



**A Response to the Criminal Bar Association to the Sentencing Guidelines Council  
Consultation on the ‘Imposition of Community and Custodial Sentences’**

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**Introduction**

1. The CBA represents the views and interests of practising members of the criminal Bar in England and Wales.
2. The CBA’s role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.
3. The CBA is the largest specialist Bar association, with over 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is maintained.

### **Overview of the Consultation**

4. *Overview. The Sentencing Council is proposing to issue a new definitive guideline for imposition of community and custodial sentences. The Sentencing Council is therefore seeking feedback from sentencers, justices' clerks, legal advisers, prosecutors, defence representatives and other interested parties on proposals to replace the New Sentences - Criminal Justice Act 2003 definitive guideline with a guideline for the Imposition of Community and Custodial Sentences.: <http://www.sentencingcouncil.org.uk/publications/item/new-sentences-criminal-justice-act-2003-definitive-guideline/> The draft guideline can be found here: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-final-consultation-paper>.*

### **Summary of Response**

5. The CBA notes the simultaneous increase in the use of suspended prison sentences and the drop in community orders. This is a matter of great concern, as it suggests that sentencers are routinely passing custodial sentences in cases when the correct penalty may be a community order. The reasons are not clear, but it seems highly unlikely that offending in all types of cases has grown correspondingly more serious during the same period, so as to justify the increase in such sentences.
6. We therefore welcome a re-statement of the governing principles, which should be of assistance to not just to sentencers and advocates, but especially to those preparing pre-sentence reports. They in particular must resist the temptation to be

over-defensive when recommending disposals, and must not ‘play safe’ (or seek to avoid criticism) by recommending too severe sentences if these are not merited.

7. Sentencers may turn first to the guideline (if any) that applies to the particular offence they are considering. Nevertheless, we would urge practitioners to make use of the proposed new general guideline to remind the Court where it mark the ‘custody threshold’ if there is a question about the side of the threshold on which the case lies.
8. More specifically, we would ask that due consideration be given to the incorporation of principles within the Bangkok Rules, officially termed as the ‘*United Nations Rules for the Treatment of Women Prisoners and Non-custodial measures for Women Offenders,*’ and which was unanimously voted for by the UN General Assembly, of which the UK is part of. The aspects relating to non-custodial sentences are contained at part III of the Bangkok rules, particularly at rules 57 to 62.

**In answer to each of the consultation questions, we propose as follows.**

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

9. Yes
10. The Sentencing Guidelines Council is asked to consider that within the Guidance reference to rule 2.3 of the Tokyo Rules and rule 58 of the Bangkok Rules that ‘*women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties. Alternative ways of managing women who commit offences, such as diversionary measures and pre-trial and sentencing alternatives, shall be implemented wherever appropriate and possible.*’

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

11. Yes

**Exceptional circumstances**

12. The current wording at page 4 of the guideline does not accurately reflect what section 177 states in terms of the application of exceptional circumstances.

13. Currently page 4 of the draft guideline states that:

*‘unless there are exceptional circumstances which relate to the offender that would make it unjust in all the circumstances to do so.’*

This is incorrect.

14. Section 177 of the Criminal Justice Act 2003 outlines that:

*‘(2B) Subsection (2A) does not apply where there are exceptional circumstances which—*

*(a) relate to the offence or to the offender,*

*(b) would make it unjust in all the circumstances for the court to comply with subsection (2A)(a) in the particular case, and*

*(c) would make it unjust in all the circumstances for the court to impose a fine for the offence concerned.’*

15. The draft guideline misses the principle that exceptional circumstances could apply to the aspect of the offence as well as the offender.

16. This interpretation of schedule 16 is also reflected at paragraph 503 of the explanatory notes to the Crime and Courts Act 2013.

17. Where no punitive requirement of a community order is to be imposed, according to an assessment of seriousness, the guideline indicates appropriate fine bands. This is useful, particularly for Crown Court Sentencers who may not frequently refer to fine bands.

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

18. We think the list provided by the Council should include the minimum and maximum number of days or hours applicable to each type of order – by way of lower and upper brackets.

Inclusion of the minimum and maximum number of days or hours applicable to each sentence should prevent unlawful sentences being passed – for instance, an Unpaid Work Order should be for a minimum of 40 hours and a maximum of 300 hours.

19. It may also be helpful to include in the guideline the general expectations of sentencing courts. For example, such that 7 hours of unpaid work per week is specified as the minimum expectation pursuant to the passing of a sentence with an Unpaid Work Order. This would help sentencers when imposing sentences because it is a practical presentation of exactly what is required and how onerous that is. This would also have the virtue of explaining more clearly Sentencing courts can set the agenda for the realistic, timely completion of a sentence. The Probation Service can execute the fine detail of requirements and orders within that.

20. The list of requirements fails to refer to the Women's Centre resources that increasingly are being used as part of a community order, to good effect. It may be that the Council envisaged that this forms part of a Rehabilitation activity requirement. However, a specific reference within the Guidelines, would inform sentencer the availability of Women's Centre, which may not be widely known?

21. In particular, we would ask that consideration be given to Rule 60 of the Bangkok Rules which outlines that *‘appropriate resources shall be made available to devise suitable alternatives for women offenders in order to combine non-custodial measures with interventions to address the most common problems leading to women’s contact with the criminal justice system. These may include therapeutic courses and counselling for victims of domestic violence and sexual abuse; suitable treatment for those with mental disability; and educational and training programmes to improve employment prospects. Such programmes shall take account of the need to provide care for children and women-only services.’*

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

#### Punishment Requirement

22. The “exceptional circumstances” exception for a punitive element should again be highlighted here. In practice, we find that a fine is rarely imposed alongside a community order as the punitive element.
23. The specific considerations section gives too great a weight to a rarely used (and often inappropriate) sentencing option.

#### Compatibility

24. More information regarding what “compatible” means may assist a sentence as compatibility can be something affecting both the resources of the probation service and the lifestyle of the offender amongst other things.
25. It is our collective experience that sentencers rarely know how the requirements attached to a community order operate in practice. For instance, that probation would expect a minimum commitment of 7 hours’ unpaid work per week or the number of sessions to be attended as part of a supervision requirement. As such,

simply including that requirements may be compatible with each other, may overestimate the extent to which sentencers are informed enough to know whether requirements are compatible.

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

PSRs:

26. This guidance could include the suggestion that full PSRs will not always be needed where the probation service can assess suitability for unpaid work.
27. The court can sometimes exclude certain (more serious) sentencing options when adjourning for the preparation of a PSR, for instance where the sentencer considers that the custody threshold is not passed. The guidance currently states that the court “must” make clear to the offender that all sentencing options remain open. We consider that the court’s ability to exclude such sentencing options (often considerably reducing stress for an offender and limiting the use of resources by probation) is a practice to be encouraged and one which the guideline should not explicitly rule out / eliminate, in a clear case.

Electronic Monitoring

28. In our collective experience, we have not seen the use of electronic monitoring in exclusion requirement cases. The guidance here may overstate the use of electronic monitoring for exclusion requirements. Exclusion requirements are often used to prevent attendance at licensed premises etc. Electronic monitoring in such a situation is often unnecessary / of limited or no use. The guidance should therefore be adapted to reflect this reality.

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

29. The risk with flow charts is that they replace proper consideration of the individual case. They should be used with caution. In our view, it is more helpful for sentencers to refer to the guidelines for the specific offence in question.

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

30. Yes

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

31. In the main the general principles do not appear to differ significantly from general principles currently set out within the Magistrates Court Sentencing Guidelines.

32. However, the Council is asked to re-consider the wording used in terms of when to obtain a pre-sentence report, namely that *'the court should obtain a pre-sentence report, unless the court considers a report to be unnecessary. Ideally a pre-sentence report should be completed on the same day to avoid adjourning a case.'*



For Crown Court users, a full or written pre-sentence report normally takes 4 weeks to prepare, and as a result we ask that that particular sentence be amended to reflect the practical realities faced in the preparation of pre-sentence reports.

**Section in terms of information considered when sentencing individuals with mental health issues:**

33. The Sentencing Council is asked to consider inclusion of reference to matters that concern individuals with mental health conditions, as per the requirements within section 157 of the Criminal Justice Act 2003.
34. A suggested summary that for example, could be inserted after the section on pre-sentence reports at page 8 of the guideline might well be:
  - *‘When dealing with an offender who is or appears to be mentally disordered, the court must obtain and consider a medical report before passing a custodial sentence.*
  - *This does not apply if the court considers a report to be unnecessary.*
  - *The court should consider any information relating to their mental health condition and also the likely effect of the sentence on that condition and any treatment which may be available to it.’*
35. There is currently no separate guideline in relation to the sentencing of individuals with mental health background conditions. It is vital in terms of the efficacy of any type of sentence, be it custodial or a community order to consider the interaction with any current medical treatment, and also an up to date assessment of an individual’s mental health condition, particularly if the court are looking at the imposition of a custodial sentence.

**Question 9: Do you agree with the approach to suspending custodial sentences?**

**Please give your reasons if you do not agree and/or highlight any additional information you believe should be included in this section of the guidance.**

36. Yes, however, again it is requested that adequate reflection be given to rule 2 of the Bangkok Rules, that outlines that ‘prior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangement for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of children.’

The difficulty in including other than highly generalized criteria will be the interplay between this guideline and Guidelines already published for specific offences.

**Question 10: Do you agree with the overall proposed guidance on imposition of community and custodial sentences?**

**Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.**

**Deferred sentences**

37. The guidance does not currently include reference to the option a sentencer has in both the Magistrates and Crown Courts has in terms of deferring sentences, under the Powers of Criminal Courts (Sentencing) Act 2000.
38. This allows a Court to defer a sentence for a period of up to 6 months to enable a court to have regard to an individual’s conduct after conviction or any change in their circumstances.

In addition a deferred sentence allows a court to impose requirements as to the offender’s conduct during that period of deferment.

The added feature is that such deferment acts ‘akin to a period of suspension’ and allows the court to consider that individual’s behaviour and compliance with requirements for up to a 6 month duration.

39. The current reference to deferred sentences within the Magistrates Courts Guidance is that ‘*sentences should be deferred in a small group of cases at either the custody threshold or the community sentence threshold where the court may be prepared to impose a lesser sentence provided the defendant is prepared to adapt his behaviour in a way clearly specified by the court.*’
40. This should be included within this guideline, particularly in light of the data analysis considered at page 4 of the consultation which outlines that there is a trend in decreasing volumes of community orders, and an increased use of suspended sentences.

### **Primary care-givers**

41. The Guidance does not specifically include reference to the impact of custodial sentences upon those individuals who are primary care-givers. It is noted that the section 125 of the Coroners and Justice Act 2009 provides the caveat that ‘*unless the court is satisfied that it would be contrary to the interests of justice to do so.*’
42. The Council is respectfully asked to consider the inclusion of factors such as being a primary care-giver, as this is fundamental to issues of ability of an individual to comply with community order requirements and addressing risk of re-offending.
43. Further, it is asked that the Bangkok Rules be adequately reflected within the principles of sentencing set out, in terms for example, taking into account Rules 57-60.

## **Offenders with mental health conditions**

44. It is suggested that there needs to be some reference to the sentencing principles of individuals with background mental health conditions. This is particularly for those who may be considered not to meet conditions for a hospital order, or mental health treatment requirement, but whose vulnerabilities and background health conditions are of crucial relevance when sentencing. One example may well be to insert a section at page 8 of the draft guideline post the section on pre-sentence reports (Please see response to question 7).