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Response to	Imposition of community and custodial sentences
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The Magistrates' Association (MA) welcomes the Sentencing Council's consultation on a new guideline on the imposition of community and custodial sentences. In general, greater clarity on the imposition of community and custodial (including suspended) sentences is a positive development. The MA has made its suggestions for improvements in that spirit.

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

Yes, we agree with the general principles for community orders.

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

It is stated that the seriousness of the offence should be the initial factor in determining which requirements to include in the community order. The MA believes it would be clearer to say that seriousness is the initial factor in determining the level of order, but which requirements to include will depend on a number of factors to do with the offence and the offender.

The levels are clear for those requirements listed, but it is also important to include rehabilitative requirements in addition, as these will frequently form part of a community order and sentencers need appropriate guidance on how they fit into the overall sentence they are considering. In particular, guidance on what length of rehabilitation activity requirement might normally be appropriate for a low, medium or high level requirement, also bearing in mind the rehabilitation needs of the offender, is required.

We therefore suggest inclusion of appropriate lengths for an RAR under low, medium and high levels. A general note would also be helpful to the effect that other requirements as listed at page 5 may be included as appropriate, as long as there is at least one element of the order which is identified as punitive.

In the interests of consistency with low-level and high-level community orders, it would seem sensible to include '1-2 requirements' in the column for medium-level orders.

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

When explaining rehabilitation activity requirements (RARs), it would be clearer to say that 'This requirement can be used either on its own or in conjunction with another requirement,' rather

than 'Where appropriate this requirement should be made in addition to, and not in place of, other requirements listed above', as this avoids any possible implication that a RAR can only be given together with another requirement. The current text states that these should not be imposed instead of other requirements available to support rehabilitation, and that these requirements should be made in addition to, and not in place of, other requirements. However, options such as gender-specific requirements for women are likely to be offered under the RAR rather than programme requirements, and it may well be that a RAR carried out at (for instance) a women's centre would be the only requirement on a community order.

It is also important to note that it will usually be necessary to obtain some information from the National Probation Service to know what rehabilitative requirements are available, whether programme requirements or RAR. If magistrates are to gauge how onerous a RAR will be for the defendant before them, they need to have a reasonable idea of what that defendant is expected to do and whether a community order with the RAR as the sole requirement can be deemed to meet the requirement for a punitive element in the sentence. More generally, it is crucial for sentencers to be in a position to know whether the broader requirements of sentencing have been met. A reference to the need for appropriate information from the NPS would therefore assist.

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.

The specific considerations are clear and comprehensive. However, the information given about the RAR could be read to contradict them, as per the MA's response to question 3. Of course, 'The particular requirements imposed must be suitable for the individual offender' may necessitate (for example) a single RAR requirement on a community order where this allows for a particular programme to be offered.

Again, it will be crucial that the court receives the appropriate information from the NPS to be able to gauge whether a community order in this circumstance can fulfil statutory requirements and the purposes of sentencing.

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

It should be noted that there is generally no need for a pre-sentence report where the only requirement is unpaid work of up to 80 hours or curfew (though some confirmation about the suitability of a curfew or unpaid work requirement may be required), or where a Band D fine is to be imposed in lieu of a community order.

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.

It would be helpful to include the number of requirements cited in the table giving example requirements for different levels of community order, eg 'Low (usually a single requirement)', 'Medium (usually one or two requirements)' and 'High (usually two or more requirements)'. 'Fine (Band A to Band C) or Discharge' may be less misleading where the offence is not serious enough for a community order.

A reference to considering whether a Band D fine might be appropriate where the offence has crossed the community threshold would also be helpful, as it would make the point that a fine of

this level is equivalent to a community order in its own right (as opposed to a lower level fine being a valid punitive addition).

A general note would also be helpful to the effect that rehabilitative requirements may be included as appropriate, as long as there is at least one element of the order which is identified as punitive.

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.

It should be made clear that guidance from the NPS will be particularly important for assessing rehabilitative options, usually for repeat offenders. Community orders for punitive purposes can often be by way of curfew, and a Band D fine can be used as an alternative disposal. Neither generally requires a report from the NPS (though some confirmation about the suitability of a curfew may be required) and can be sentenced without the need to adjourn or put cases back for reports.

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.

The MA has concerns about how the definition of the custody threshold may be interpreted by some sentencers. While this remains anecdotal, mixed views were expressed by MA Committee members on whether or not the nature of the custody threshold and ‘cusp of custody’ was fully clear and whether it was being interpreted differently. The MA would like to see more research into this question, to look at what is being understood by the current language and to consider whether appropriate training may be useful to ensure consistency of interpretation and practice. The MA would be willing to work with appropriate bodies to carry out any research and follow-up implementation. The suggestions made below aim to provide more clarity and guidance on the agreed principles and aims around the custody threshold.

The MA warmly welcomes the references to the potential impact of a custodial sentence on dependants. It suggests, though, that this should be considered in all custodial cases where custody might be avoidable, not just ‘cusp of custody’ cases. As this is a new reference, the MA would also suggest that it should be clarified that sentencers are considering a ‘significant’ impact. This is also an area where sentencers would benefit from training to ensure that the impact on dependants is fully considered, and the MA would be more than happy to work with others in this area.

The wording of the ‘so serious that neither a fine alone or nor a community sentence can be justified for the offence’ definition placed first may cause confusion, as later in the process alternative options are in fact considered, so we would suggest moving that definition to the end. The text on the approach to imposing a custodial sentence would, with our suggestions, read as per the below:

The approach to the imposition of a custodial sentence should be as follows:

- 1) Has the custody threshold been passed?
 - The custody threshold is indicated within specific guidelines.
 - The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences. Crossing the custody threshold indicates that custody is an option, not that it is inevitable.

- 2) If so, is it unavoidable that a custodial sentence be imposed?
 - Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable; custody can still be avoided in light of offender mitigation or where there is a suitable intervention in the community which provides sufficient restriction on the offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.
 - Alternatives to custody should be considered in all cases where custody might be avoidable.
 - For offenders, would imprisonment result in a significant impact on dependants which would make a custodial sentence disproportionate?
- 3) What is the shortest term commensurate with the seriousness of the offence?
 - In considering this the court must NOT consider any licence or post sentence supervision requirements which may subsequently be imposed upon the offender's release.
- 4) Can the sentence be suspended? See page 9.
- 5) A custodial sentence, whether immediate or suspended, must not be imposed unless the offence 'was so serious that neither a fine alone or nor a community sentence can be justified for the offence'.

Finally, the MA suggests it would be worth including the reasons why a PSR would be required before deciding whether custody was inevitable: it would not be possible without information from the NPS to know whether there was suitable intervention in the community and because information on the offender would be needed to assess offender mitigation, effects on dependants and so forth. Any previous history of sentencing may also be pertinent and assist with decisions, especially where custody had been deemed avoidable in the past.

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.

Including the potential impact on offenders and/or dependants as above would highlight the importance of not imposing a suspended sentence (as opposed to a community order) where activation would be disproportionate.

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.

It needs to be made clear that aggravation or mitigation, including credit for guilty plea, and other information (such as victim impact statements) can have an effect on sentence level and may have the effect of taking the offence above or below the custody threshold.