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Sentencing Guidelines Council

**Custodial Sentences of Less
Than 12 Months: Criminal
Justice Act 2003**

Consultation Guideline

CUSTODIAL SENTENCES OF LESS THAN 12 MONTHS

FOREWORD

The Sentencing Guidelines 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.

The Council receives advice from the Sentencing Advisory Panel which consults widely before tendering that advice. The Council then produces a draft guideline on which it seeks the views of a limited group as provided by the Criminal Justice Act 2003. The Panel's advice to the Council is being published simultaneously.

This draft guideline for the new "custody plus" sentence has been developed in expectation that the legislative provisions will be implemented in autumn 2006. Those provisions will replace the existing provisions relating to custodial sentences of less than 12 months. The Council has issued guidelines in relation to parts of the framework that have already been introduced.¹ This draft guideline covers both the circumstances in which the new sentence should be used and the way in which individual sentences should be structured.

The Council has reached the view that a custody plus order and a sentence of less than 12 months under the existing framework are so radically different that it is impossible (and probably undesirable) to construct any formulaic approach that achieves correlation between them.

Instead, the draft guideline explores the effect that the new orders have on the custody threshold. Conscious that the combination of a short period in custody followed by prescribed requirements set by the court will make a custody plus order a potentially attractive sentence, the guideline emphasises the statutory requirement that such an order should only be imposed where the offence is so serious that neither a fine alone nor a community order is justified.

The draft guideline considers in detail the structure of a custody plus order including both the relationship between the duration of the custodial and licence elements of the sentence and the nature and severity of the requirements that may be imposed during the licence period.

The Panel's advice (and discussion paper that formed the basis of consultation seminars) contains further background details. All documents can be found at www.sentencing-guidelines.gov.uk or can be obtained from the Council's Secretariat at 85 Buckingham Gate, London SW1E 6PD.

When the consultation period is concluded, the Council will consider any responses received and then issue definitive guidelines to which every court must have regard in accordance with section 172 of the 2003 Act.

Chairman of the Council
March 2006

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¹ *New Sentences: Criminal Justice Act 2003* published December 2004; www.sentencing-guidelines.gov.uk

CUSTODIAL SENTENCES OF LESS THAN 12 MONTHS

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CUSTODIAL SENTENCES OF LESS THAN 12 MONTHS

A. Statutory Provisions

Prison sentences of less than 12 months - Section 181 Criminal Justice Act 2003 provides:

- (1) *Any power of a court to impose a sentence of imprisonment for a term of less than 12 months on an offender may be exercised only in accordance with the following provisions of this section unless the court makes an intermittent custody order (as defined by section 183).*
- (2) *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.*
- (3) *The court, when passing sentence, must –*
 - (a) *specify the period (in this Chapter referred to as “the custodial period”) at the end of which the offender is to be released on a licence, and*
 - (b) *by order require the licence to be granted subject to conditions requiring the offender’s compliance during the remainder of the term (in this Chapter referred to as “the licence period”) or any part of it with one or more requirements falling within section 182(1) and specified in the order.*
- (4) *In this Part “custody plus order” means an order under section (3)(b).*
- (5) *The custodial period –*
 - (a) *Must be at least 2 weeks, and*
 - (b) *In respect of any one offence, must not be more than 13 weeks.*
- (6) *In determining the term of the sentence and the length of the custodial period, the court must ensure that the licence period is at least 26 weeks in length.*
- (7) *Where the court imposes two or more terms of imprisonment in accordance with this section to be served consecutively –*
 - (a) *The aggregate length of the terms of imprisonment must not be more than 65 weeks, and*
 - (b) *The aggregate length of the custodial periods must not be more than 26 weeks.*
- (8) *A custody plus order which specifies two or more requirements may, in relation to any requirement, refer to compliance within such part of the licence period as is specified in the order.*
- (9) *Subsection (3)(b) does not apply where the sentence is a suspended sentence.*

Licence conditions - Section 182 Criminal Justice Act 2003 provides:

- (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 supervision requirement (as defined by section 213), and*
 - (h) *in a case where the offender is aged under 25, an attendance centre requirement (as defined by section 214).*

- (2) *The power under section 181(3)(b) to determine the conditions of the licence 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), and*
 - (d) *section 203(2) (prohibited activity requirement).*

- (3) *Where the court makes a custody plus order requiring a licence to contain a curfew requirement or an exclusion requirement, the court must also require the licence to contain 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 custody plus order requiring a licence to contain an unpaid work requirement, and activity requirement, a programme requirement, a prohibited activity requirement, a supervision requirement or an attendance centre requirement, the court may also require the licence to contain an electronic monitoring requirement unless the court is prevented from doing so by section 215(2) or 218(4).*

- (5) *Before making a custody plus order requiring a licence to contain 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.*

1. The implementation of the custody plus order² introduces a major change to the character of short prison sentences. For the purposes of this guideline, the terms *custody plus* and *custody plus order* mean the totality of a custodial sentence of less than 12 months, comprising both the custodial and licence elements.

2. The custody plus order can be used as a sentence for all offenders aged 18 or over. It is the final element of the framework of sentencing options in the 2003 Act for offences that may attract custodial sentences.³ Once a court has decided to

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²Criminal Justice Act 2003, ss. 181 and 182

³ The power in the Magistrates' Courts Act 1980, s.135 to impose one day's detention remains in force.

impose a custody plus order, it can order that the sentence be suspended⁴ or, with the agreement of the offender, that it should be served intermittently.⁵

3. A custody plus order will consist of a “custodial period” and a “licence period”.⁶ When imposing a custody plus order, the court must specify the custodial period, the licence period and the requirements to be complied with during the licence period.⁷ There must be:

- (i) an overall term of between 28 and 51 weeks
- (ii) a custodial period of between 2 and 13 weeks
- (iii) a licence period of at least 26 weeks.

4. The term of the sentence **must** be expressed in weeks.⁸ The minimum term is 28 weeks;⁹ the maximum term is 51 weeks for a single offence¹⁰ and 65 weeks where two or more terms are imposed consecutively.¹¹ This is subject to the maximum provided for the offence,¹² although it is anticipated that all summary offences that allow for a custodial sentence will enable this sentence to be imposed in full.¹³

5. The custodial period must be for at least 2 weeks.¹⁴ It must not exceed 13 weeks for a single offence¹⁵ or 26 weeks where two or more terms are imposed consecutively.¹⁶ The offender will be released on licence on completion of the whole of the custodial period set by the court unless qualifying for early release.¹⁷ Whether or not a prisoner will be released early is not a relevant consideration in determining the appropriate length of the custodial period.

6. The licence period must be at least 26 weeks in length.¹⁸

7. The licence period will always be proportionately longer than the custodial element - at least 2:1 and at its extremes as much as 24:1 (i.e. 2 weeks in custody followed by 49 weeks on licence).

8. The licence period will be subject to conditions set by the court which will oblige the offender to comply with the requirements which the court has included in the order.

9. The court may determine whether the requirements are to be complied with throughout the licence period or only for a specified part of it.¹⁹ This enables the number and onerousness of requirements, and the period for which the offender is required to comply with them, to be adjusted so as to be commensurate with the

⁴ *ibid.* schedule 12, para.9

⁵ *ibid.* s.183

⁶ *ibid.* s.181(3)

⁷ *ibid.* s.181(3)

⁸ *ibid.* s.181(2)

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.* s.181(7)(a)

¹² *ibid.* s.181(2)(d)

¹³ *ibid.* ss.280-282

¹⁴ *ibid.* s.181(5)

¹⁵ *ibid.*

¹⁶ *ibid.* s.181(7)(b)

¹⁷ *ibid.* s.246 and s.260. In accordance with section 246, where the custodial period is at least 6 weeks and the prisoner has served at least 4 weeks or one half of that period (whichever is the greater), the Secretary of State may authorise release earlier than the end of the custodial period.

¹⁸ *ibid.* s.181(6)

¹⁹ *ibid.* s.181(3)(b)

seriousness of the offence; in the least serious of cases, the restriction on liberty may be minimal.

10. Restrictions relating to the way in which licence requirements can be imposed must be borne in mind when deciding on the content of the licence period and the period during which the requirements are to be complied with.
11. The maximum number of hours which can be ordered under an unpaid work requirement is 300. Where that requirement is imposed within a community order, the maximum number of hours is also 300 and the work must normally be completed within 12 months. Care must be taken when fixing the number of hours of unpaid work within a custody plus order, given that the licence period within which the work must be completed is variable, and may be only 26 weeks.
12. There are some restrictions on length that may mean that a requirement cannot continue for the whole of a licence period. For example, a curfew requirement can run for a maximum of 6 months.²⁰
13. In addition to the conditions imposed by the court, “standard conditions” (as provided by legislation²¹) will also be imposed during the licence period by the executive; these cover the offender’s obligations in relation to the instructions of the ‘responsible officer’ and general behaviour. Conditions for electronic monitoring and drug testing requirements may also be included, as may conditions considered necessary for the protection of the public.²²
14. Subject to paragraph 15 below, the requirements that may be imposed are the same as those available under a community order²³ or a suspended sentence order²⁴ and are subject to similar restrictions to those imposed under a community order.²⁵ In particular, there is an obligation to impose electronic monitoring in most cases where a curfew or exclusion requirement is included and a power to do so for all other requirements.
15. Four requirements that can be included within a community order or suspended sentence order are excluded from a custody plus order. These are:
 - (i) a residence requirement;
 - (ii) a mental health treatment requirement;
 - (iii) a drug rehabilitation requirement; and
 - (iv) an alcohol treatment requirement.
16. At any time while a custody plus order is in force, the court may revoke or amend the *conditions* attached to a custody plus order if, on the application of the offender or the responsible officer, it appears that it would be in the interests of justice to do so, having regard to circumstances which have arisen since the order was made. This power does not affect the *custodial term* of the order.²⁶

²⁰ *ibid.* s.204(3), (4)

²¹ *ibid.* s.250(1), (2)(a)(ii) and Criminal Justice (Sentencing Licence Conditions) Order, S.I. 2005 / 648

²² *ibid.* s.250(2)(b) and s.62 and s.64 Criminal Justice and Court Services Act 2000

²³ *ibid.* ss.182(1) and 177(1)

²⁴ *ibid.* s.190

²⁵ *ibid.* s.182(2)-(5)

²⁶ *ibid.* schedule 10, paras. 3 to 5

17. Whilst a licence requirement can be cancelled or replaced with another suitable requirement,²⁷ a court should endeavour to ensure that the requirements imposed at the time of sentence are the most suitable in all the circumstances. The pre-sentence report, which will be based on the court's indication of the purpose of the sentence and will take into account the availability and suitability of particular requirements, will provide information to help the court decide on the nature of the licence period.
18. A court should decide first on a provisional overall term (see paragraph 52 below). That term must be for the shortest period (within the 28 to 51 week range) that is commensurate with the seriousness of the offence.
19. Within the overall term, the custodial term also should be for the shortest term (within the 2 to 13 week range) that is commensurate with the seriousness of the offence. Since the overall term of the order has already been decided, this would automatically set the length of the licence period.
20. However, there is no need for an offender to be required to comply with licence requirements until the end of that period²⁸ (save that, if a supervision requirement is contained in the licence, it must apply to the entire length of the licence period²⁹) and so there would still be flexibility for the nature and length of the requirements to be adjusted to suit the individual offender.
21. A court must then check that, overall, the term of the order is the shortest term commensurate with the seriousness of the offence.

B. The general approach

It is not possible for sentencing guidelines to include a formulaic methodology for comparing custody plus orders with custodial sentences of less than 12 months under existing legislation, and sentencers should not attempt to do so.

The aim of the guideline on the custody plus order is to establish the general principles to be applied when considering whether a custody plus order is the most appropriate disposal.

Existing guidelines in relation to the imposition of short custodial sentences should in future be read in the light of the new sentences that are available.³⁰

The custody plus order is potentially more onerous than a custodial sentence of less than 12 months under existing legislation.

Comparison with existing short custodial sentences

22. A custody plus order is a custodial sentence. It is designed to make short custodial sentences more effective in reducing re-offending than short custodial sentences under the existing framework. However, the requirements imposed during the licence period widen the scope of the sentence to include reparation and 7.

²⁷ *ibid.* sched. 10, paras. 4 and 5

²⁸ *ibid.* s.181(3)(b)

²⁹ *ibid.* s.213

³⁰ See further the advice of the Sentencing Advisory Panel, paras.20-26 www.sentencing-guidelines.gov.uk

rehabilitation. The degree to which these two parts complement each other is likely to be guided by a balance between offence seriousness and offender profile. Such an order has the potential to impose a greater restriction on liberty than existing short custodial sentences. The restriction may be in the form of periods of unpaid work or other requirements, whereas neither supervision nor any licence conditions attach to pre Criminal Justice Act 2003 short custodial sentences.

23. Statute prescribes the minimum and maximum terms of a custody plus order; it also prescribes the minimum and maximum lengths of the custodial period and the minimum and maximum length of the licence period. However, it does not prescribe the correlation between the three (except in relation to the minimum sentence of 28 weeks) and, since a court can select from a range of licence requirements when imposing sentence, there is a wide range of possible orders.
24. The flexible nature of the custody plus order was designed to enable a court to tailor a sentence to an individual offender; any attempt to restrict the use of those provisions would undermine the clear intentions of Parliament. Consistency of sentencing *approach* is vital if the new sentencing framework is to be effective and respected, but variation in sentencing *outcomes* will be a consequence of the greater flexibility accorded to the courts.

C. Imposing a custody plus order

A custodial sentence must be imposed only when an offence is so serious that neither a fine alone nor a community sentence can be justified.

25. Now that the new sentencing framework is complete, sentencers will need to approach the decision regarding the crossing of the custody threshold and the decision on the content of a custody plus order in the light of the significant changes that have been made.

Custody threshold

26. A custodial sentence should only be imposed where a court forms the view that the offence (or the combination of the offence and one or more offences associated with it) was so serious that neither a fine alone nor a community sentence can be justified.³¹ Since both community orders and custody plus orders are potentially more onerous and restrictive on liberty than equivalent sentences under the previous framework and legislation, this threshold is higher than previously.
27. Once the threshold has been passed, a court may still select a non-custodial sentence.³²
28. Taking account of all the circumstances of the offence and the offender, the court should first consider whether a fine alone can be justified even though the offence seriousness crosses the custody threshold. If so, a fine should be imposed.

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³¹ Criminal Justice Act 2003, s.152(2)

³² *ibid.* s.166(2); *Overarching Principles: Seriousness*, page 8, published December 2004; www.sentencing-guidelines.gov.uk

