-offending;**
- (iv) the ability of the offender to comply, and**
- (v) the availability of requirements in the local area.**

The resulting restriction on liberty must be a proportionate response to the offence that was committed.

1.1.24 Below we set out a non-exhaustive description of examples of requirements that might be appropriate in the three sentencing ranges. These examples focus on punishment in the community, although it is recognised that not all packages will necessarily need to include a punitive requirement. There will clearly be other requirements of a rehabilitative nature, such as a treatment requirement or an accredited programme, which may be appropriate depending on the specific needs of the offender and assessment of suitability. Given the intensity of such interventions, it is expected that these would normally only be appropriate at medium and high levels of seriousness, and where assessed as having a medium or high risk of re-offending. In addition, when passing sentence in any one of the three ranges, the court should consider whether a rehabilitative intervention such as a programme requirement, or a restorative justice intervention might be suitable as an additional or alternative part of the sentence.

LOW

1.1.25 For offences only just crossing the community sentence threshold (such as persistent petty offending, some public order offences, some thefts from shops, or interference with a motor vehicle, where the seriousness of the offence or the nature of the offender's record means that a discharge or fine is inappropriate).

1.1.26 Suitable requirements might include:

- 40 to 80 hours of unpaid work or
- a curfew requirement within the lowest range (e.g. up to 12 hours per day for a few weeks) or
- an exclusion requirement (where the circumstances of the case mean that this would be an appropriate disposal without electronic monitoring) lasting a few months or
- a prohibited activity requirement or
- an attendance centre requirement (where available).

1.1.27 Since the restriction on liberty must be commensurate with the seriousness of the offence, particular care needs to be taken with this band to ensure that this obligation is complied with. In most cases, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary.

MEDIUM

1.1.28 For offences that obviously fall within the community sentence band such as handling stolen goods worth less than £1000 acquired for resale or somewhat more valuable goods acquired for the handler's own use, some cases of burglary in commercial premises, some cases of taking a motor vehicle without consent, or some cases of obtaining property by deception.

1.1.29 Suitable requirements might include:

- a greater number (e.g. 80 to 150) of hours of unpaid work or
- an activity requirement in the middle range (20 to 30 days) or
- a curfew requirement within the middle range (e.g. up to 12 hours for 2–3 months) or
- an exclusion requirement lasting in the region of 6 months or
- a prohibited activity requirement.

1.1.30 Since the restriction on liberty must be commensurate with the seriousness of the offence, particular care needs to be taken with this band to ensure that this obligation is complied with.

HIGH

1.1.31 For offences that only just fall below the custody threshold or where the custody threshold is crossed but a community sentence is more appropriate in all the circumstances, for example some cases displaying the features of a standard domestic burglary committed by a first-time offender.

1.1.32 More intensive sentences which combine two or more requirements may be appropriate at this level. Suitable requirements might include an unpaid work order of between 150 and 300 hours; an activity requirement up to the maximum 60 days; an exclusion order lasting in the region of 12 months; a curfew requirement of up to 12 hours a day for 4–6 months.

(c) Electronic Monitoring

1.1.33 The court must also consider whether an electronic monitoring requirement⁸ should be imposed which is mandatory⁹ in some circumstances.

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.

(d) Recording the Sentence Imposed

1.1.34 Under the new framework there is only one (generic) community sentence provided by statute. This does not mean that offenders who have completed a community sentence and have then re-offended should be regarded as ineligible for a second community sentence on the basis that this has been tried and failed. Further community sentences, perhaps with different requirements, may well be justified.

1.1.35 Those imposing sentence will wish to be clear about the ‘purposes’ that the community sentence is designed to achieve when setting the requirements. Sharing those purposes with the offender and Probation Service will enable them to be clear about the goals that are to be achieved.

1.1.36 Any future sentencer must have full information about the requirements that were inserted by the court into the previous community sentence imposed on the offender (including whether it was a low/medium/high level order) and also about the offender’s response. This will enable the court to consider the merits of imposing the same or different requirements as part of another community sentence. The requirements should be recorded in such a way as to ensure that they can be made available to another court if another offence is committed.

When an offender is required to serve a community sentence, the court records should be clearly annotated to show which particular requirements have been imposed.

⁸ *ibid* section 177(3) and (4)

⁹ unless the necessary facilities are not available or, in the particular circumstances of the case, the court considers it inappropriate.

(ii) Time Spent on Remand

1.1.37 The court will need to consider whether to give any credit for time spent in custody on remand.¹⁰ (For further detail from the Panel's Advice, see Annex A)

The court should seek to give credit for time spent on remand (in custody or equivalent status) in all cases. It should make clear, when announcing sentence, whether or not credit for time on remand has been given (bearing in mind that there will be no automatic reduction in sentence once section 67 of the Criminal Justice Act 1967 is repealed) and should explain its reasons for not giving credit when it considers either that this is not justified, would not be practical, or would not be in the best interests of the offender.

1.1.38 Where an offender has spent a period of time in custody on remand, there will be occasions where a custodial sentence is warranted but the length of the sentence justified by the seriousness of the offence would mean that the offender would be released immediately. Under the present framework, it may be more appropriate to pass a community sentence since that will ensure supervision on release.

1.1.39 However, given the changes in the content of the second part of a custodial sentence of 12 months or longer, a court in this situation where the custodial sentence would be 12 months or more should, under the new framework, pass a custodial sentence in the knowledge that licence requirements will be imposed on release from custody. This will ensure that the sentence imposed properly reflects the seriousness of the offence.

1.1.40 Recommendations made by the court at the point of sentence will be of particular importance in influencing the content of the licence. This will properly reflect the gravity of the offence(s) committed.

(iii) Breaches

1.1.41 Where an offender fails, without reasonable excuse, to comply with one or more requirements, the 'responsible officer'¹¹ can either give a warning or initiate breach proceedings. Where the offender fails to comply without reasonable excuse for the second time within a 12-month period, the 'responsible officer' must initiate proceedings.

1.1.42 In such proceedings the court must¹² either **increase the severity of the existing sentence** (i.e. impose more onerous conditions including requirements aimed at enforcement, such as a curfew or supervision requirement) or **revoke the existing sentence and proceed as though sentencing for the original offence**. The court is required to take account of the circumstances of the breach,¹³ which will inevitably have an impact on its response.

1.1.43 In certain circumstances (where an offender has wilfully and persistently failed to comply with an order made in respect of an offence that is not itself punishable by imprisonment), the court can **impose a maximum of 51 weeks custody**.¹⁴

10 Criminal Justice Act 2003 section 149

11 Criminal Justice Act 2003 schedule 8, paragraphs 5–6

12 *ibid* paragraphs 9–10

13 *ibid* paragraph 9(2)

14 *ibid* paragraph 9(1)(c)

1.1.44 When increasing the onerousness of requirements, the court must consider the impact on the offender's ability to comply and the possibility of precipitating a custodial sentence for further breach. For that reason, and particularly where the breach occurs towards the end of the sentence, the court should take account of compliance to date and may consider that extending the supervision or operational periods will be more sensible; in other cases it might choose to add punitive or rehabilitative requirements instead. In making these changes the court must be mindful of the legislative restrictions on the overall length of community sentences and on the supervision and operational periods allowed for each type of requirement.

1.1.45 The court dealing with breach of a community sentence should have as its primary objective ensuring that the requirements of the sentence are finished, and this is important if the court is to have regard to the statutory purposes of sentencing. A court that imposes a custodial sentence for breach without giving adequate consideration to alternatives is in danger of imposing a sentence that is not commensurate with the seriousness of the original offence and is solely a punishment for breach. This risks undermining the purposes it has identified as being important. Nonetheless, courts will need to be vigilant to ensure that there is a realistic prospect of the purposes of the order being achieved.

Having decided that a community sentence is commensurate with the seriousness of the offence, the primary objective when sentencing for breach of requirements is to ensure that those requirements are completed.

1.1.46 A court sentencing for breach must take account of the extent to which the offender has complied with the requirements of the community order, the reasons for breach and the point at which the breach has occurred. Where a breach takes place towards the end of the operational period and the court is satisfied that the offender's appearance before the court is likely to be sufficient in itself to ensure future compliance, then given that it is not open to the court to make no order, an approach that the court might wish to adopt could be to re-sentence in a way that enables the original order to be completed properly – for example, a differently constructed community sentence that aims to secure compliance with the purposes of the original sentence.

1.1.47 If the court decides to increase the onerousness of an order, it must give careful consideration, with advice from the Probation Service, to the offender's ability to comply. A custodial sentence should be the last resort, where all reasonable efforts to ensure that an offender completes a community sentence have failed.

- ❑ The Act allows for a custodial sentence to be imposed in response to breach of a community sentence. Custody should be the last resort, reserved for those cases of deliberate and repeated breach where all reasonable efforts to ensure that the offender complies have failed.**
- ❑ Before increasing the onerousness of requirements, sentencers should take account of the offender's ability to comply and should avoid precipitating further breach by overloading the offender with too many or conflicting requirements.**
- ❑ There may be cases where the court will need to consider re-sentencing to a differently constructed community sentence in order to secure compliance with the purposes of the original sentence, perhaps where there has already been partial compliance or where events since the sentence was imposed have shown that a different course of action is likely to be effective.**

SECTION 1 PART 2 – DEFERRED SENTENCES

A. Statutory Provisions

1.2.1 Under the existing legislation,¹⁵ a court can defer a sentence for up to six months, provided the offender consents and the court considers that deferring the sentence is in the interests of justice.

1.2.2 The new provisions¹⁶ continue to require the consent of the offender and that the court be satisfied that the making of such a decision is in the interests of justice. However, it is also stated that the power to defer sentence can only be exercised where:

“the offender undertakes to comply with any requirements as to his conduct during the period of the deferment that the court considers it appropriate to impose;”¹⁷

1.2.3 This enables the court to impose a wide variety of conditions (including a residence requirement).¹⁸ The Act allows the court to appoint the probation service or other responsible person to oversee the offender’s conduct during this period and prepare a report for the court at the point of sentence i.e. the end of the deferment period.

1.2.4 As under the existing legislation, if the offender commits another offence during the deferment period the court may have the power to sentence for both the original and the new offence at once. Sentence cannot be deferred for more than six months and, in most circumstances, no more than one period of deferment can be granted.¹⁹

1.2.5 A significant change is the provision enabling a court to deal with an offender before the end of the period of deferment.²⁰ For example if the court is satisfied that the offender has failed to comply with one or more requirements imposed in connection with the deferment, the offender can be brought back before the court and the court can proceed to sentence.

B. Use of Deferred Sentences

1.2.6 Under the new framework, there is a wider range of sentencing options open to the courts, including the increased availability of suspended sentences, and deferred sentences are likely to be used in very limited circumstances. A deferred sentence enables the court to review the conduct of the defendant before passing sentence, having first prescribed certain requirements. It also provides several opportunities for an offender to have some influence as to the sentence passed –

- a) it tests the commitment of the offender not to re-offend;
- b) it gives the offender an opportunity to do something where progress can be shown within a short period;
- c) it provides the offender with an opportunity to behave or refrain from behaving in a particular way that will be relevant to sentence.

15 Powers of Criminal Courts (Sentencing) Act 2000 sections 1 and 2

16 Criminal Justice Act 2003 schedule 23 repealing and replacing sections 1 and 2 of the 2000 Act

17 *ibid* new section 1(3)(b) as inserted by schedule 23 to the Criminal Justice Act 2003

18 *ibid* new section 1A(1)

19 *ibid* new section 1(4)

20 *ibid* new section 1B

1.2.7 Given the new power to require undertakings and the ability to enforce those undertakings before the end of the period of deferral, the decision to defer sentence should be predominantly for a small group of cases at either the custody threshold or the community sentence threshold where the sentencer feels that there would be particular value in giving the offender the opportunities listed because, if the offender complies with the requirements, a different sentence will be justified at the end of the deferment period. This could be a community sentence instead of a custodial sentence or a fine or discharge instead of a community sentence. It may, rarely, enable a custodial sentence to be suspended rather than imposed immediately.

The use of deferred sentences should be predominantly for a small group of cases close to a significant threshold where, should the defendant be prepared to adapt his behaviour in a way clearly specified by the sentencer, the court may be prepared to impose a lesser sentence.

1.2.8 A court may impose any conditions during the period of deferment that it considers appropriate.²¹ These could be specific requirements as set out in the provisions for community sentences,²² or requirements that are drawn more widely. These should be specific, measurable conditions so that the offender knows exactly what is required and the court can assess compliance; the restriction on liberty should be limited to ensure that the offender has a reasonable expectation of being able to comply whilst maintaining his or her social responsibilities.

1.2.9 Given the need for clarity in the mind of the offender and the possibility of sentence by another court, the court should give a clear indication (and make a written record) of the type of sentence it would be minded to impose if it had not decided to defer and ensure that the offender understands the consequences of failure to comply with the court's wishes during the deferral period.

When deferring sentence, the sentencer must make clear the consequence of not complying with any requirements and should indicate the type of sentence it would be minded to impose. Sentencers should impose specific, measurable conditions that do not involve a serious restriction on liberty.

²¹ *ibid* new section 1 (3)(b) as inserted by schedule 23 to the Criminal Justice Act 2003
²² Criminal Justice Act 2003 section 177

SECTION 2 – CUSTODIAL SENTENCES

PART 1 – CUSTODIAL SENTENCES OF 12 MONTHS OR MORE

A. Statutory Provisions

2.1.1 Under existing legislation:

- ❑ an adult offender receiving a custodial sentence of at least 12 months and below 4 years will automatically be released at the halfway point and will then be supervised under licence until the three-quarter point of the sentence. [For some, the actual release date may be earlier as a result of release on Home Detention Curfew (HDC).]
- ❑ an adult offender receiving a determinate sentence of 4 years or above will be eligible for release from the halfway point and, if not released before, will automatically be released at the two-thirds point. After release, the offender will be supervised under licence until the three-quarter point of the sentence.

2.1.2 Under the new framework, the impact of a custodial sentence will be more severe since the period in custody and under supervision will be for the whole of the sentence term set by the court. Additionally, separate provisions for the protection of the public will be introduced for those offenders designated as “dangerous” under the Act which are designed to ensure that release only occurs when it is considered safe to do so.

2.1.3 Where a prison sentence of 12 months or more is imposed on an offender who is not classified as “dangerous”, that offender will be entitled to be released from custody after completing half of the sentence. The whole of the second half of the sentence will be subject to licence requirements. These requirements will be set shortly before release by the Secretary of State (with advice from the Governor responsible for authorising the prisoner’s release in consultation with the Probation Service) but a court will be able to make recommendations at the sentencing stage on the content of those requirements.²³ The conditions that the Secretary of State may attach to a licence are to be prescribed by order.²⁴

2.1.4 The Act requires that a custodial sentence for a fixed term should be for the shortest term that is commensurate with the seriousness of the offence.²⁵

²³ Criminal Justice Act 2003 section 238(1)

²⁴ *ibid* section 250

²⁵ *ibid* section 153(2)

B. Imposition of Custodial Sentences of 12 Months or more

(i) Length of Sentence

2.1.5 The requirement that the second half of a prison sentence will be served in the community subject to conditions imposed prior to release is a major new development and will require offenders to be under supervision for the full duration of the sentence prescribed by the court. The Probation Service will be able to impose a number of complementary requirements on the offender during the second half of a custodial sentence and these are expected to be more demanding and involve a greater restriction on liberty than current licence conditions.

2.1.6 As well as restricting liberty to a greater extent, the new requirements will last until the very end of the sentence, rather than to the three-quarter point as at present, potentially making a custodial sentence significantly more demanding than under existing legislation. Breach of these requirements at any stage is likely to result in the offender being returned to custody and this risk continues, therefore, for longer under the new framework than under the existing legislation.

Transitional arrangements

2.1.7 In general, a fixed term custodial sentence of 12 months or more under the new framework will increase the sentence actually served (whether in custody or in the community) since it continues to the end of the term imposed. Existing guidelines issued since 1991 have been based on a different framework and so, in order to maintain consistency between the lengths of sentence under the current and the new framework, there will need to be some adjustment to the starting points for custodial sentences contained in those guidelines (subject to the special sentences under the 2003 Act where the offender is a “dangerous” offender).

2.1.8 This aspect of the guideline will be temporary to overcome the short-term situation where sentencing guidelines (issued since implementation of the reforms to custodial sentences introduced by the Criminal Justice Act 1991) are based on a different framework and the new framework has made those sentences more demanding. As new guidelines are issued they will take into account the new framework in providing starting points and ranges of appropriate sentence lengths for offences and an adjustment will not be necessary.

2.1.9 Since there are so many factors that will vary, it is difficult to calculate precisely how much more demanding a sentence under the new framework will be. The Council’s conclusion is that the sentencer should seek to achieve the best match between a sentence under the new framework and its equivalent under the old framework so as to maintain the same level of punishment. As a guide, the Council suggests the sentence length should be reduced by in the region of 15%.

2.1.10 The changes in the nature of a custodial sentence will require changes in the way the sentence is announced. Sentencers will need to continue²⁶ to spell out the practical implications of the sentence being imposed so that offenders, victims and the public alike all understand that the sentence does not end when the offender is released from custody. The fact that a breach of the requirements imposed in the second half of the sentence is likely to result in a return to custody should also be made very clear at the point of sentence.

²⁶ having reference to the *Consolidated Criminal Practice Direction* [2002] 2 Cr App R 533, Annex C, as suitably amended

- ❑ When imposing a fixed term custodial sentence of 12 months or more under the new provisions, courts should consider reducing the overall length of the sentence that would have been imposed under the current provisions by in the region of 15%.**
- ❑ When announcing sentence, sentencers should explain the way in which the sentence has been calculated, how it will be served and the implications of non-compliance with licence requirements. In particular, it needs to be stated clearly that the sentence is in two parts, one in custody and one under supervision in the community.**
- ❑ This proposal does not apply to sentences for dangerous offenders, for which separate provision has been made in the Act.**

(ii) Licence conditions

2.1.11 Under the Act, a court imposing a prison sentence of 12 months or more may recommend conditions that should be imposed by the Secretary of State (with advice from the Governor responsible for authorising the prisoner's release in consultation with the Probation Service) on release from custody.²⁷ Recommendations do not form part of the sentence and they are not binding on the Secretary of State.²⁸

2.1.12 When passing such a sentence, the court will not know with any certainty to what extent the offender's behaviour may have been addressed in custody or what the offender's health and other personal circumstances might be on release and so it will be extremely difficult, especially in the case of longer custodial sentences, for sentencers to make an informed judgement about the most appropriate licence conditions to be imposed on release. However, in most cases, it would be extremely helpful for sentencers to indicate areas of an offender's behaviour about which they have the most concern and to make suggestions about the types of intervention whether this, in practice, takes place in prison or in the community.

2.1.13 The involvement of the Probation Service at the pre-sentence stage will clearly be pivotal. A recommendation on the likely post-release requirements included in a pre-sentence report will assist the court with the decision on overall sentence length, although any recommendation would still have to be open to review when release is being considered. A curfew, exclusion requirement or prohibited activity requirement might be suitable conditions to recommend for the licence period. A court might also wish to suggest that the offender should complete a rehabilitation programme, for example for drug abuse, anger management, or improving skills such as literacy and could recommend that this should be considered as a licence requirement if the programme has not been undertaken or completed in custody.

²⁷ Criminal Justice Act 2003 section 238(1)

²⁸ *ibid* section 250

2.1.14 The Governor responsible for authorising the prisoner's release, in consultation with the Probation Service, is best placed to make recommendations at the point of release; this is the case at present and continues to be provided for in the Act. *Specific* court recommendations will only generally be appropriate in the context of relatively short sentences, where it would not be unreasonable for the sentencer to anticipate the relevance of particular requirements at the point of release. Making recommendations in relation to longer sentences (other than suggestions about the types of intervention that might be appropriate at some point during the sentence) would be unrealistic. The Governor and Probation Service should have due regard to any recommendations made by the sentencing court and the final recommendation to the Secretary of State on licence conditions will need to build upon any interventions during the custodial period and any other changes in the offender's circumstances.

□ A court may sensibly suggest interventions that could be useful when passing sentence, but should only make specific recommendations about the requirements to be imposed on licence when announcing short sentences and where it is reasonable to anticipate their relevance at the point of release. The Governor and Probation Service should have due regard to any recommendations made by the sentencing court but its decision should be contingent upon any changed circumstances during the custodial period.

□ The court should make it clear, at the point of sentence, that the requirements to be imposed on licence will ultimately be the responsibility of the Governor and Probation Service and that they are entitled to review any recommendations made by the court in the light of any changed circumstances.

SECTION 2 PART 2 – SUSPENDED SENTENCES OF IMPRISONMENT

A. Statutory Provisions

2.2.1 Section 189 Criminal Justice Act 2003

- (1) A court which passes a sentence of imprisonment for a term of at least 28 weeks but not more than 51 weeks²⁹ in accordance with section 181 may –
 - (a) order the offender to comply during a period specified for the purposes of this paragraph in the order (in this Chapter referred to as “the supervision period”) with one or more requirements falling within section 190(1) and specified in the order, and
 - (b) order that the sentence of imprisonment is not to take effect unless either –
 - (i) during the supervision period the offender fails to comply with a requirement imposed under paragraph (a), or
 - (ii) during a period specified in the order for the purposes of this sub-paragraph (in this Chapter referred to as “the operational period “) the offender commits in the United Kingdom another offence (whether or not punishable with imprisonment), and (in either case) a court having power to do so subsequently orders under paragraph 8 of Schedule 12 that the original sentence is to take effect.
- (2) Where two or more sentences imposed on the same occasion are to be served consecutively, the power conferred by subsection (1) is not exercisable in relation to any of them unless the aggregate of the terms of the sentences does not exceed 65 weeks.
- (3) The supervision period and the operational period must each be a period of not less than six months and not more than two years beginning with the date of the order.
- (4) The supervision period must not end later than the operational period.
- (5) A court which passes a suspended sentence on any person for an offence may not impose a community sentence in his case in respect of that offence or any other offence of which he is convicted by or before the court or for which he is dealt with by the court.
- (6) Subject to any provision to the contrary contained in the Criminal Justice Act 1967 (c.80), the Sentencing Act or any other enactment passed or instrument made under any enactment after 31st December 1967, a suspended sentence which has not taken effect under paragraph 8 of Schedule 12 is to be treated as a sentence of imprisonment for the purposes of all enactments and instruments made under enactments.
- (7) In this Part –
 - (a) “suspended sentence order “ means an order under subsection (1),
 - (b) “suspended sentence “ means a sentence to which a suspended sentence order relates, and

²⁹ Since “custody plus” is not expected to be brought into force until a later date, it is likely that transitional provisions will provide for this power to be used for any sentence of imprisonment of less than 12 months.

- (c) “community requirement”, in relation to a suspended sentence order, means a requirement imposed under subsection (1)(a).

2.2.2 Imposition of requirements – Section 190 Criminal Justice Act 2003

- (1) The requirements falling within this subsection are –
 - (a) an unpaid work requirement (as defined by section 199),
 - (b) an activity requirement (as defined by section 201),
 - (c) a programme requirement (as defined by section 202),
 - (d) a prohibited activity requirement (as defined by section 203),
 - (e) a curfew requirement (as defined by section 204),
 - (f) an exclusion requirement (as defined by section 205),
 - (g) a residence requirement (as defined by section 206),
 - (h) a mental health treatment requirement (as defined by section 207),
 - (i) a drug rehabilitation requirement (as defined by section 209),
 - (j) an alcohol treatment requirement (as defined by section 212),
 - (k) a supervision requirement (as defined by section 213), and
 - (l) in a case where the offender is aged under 25, an attendance centre requirement (as defined by section 214).
- (2) Section 189(1)(a) has effect subject to section 218 and to the following provisions of Chapter 4 relating to particular requirements-
 - (a) section 199(3) (unpaid work requirement),
 - (b) section 201(3) and (4) (activity requirement),
 - (c) section 202(4) and (5) (programme requirement),
 - (d) section 203(2) (prohibited activity requirement),
 - (e) section 207(3) (mental health treatment requirement),
 - (f) section 209(2) (drug rehabilitation requirement), and
 - (g) section 212(2) and (3) (alcohol treatment requirement).
- (3) Where the court makes a suspended sentence order imposing a curfew requirement or an exclusion requirement, it must also impose an electronic monitoring requirement (as defined by section 215) unless –
 - (a) the court is prevented from doing so by section 215(2) or 218(4), or
 - (b) in the particular circumstances of the case, it considers it inappropriate to do so.
- (4) Where the court makes a suspended sentence order imposing an unpaid work requirement, an activity requirement, a programme requirement, a prohibited activity requirement, a residence requirement, a mental health treatment requirement, a drug rehabilitation requirement, an alcohol treatment requirement, a supervision requirement or an attendance centre requirement, the court may also impose an electronic monitoring requirement unless the court is prevented from doing so by section 215(2) or 218(4).
- (5) Before making a suspended sentence order imposing two or more different requirements falling within subsection (1), the court must consider whether, in the circumstances of the case, the requirements are compatible with each other.

2.2.3 Power to provide for review – Section 191 Criminal Justice Act 2003

- (1) A suspended sentence order may –
 - (a) provide for the order to be reviewed periodically at specified intervals,
 - (b) provide for each review to be made, subject to section 192(4), at a hearing held for the purpose by the court responsible for the order (a “review hearing”),
 - (c) require the offender to attend each review hearing, and
 - (d) provide for the responsible officer to make to the court responsible for the order, before each review, a report on the offender’s progress in complying with the community requirements of the order.
- (2) Subsection (1) does not apply in the case of an order imposing a drug rehabilitation requirement (provision for such a requirement to be subject to review being made by section 210).
- (3) In this section references to the court responsible for a suspended sentence order are references –
 - (a) where a court is specified in the order in accordance with subsection (4), to that court;
 - (b) in any other case, to the court by which the order is made.
- (4) Where the area specified in a suspended sentence order made by a magistrates’ court is not the area for which the court acts, the court may, if it thinks fit, include in the order provision specifying for the purpose of subsection (3) a magistrates’ court which acts for the area specified in the order.
- (5) Where a suspended sentence order has been made on an appeal brought from the Crown Court or from the criminal division of the Court of Appeal, it is to be taken for the purposes of subsection (3)(b) to have been made by the Crown Court.

2.2.4 Periodic reviews – Section 192 Criminal Justice Act 2003

- (1) At a review hearing (within the meaning of subsection (1) of section 191) the court may, after considering the responsible officer’s report referred to in that, subsection, amend the community requirements of the suspended sentence order, or any provision of the order which relates to those requirements.
- (2) The court –
 - (a) may not amend the community requirements of the order so as to impose a requirement of a different kind unless the offender expresses his willingness to comply with that requirement,
 - (b) may not amend a mental health treatment requirement, a drug rehabilitation requirement or an alcohol treatment requirement unless the offender expresses his willingness to comply with the requirement as amended,
 - (c) may amend the supervision period only if the period as amended complies with section 189(3) and (4),
 - (d) may not amend the operational period of the suspended sentence, and
 - (e) except with the consent of the offender, may not amend the order while an appeal against the order is pending.

- (3) For the purposes of subsection (2)(a)–
- (a) a community requirement falling within any paragraph of section 190(1) is of the same kind as any other community requirement falling within that paragraph, and
 - (b) an electronic monitoring requirement is a community requirement of the same kind as any requirement falling within section 190(1) to which it relates.
- (4) If before a review hearing is held at any review the court, after considering the responsible officer's report, is of the opinion that the offender's progress in complying with the community requirements of the order is satisfactory, it may order that no review hearing is to be held at that review; and if before a review hearing is held at any review, or at a review hearing, the court, after considering that report, is of that opinion, it may amend the suspended sentence order so as to provide for each subsequent review to be held without a hearing.
- (5) If at a review held without a hearing the court, after considering the responsible officer's report, is of the opinion that the offender's progress under the order is no longer satisfactory, the court may require the offender to attend a hearing of the court at a specified time and place.
- (6) If at a review hearing the court is of the opinion that the offender has without reasonable excuse failed to comply with any of the community requirements of the order, the court may adjourn the hearing for the purpose of dealing with the case under paragraph 8 of Schedule 12.
- (7) At a review hearing the court may amend the suspended sentence order so as to vary the intervals specified under section 191(1).
- (8) In this section any reference to the court, in relation to a review without a hearing is to be read –
- (a) in the case of the Crown Court, as a reference to a judge of the court, and
 - (b) in the case of a magistrates' court, as a reference to a justice of the peace acting for the commission area for which the court acts.

2.2.5 *Breach, revocation or amendment of orders, and effect of further conviction–
Section 193 Criminal Justice Act 2003*

Schedule 12 (which relates to the breach, revocation or amendment of the community requirements of suspended sentence orders, and to the effect of any further conviction) shall have effect.

B. Imposing a Suspended Sentence

2.2.6 A suspended sentence is a sentence of imprisonment. It is subject to the same criteria as a sentence of imprisonment which is to commence immediately. In particular, this requires a court to be satisfied that the custody threshold has been passed and that the length of the term is the shortest term commensurate with the seriousness of the offence.

2.2.7 A court which passes a prison sentence of less than 12 months may suspend it for between 6 months and 2 years (the operational period).³⁰ During that period, the court can impose one or more requirements for the offender to undertake in the community. The requirements are identical to those available for the new community sentence.

2.2.8 The period during which the offender undertakes community requirements is “the supervision period” when the offender will be under the supervision of a “responsible officer”; this period may be shorter than the operational period. The court may periodically review the progress of the offender in complying with the requirements and the reviews will be informed by a report from the responsible officer.

2.2.9 If the offender fails to comply with a requirement during the supervision period, or commits a further offence during the operational period, the suspended sentence can be activated in full or in part or the terms of the supervision made more onerous. There is a presumption that the suspended sentence will be activated either in full or in part.

(i) The decision to suspend

2.2.10 There are many similarities between the suspended sentence and the community sentence. In both cases, requirements can be imposed during the supervision period and the court can respond to breach by sending the offender to custody. The crucial difference is that the suspended sentence is a prison sentence and is appropriate only for an offence that passes the custody threshold and for which imprisonment is the only option. A community sentence may also be imposed for an offence that passes the custody threshold where the court considers that to be appropriate.

2.2.11 The full decision making process for imposition of custodial sentences under the new framework (including the custody threshold test) is set out in paragraphs 1.31–1.33 of the Seriousness guideline. For the purposes of suspended sentences the relevant steps are:

- (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, can the sentence be served intermittently?
- (e) if not, impose a sentence which takes immediate effect for the term commensurate with the seriousness of the offence.

³⁰ The power to suspend a sentence is expected to come into force earlier than the provisions implementing “custody plus” and transitional provisions are expected to enable any sentence of imprisonment of under 12 months to be suspended. This guideline therefore is written in the language of the expected transitional provisions.

(ii) Length of sentence

2.2.12 Before making the decision to suspend sentence, the court must already have decided that a prison sentence is justified and should also have decided the length of sentence that would be the shortest term commensurate with the seriousness of the offence if it were to be imposed immediately. The decision to suspend the sentence should not lead to a longer term being imposed than if the sentence were to take effect immediately.

A prison sentence that is suspended should be for the same term that would have applied if the offender were being sentenced to immediate custody.

2.2.13 When assessing the length of the operational period of a suspended sentence, the court should have in mind the relatively short length of the sentence being suspended and the advantages to be gained by retaining the opportunity to extend the operational period at a later stage (see below).

The operational period of a suspended sentence should reflect the length of the sentence being suspended. As an approximate guide, an operational period of up to 12 months might normally be appropriate for a suspended sentence of up to 6 months and an operational period of up to 18 months might normally be appropriate for a suspended sentence of up to 12 months.

(iii) Requirements

2.2.14 The court will set the requirements to be complied with during the supervision period. Whilst the offence for which a suspended sentence is imposed is generally likely to be more serious than one for which a community sentence is imposed, the imposition of the custodial sentence is a clear punishment and deterrent. In order to ensure that the overall terms of the sentence are commensurate with the seriousness of the offence, it is likely that the requirements to be undertaken during the supervision period would be less onerous than if a community sentence had been imposed. These requirements will need to ensure that they properly address those factors that are most likely to reduce the risk of re-offending.

Because of the very clear deterrent threat involved in a suspended sentence, requirements imposed as part of that sentence should generally be less onerous than those imposed as part of a community sentence. A court wishing to impose onerous or intensive requirements on an offender should reconsider its decision to suspend sentence and consider whether a community sentence might be more appropriate.

C. Breaches

2.2.15 The essence of a suspended sentence is to make it abundantly clear to an offender that failure to comply with the requirements of the order or commission of another offence will almost certainly result in a custodial sentence. Where an offender has breached any of the requirements without reasonable excuse for the first time, the responsible officer must either give a warning or initiate breach proceedings.³¹ Where there is a further breach within a twelve-month period, breach proceedings must be initiated.³²

2.2.16 Where proceedings are brought the court has several options, including extending the operational period. However, the presumption (which also applies where breach is by virtue of the commission of a further offence) is that the suspended prison sentence will be activated (either with its original custodial term or a lesser term) unless the court takes the view that this would, in all the circumstances, be unjust. In reaching that decision, the court may take into account both the extent to which the offender has complied with the requirements and the facts of the new offence.³³

2.2.17 Where a court considers that the sentence needs to be activated, it may activate it in full or with a reduced term. Again, the extent to which the requirements have been complied with will be very relevant to this decision.

2.2.18 If a court amends the order rather than activating the suspended prison sentence, it must either make the requirements more onerous, or extend the supervision or operational periods (provided that these remain within the limits defined by the Act).³⁴ In such cases, the court must state its reasons for not activating the prison sentence,³⁵ which could include the extent to which the offender has complied with requirements or the facts of the subsequent offence.

2.2.19 If an offender near the end of an operational period (having complied with the requirements imposed) commits another offence, it may be more appropriate to amend the order rather than activate it.

2.2.20 If a new offence committed is of a less serious nature than the offence for which the suspended sentence was passed, it may justify activating the sentence with a reduced term or amending the terms of the order.

2.2.21 It is expected that any activated suspended sentence will be consecutive to the sentence imposed for the new offence.

2.2.22 If the new offence is non-imprisonable, the sentencer should consider whether it is appropriate to activate the suspended sentence at all.

Where the court decides to amend a suspended sentence order rather than activate the custodial sentence, it should give serious consideration to extending the supervision or operational periods (within statutory limits) rather than making the requirements more onerous.

31 Criminal Justice Act 2003 schedule 12, para 4

32 *ibid* para 5

33 *ibid* para 8(4)

34 *ibid* section 189 (3) and (4)

35 *ibid* schedule 12, para. 8(3)

SECTION 2 PART 3 – INTERMITTENT CUSTODY

A. Statutory Provisions

2.3.1 Section 183 Criminal Justice Act 2003

- (1) A court may, when passing a sentence of imprisonment for a term complying with subsection (4)–
 - (a) specify the number of days that the offender must serve in prison under the sentence before being released on licence for the remainder of the term, and
 - (b) by order –
 - (i) specify periods during which the offender is to be released temporarily on licence before he has served that number of days in prison, and
 - (ii) require any licence to be granted subject to conditions requiring the offender’s compliance during the licence periods with one or more requirements falling within section 182(1) and specified in the order.
- (2) In this Part “intermittent custody order” means an order under subsection (1)(b).
- (3) In this Chapter –

“licence period”, in relation to a term of imprisonment to which an intermittent custody order relates, means any period during which the offender is released on licence by virtue of subsection (1)(a) or (b)(i); “the number of custodial days”, in relation to a term of imprisonment to which an intermittent custody order relates, means the number of days specified under subsection (1)(a).
- (4) The term of the sentence –
 - (a) must be expressed in weeks,
 - (b) must be at least 28 weeks,
 - (c) must not be more than 51 weeks in respect of any one offence, and
 - (d) must not exceed the maximum term permitted for the offence.
- (5) The number of custodial days –
 - (a) must be at least 14, and
 - (b) in respect of any one offence, must not be more than 90.
- (6) A court may not exercise its powers under subsection (1) unless the offender has expressed his willingness to serve the custodial part of the proposed sentence intermittently, during the parts of the sentence that are not to be licence periods.
- (7) Where a court exercises its powers under subsection (1) in respect of two or more terms of imprisonment that are to be served consecutively –
 - (a) the aggregate length of the terms of imprisonment must not be more than 65 weeks, and
 - (b) the aggregate of the numbers of custodial days must not be more than 180.
- (8) The Secretary of State may by order require a court, in specifying licence periods under subsection (1)(b)(i), to specify only –
 - (a) periods of a prescribed duration,
 - (b) periods beginning or ending at prescribed times, or
 - (c) periods including, or not including, specified parts of the week.

- (9) An intermittent custody order which specifies two or more requirements may, in relation to any requirement, refer to compliance within such licence period or periods, or part of a licence period, as is specified in the order.

2.3.2 *Restrictions on power to make orders – Section 184 Criminal Justice Act 2003*

- (1) A court may not make an intermittent custody order unless it has been notified by the Secretary of State that arrangements for implementing such orders are available in the area proposed to be specified in the intermittent custody order and the notice has not been withdrawn.
- (2) The court may not make an intermittent custody order in respect of any offender unless –
- (a) it has consulted an officer of a local probation board,
 - (b) it has received from the Secretary of State notification that suitable prison accommodation is available for the offender during the custodial periods, and
 - (c) it appears to the court that the offender will have suitable accommodation available to him during the licence periods.
- (3) In this section “custodial period”, in relation to a sentence to which an intermittent custody order relates, means any part of the sentence that is not a licence period.

2.3.3 *Licence conditions – Section 185 Criminal Justice Act 2003*

- (1) Section 183(1)(b) has effect subject to section 218 and to the following provisions of Chapter 4 limiting the power to require the licence to contain particular requirements –
- (a) section 199(3) (unpaid work requirement),
 - (b) section 201(3) and (4) (activity requirement),
 - (c) section 202(4) and (5) (programme requirement), and
 - (d) section 203(2) (prohibited activity requirement).
- (2) Subsections (3) to (5) of section 182 have effect in relation to an intermittent custody order as they have effect in relation to a custody plus order.

2.3.4 *Further provisions – Section 186 Criminal Justice Act 2003*

- (1) Section 21 of the 1952 Act (expenses of conveyance to prison) does not apply in relation to the conveyance to prison at the end of any licence period of an offender to whom an intermittent custody order relates.
- (2) The Secretary of State may pay to any offender to whom an intermittent custody order relates the whole or part of any expenses incurred by the offender in travelling to and from prison during licence periods.
- (3) In section 49 of the 1952 Act (persons unlawfully at large) after subsection (4) there is inserted –
- “(4A) For the purposes of this section a person shall also be deemed to be unlawfully at large if, having been temporarily released in pursuance of an intermittent custody order made under section 183 of the Criminal Justice Act 2003, he remains at large at a time when, by reason of the expiry of the period for which he was temporarily released, he is liable to be detained in pursuance of his sentence.”

(4) In section 23 of the Criminal Justice Act 1961 (c.39)(prison rules), in subsection (3) for “The days “there is substituted “Subject to subsection (3A), the days” and after subsection (3) there is inserted –

“(3A) In relation to a prisoner to whom an intermittent custody order under section 183 of the Criminal Justice Act 2003 relates, the only days to which subsection (3) applies are Christmas Day, Good Friday and any day which under the Banking and Financial Dealings Act 1971 is a bank holiday in England and Wales.”

(5) In section 1 of the Prisoners (Return to Custody) Act 1995 (c.16) (remaining at large after temporary release) after subsection (1) there is inserted –

“(1A) A person who has been temporarily released in pursuance of an intermittent custody order made under section 183 of the Criminal Justice Act 2003 is guilty of an offence if, without reasonable excuse, he remains unlawfully at large at any time after becoming so at large by virtue of the expiry of the period for which he was temporarily released.”

(6) In this section “the 1952 Act “ means the Prison Act 1952 (c.52).

2.3.5 *Revocation or amendment – Section 187 Criminal Justice Act 2003*

Schedule 10 (which contains provisions relating to the revocation or amendment of custody plus orders and the amendment of intermitten custody orders) shall have effect.

B. Imposing an Intermittent Custody Order

2.3.6 Intermittent custody must be used only for offences that have crossed the custodial threshold. It is an alternative to immediate full-time custody and so must meet all the criteria that apply to such a sentence, in particular the need to pass the custody threshold and the need to ensure that the sentence is for the shortest term commensurate with the seriousness of the offence.

2.3.7 The prison sentence is not continuous but is interspersed by periods when the offender is released on temporary licence in the community. A court may only impose intermittent custody if the offender consents to serving the custodial part of the sentence intermittently. The court must also make sure that the relevant resources are available in the local area and must consult the Probation Service³⁶ to confirm that the offender is an appropriate candidate for such a sentence.

2.3.8 This sentence is currently being piloted and this guidance will be reviewed and may need to be developed further in the light of the outcome.

(i) Circumstances when intermittent custody may be appropriate

2.3.9 Guidance supporting the pilots³⁷ states that intermittent custody is not intended to be used for sex offenders or those convicted of *serious* offences of either violence or burglary. There may be other offences which by their nature would make intermittent custody inappropriate and public safety should always be the paramount consideration.

³⁶ Criminal Justice Act 2003 section 184(2)

³⁷ IC Pilot Project “A Brief Guide to Intermittent Custody” 02/03/04 HMPS

2.3.10 The circumstances of the offender are likely to be the determining factor in deciding whether an intermittent custody order is appropriate. It is only appropriate where the custody threshold has been crossed and where suspending the custodial sentence or imposing a non-custodial sentence have been ruled out. Suitable candidates for weekend custody might include offenders who are: full-time carers; employed; or in education.

2.3.11 The full decision making process for imposition of custodial sentences under the new framework (including the custody threshold test) is set out in paragraphs 1.31–1.33 of the Seriousness guideline. For the purposes of intermittent custody the relevant steps are:

- (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, can it be served intermittently?**
- (e) if not, impose a sentence which takes immediate effect for the term commensurate with the seriousness of the offence.

- Courts must be satisfied that a custodial sentence of less than 12 months is justified and that neither a community sentence nor a suspended sentence is appropriate before considering whether to make an intermittent custody order.**
- When imposing a custodial sentence of less than 12 months, the court should always consider whether it would be appropriate to sentence an offender to intermittent custody; primary considerations will be public safety, offender suitability and sentence availability.**
- Courts should strive to ensure that the intermittent custody provisions are applied in a way that limits discrimination and they should, in principle, be considered for all offenders.**

(ii) Licence requirements

2.3.12 As a primary objective of being able to serve a custodial sentence intermittently is to enable offenders to continue to fulfil existing obligations in the community, and since the time spent in custody is utilised extensively for activities, experience has so far shown that additional, similar, requirements to be completed whilst on licence are not practical. However, requirements such as curfews, prohibited activity and exclusion requirements might be appropriate in a particular case.

The practical workings of an intermittent custody sentence will effectively rule out the use of some of the longer or more intensive community requirements. Requirements such as curfews, prohibited activity and exclusion requirements might be appropriate in a particular case.

(iii) Sentence length

2.3.13 The demands made on the offender by this sentence will generally be considerably greater than for a custodial sentence to be served immediately in full. The disruptive effect on family life, the psychological impact of going in and out of custody and the responsibility on the offender to travel to and from the custodial establishment on many occasions all make the sentence more onerous.

Once a court has decided that an offender should be sent to prison and has determined the length of the sentence, it should reduce the overall length of the sentence because it is to be served intermittently.

ANNEX A

Time Spent on Remand – Sentencing Advisory Panel’s Advice

The Act makes provision for a sentencer to give credit for time spent on remand in custody where a custodial sentence is passed.³⁸ It also empowers the court to have regard to time spent on remand in custody when determining the restrictions on liberty to be imposed by a community order or youth community order.³⁹ Where an offender has spent several weeks in custody, this may affect the nature of the sentence that is passed. For example, where the court decides that a custodial sentence is justified some sentencers may decide to pass a community sentence instead, on the basis that the offender has already completed the equivalent of a punitive element in a sentence. The Panel takes the view that, given the changes in the content of the second part of a custodial sentence, in such cases it will be more appropriate to pass a custodial sentence knowing that licence requirements will be imposed on release from custody (which may be immediate). Recommendations made by the court at the point of sentence will then be of particular importance in influencing the content of the licence. This will help to ensure that the record clearly shows the assessment of seriousness of the offending behaviour.

Whereas the Act clearly states that time spent on remand is to be regarded as part of a custodial sentence unless the Court considers it unjust,⁴⁰ it states that sentencers passing a community sentence *may* have regard to time spent on remand, but no further information is given on how this discretion should be exercised. The Panel recognises that giving credit for time spent on remand is likely to be easier to apply in relation to punitive requirements rather than the rehabilitative elements of a community sentence. For example, reducing the number of unpaid work hours could be fairly easy, whereas reducing the length of a rehabilitation programme might not be appropriate as it could undermine its effectiveness. Where an offender has been kept on remand, one could take the view that this action was justified by the bail provisions and that the sentencer should not, therefore, feel obliged to adjust the terms of the community sentence. However, in principle, the Panel recommends that the court should seek to give credit for time spent on remand in all cases and should explain its reasons for not doing so when it considers either that this is not justified, would not be practical, or would not be in the best interests of the offender.

The court should seek to give credit for time spent on remand in all cases. It should make clear, when announcing sentence, whether or not credit for time on remand has been given and should explain its reasons for not giving credit when it considers either that this is not justified, would not be practical, or would not be in the best interests of the offender.

³⁸ Criminal Justice Act 2003 section 240.

³⁹ *ibid* section 149.

⁴⁰ *ibid* section 240 (which will, at a future date, replace Criminal Justice Act 1967, section 67, by which such period is now deducted automatically).

Where, following a period of time spent in custody on remand, the court decides that a custodial sentence is justified then, given the changes in the content of the second part of a custodial sentence, the court should pass a custodial sentence in the knowledge that licence requirements will be imposed on release from custody. Recommendations made by the court at the point of sentence will be of particular importance in influencing the content of the licence.⁴¹

⁴¹ This recommendation only applies to sentences of 12 months and above pending the implementation of 'custody plus'.
