

PUBLISHED FOR CONSULTATION ONLY



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

29. If a fine alone cannot be justified, the court should consider whether a community order can be justified. Again, this will take account of all the circumstances of the offence and the offender and the potential punishment and rehabilitation offered by a community order. See paragraphs 33-38 below for more detail concerning these considerations.
30. Only after these options have been eliminated will the proper course be to make a custody plus order.
31. Where a court decides on a custody plus order, it must consider whether that sentence can be suspended, whether it can be served intermittently or whether it must be served in full immediately.³³
32. Where a court imposes a custodial sentence, it must be for the “shortest term” that “in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it”.³⁴

A custody plus order should not be imposed where a community order would have been imposed under the existing legislative provisions. This would be wholly inappropriate.

The decision making steps whether taken by the same or successive sentencers 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?
- (d) if not, can it be served intermittently?
- (e) if not, impose a sentence which takes immediate effect, with custodial and licence terms that are commensurate with the seriousness of the offence.

Comparison with other sentences

33. The differences between the custody plus order and other sentences available are summarised below. This summary is intended to assist courts to adopt a consistent approach to the selection of the most appropriate sentence in the light of the particular facts of the case:

(i) Community orders

When deciding whether to impose a community order or a custody plus order, the court’s decision will be guided primarily by the seriousness of the offence.

The purposes of sentencing identified by the court and the degree to which an individual offender is likely to benefit from longer rehabilitative requirements will be very important considerations and might suggest that a community order would be the appropriate sentence in all the circumstances.

³³ *New Sentences: Criminal Justice Act 2003*, pages 20-31, published December 2004; www.sentencing-guidelines.gov.uk

³⁴ Criminal Justice Act 2003, s.153 (2)

34. The most obvious difference is that the custody plus order includes a period spent in custody, and will be the appropriate disposal where the court considers that a custodial sentence is necessary to mark the seriousness of an offence.
35. A community order may be imposed even though an offence has crossed the custody threshold.³⁵ This commonly occurs where there are some personal mitigating features and a community order appears to the court to be more appropriate in all the circumstances.
36. The differences between a custody plus order and a community order that a court will need to take into account when deciding which is the most appropriate disposal are:

❖ *The response to breach of a requirement is different.*

i) If a requirement is not complied with during a *community order*, enforcement proceedings will be brought before a court. The court will proceed on the basis that the primary purpose when sentencing for breach is to ensure future compliance; the ultimate sanction is a custodial sentence.³⁶

ii) If a requirement is not complied with during a *custody plus order*, enforcement action is by immediate (executive) recall to custody without recourse to a court. The date of release following that recall will be decided by the Parole Board rather than the court.

❖ *The length of the overall terms and the range of requirements that can be imposed within the orders differ (see paragraph 15 above).* The non-availability of requirements such as drug rehabilitation and alcohol treatment orders will inevitably have an impact on what a court can reasonably expect to be achieved from the sentence.

The maximum term of a custody plus order imposed for a single offence is 51 weeks, of which a maximum of 49 weeks can be spent subject to licence requirements, whereas a community order can run for up to 3 years³⁷ and the offender can be subject to requirements for that whole period. Some of the more intense programme requirements may not be able to be completed within the term of a custody plus order.

All requirements, whether primarily punitive or rehabilitative, restrict an offender's liberty and can be regarded as a punishment. A number of short programmes, alone or in addition to a supervision requirement, will be available within the licence period of a custody plus order which can normally be completed within 26 weeks. These programmes can be used to help an offender deal with the underlying problems that are likely to lead to re-offending. A pre-sentence report will indicate whether specific programmes are available and the suitability of an offender to undertake them.

³⁵ Criminal Justice Act 2003, s.166(2); *New Sentences: Criminal Justice Act 2003*, page 10, published December 2004; www.sentencing-guidelines.gov.uk

³⁶ *New Sentences: Criminal Justice Act 2003*, page 13, published December 2004; www.sentencing-guidelines.gov.uk

³⁷ Criminal Justice Act 2003, s.177(5)

37. Nevertheless, the fact that a community order can run for a much longer period than the licence period of a custody plus order, during which time intensive programmes are available, must inevitably mean that a community order can place greater demands on an offender whilst also offering a greater opportunity for rehabilitation. Where an offender is most likely to be discouraged from re-offending through rehabilitation and he or she has specific longer-term treatment needs, the community order will generally be the most appropriate disposal.

(ii) Suspended sentence orders

A court should impose a suspended sentence order only where it is satisfied that a custodial sentence is necessary to mark the seriousness of an offence and that the sentence cannot be brought down to a community order or fine by personal mitigation.

Having decided that a custody plus order is the most appropriate sentence, consideration as to whether that sentence should be suspended should be guided both by the extent to which the purposes of sentencing could be achieved more effectively through reparation and rehabilitation in the community, and by the risk of re-offending.

38. A custody plus order can be suspended for between 6 months and 2 years (the operational period)³⁸ subject to the offender complying with requirements specified by the court. The period during which the offender must comply with requirements (the supervision period) may be shorter than (but must not be longer than) the operational period.³⁹ Thus the period of time during which an offender may be required to comply with requirements could potentially be significantly longer than the maximum 49 week period available for a single custody plus order.

39. A court may only impose a suspended sentence order where it is satisfied that a custodial sentence is unavoidable. A court will need to be satisfied both that the custodial threshold has been passed and that it is not possible to impose a community order, a fine or another non-custodial sentence.

40. A Council guideline⁴⁰ emphasises that the custodial term within a suspended sentence should be for no longer than that which would have been imposed if the offender was being sentenced to immediate custody. In addition, the guideline says that requirements imposed as part of a suspended sentence order should generally be less onerous than those imposed as part of a community sentence.

41. When imposing a suspended sentence order, the court will set the overall term and the custodial period of the custody plus order that is being suspended but will not determine the requirements to be completed during the licence period should that sentence be implemented. However, the court will set the requirements to be complied with during the supervision period of the suspended sentence order, which include those conditions that are not available under a custody plus order (see paragraph 15 above).

11.

³⁸ Criminal Justice Act 2003, s. 189(3)

³⁹ *ibid.* s.189 (1)(a) and 189(4)

⁴⁰ *New Sentences: Criminal Justice Act 2003*, page 25, published December 2004; www.sentencing-guidelines.gov.uk

42. A suspended sentence order is a custodial sentence. Where the requirements of a suspended sentence order are breached, or where any other offence (whether or not punishable with a sentence of imprisonment) is committed, there is a presumption that the sentence will be activated (either with its original term and/or custodial period or with a lesser term and/or custodial period⁴¹) unless the court considers that would be unjust.

43. The range of requirements that can be imposed as part of a suspended sentence order is the same as that available within a community order. A suspended sentence order may be considered an attractive option when the court has rehabilitation of the offender as its primary purpose.

(iii) Intermittent custody

44. An intermittent custody order can be imposed only with the consent of the offender. It is currently available only in a small number of pilot areas. Guidance is already available in the Council guidelines⁴² as to when a custodial sentence under the pre-Criminal Justice Act 2003 framework might be ordered to be served intermittently.

45. If a custody plus order is imposed intermittently,⁴³ the periods in custody are interspersed with periods when the offender is on temporary licence in the community, subject to requirements specified by the court at the point of sentence. The requirements available are the same as those available under a custody plus order⁴⁴ with the treatment requirements being excluded as an option in both sentences. The number of custodial days is no less than 14 (as with a custody plus order) and no more than 90 (approximately the same as the maximum 13 weeks in custody as part of a custody plus order).

46. An intermittent custody order is more flexible than a custody plus order in that the term of imprisonment may be served in small sections, which may enable an offender to maintain employment or caring responsibilities. The Council guideline states that, because of the demands on the offender, the term of a sentence should be reduced when it is to be served intermittently.⁴⁵ It also states that, having determined that a custodial sentence is unavoidable, the decision whether to impose an intermittent custody order is to be guided by public safety, offender suitability and availability of the appropriate facilities.

47. Since the intermittent custody order will not change significantly as a result of the implementation of the custody plus provisions, the Council has concluded that there is no reason to reconsider the existing guideline.

D. The structure of a custody plus order

48. When imposing a custody plus order, the primary aims are to impose a sentence that taken as a whole:

⁴¹ *ibid.* Schedule 12, Part 2, paragraph 8(2)

⁴² *New Sentences: Criminal Justice Act 2003*, published December 2004; www.sentencing-guidelines.gov.uk

⁴³ Criminal Justice Act 2003, s.183

⁴⁴ *ibid.* s.183(1)(b)(ii)

⁴⁵ *New Sentences: Criminal Justice Act 2003*, page 31, published December 2004; www.sentencing-guidelines.gov.uk

- i) restricts liberty to a degree that is proportionate to the seriousness of the offence committed,
- ii) meets the purposes of sentencing directed by the court and
- iii) imposes requirements on the offender that are realistic and achievable.

49. The general principles that follow are designed to ensure both a consistent approach to the sentencing decision and that the overall terms of custody plus orders are consistent for similar offending behaviour and for offences of similar degrees of seriousness.

50. In summary, the approach to determining the content of a custody plus order will be as follows:

- i. Having decided to impose a custody plus order, a court must begin by determining the provisional overall term of the order (within the 28 to 51 week range); this must be for the shortest term commensurate with the seriousness of the offence.**
- ii. The next step is to determine the length of the custodial period (within the 2 to 13 week range), which should also be the shortest term commensurate with the seriousness of the offence.**
- iii. Once the overall term of the order and the length of the custodial period have been decided, a court must impose suitable licence requirements and decide whether these are to be complied with during part or all of the licence period.**
- iv. The court should review all elements of the custody plus order to ensure proportionality.**

51. The structure of an order must depend on the particular circumstances of each individual case. The following part of the Guideline is designed to ensure consistency of approach.

52. As with a community order, offences justifying a custody plus order can be divided into three categories of general seriousness, **Low, Medium and High**. Sentencing ranges are set out below for each category. These are starting points designed to enable consistency of approach. A court will always need to be alert to the obligation to ensure that the order matches the seriousness of the offence and adjustments to one or other element must be considered in the light of the impact of the order taken as a whole.

53. The requirements proposed for each of the ranges are based on those recommended for community orders in the guideline on New Sentences⁴⁶ recognising the additional factor that the offender is also being sentenced to a period in custody. An activity requirement (which, in practice, is most likely to involve education or life management skills training) is added as an option in the Low range and all three ranges include the option of a rehabilitative programme requirement.

⁴⁶ *New Sentences: Criminal Justice Act 2003*, pages 9 to 10, published December 2004; www.sentencing-guidelines.gov.uk

54. Examples of suitable activity and programme requirements are not given as the nature of the requirement and the period of time for which it should run will need to be determined on an individual basis according to availability and offender need.

When deciding on the content of a custody plus order, a court must bear in mind that breach of a requirement will lead to executive recall⁴⁷ and the offender will not be returned to court.

55. As the sentence includes a custodial element, it may not be necessary for all licences to include a primarily punitive requirement.

56. A court must ensure that the sentence strikes the right balance between proportionality and suitability and that, where more than one licence requirement is imposed, the requirements are mutually compatible.

57. A requirement should not be imposed unless there is good reason for it and it is achievable during the licence period; the nature of the requirements and the length of the licence period will vary between offenders.

58. The extent to which a licence includes a balance of punitive, reparative and rehabilitative requirements must be guided by the offender profile in an individual case, as identified in the pre-sentence report.

59. A court must always consider whether primarily rehabilitative requirements, including a supervision requirement and/or a programme requirement, would be more effective in reducing re-offending than primarily punitive requirements.

60. When deciding which requirements to include, the court needs to be aware that the standard licence conditions, which will apply in every case except where they are incompatible with requirements imposed by a court, already include an element of supervision. Supervision is key to the successful monitoring of the licence period and it would be sensible for the courts to impose a supervision requirement in all cases.

The decision whether to impose additional or more onerous requirements should be guided by the seriousness of the offence, as set out below:

⁴⁷ In accordance with National Standards.

Low level of seriousness	Medium level of seriousness	High level of seriousness
For offences just crossing the custody threshold	For offences that obviously fall within the custody plus category	For offences that only just fall below the 12 months threshold
i. An overall term of up to 28 weeks	i. An overall term of up to 29-40 weeks	i. An overall term of up to 41-51 weeks
ii. A custodial period of 2 weeks	ii. A custodial period of up to 3-9 weeks with a variable licence period	ii. A custodial period of up to 10-13 weeks and a variable licence period
iii. A maximum of two requirements, one of which will normally be a supervision requirement	iii. In general no more than two licence requirements, one of which will normally be a supervision requirement	iii. It may be appropriate to include two or more requirements at this level, one of which will normally be a supervision requirement
<p>Suitable requirements in addition to a supervision requirement <u>might</u> include:</p> <ul style="list-style-type: none"> ○ 40 to 60 hours of unpaid work ○ an activity requirement in the low range (up to 20 days) ○ a prohibited activity requirement ○ an attendance centre requirement (where available) ○ a programme requirement ○ a curfew requirement within the lowest range e.g. up to 12 hours a day for a few weeks ○ an exclusion requirement lasting in the region of a few weeks or until the end of the order, depending on the purpose of the exclusion 	<p>Suitable requirements in addition to a supervision requirement <u>might</u> include:</p> <ul style="list-style-type: none"> ○ 60 to 80 hours of unpaid work ○ an activity requirement in the middle range (up to 30 days) ○ a prohibited activity requirement ○ a programme requirement ○ a curfew requirement within the middle range e.g. up to 12 hours a day for 2 to 3 months ○ an exclusion requirement lasting in the region of a few months or until the end of the order, depending on the purpose of the exclusion 	<p>Suitable requirements in addition to a supervision requirement <u>might</u> include:</p> <ul style="list-style-type: none"> ○ 80 to 100 hours of unpaid work ○ an activity requirement up to the maximum 60 days ○ a programme requirement ○ a curfew requirement up to a maximum of up to 12 hours a day for 4 to 6 months ○ an exclusion order lasting until the end of the custody plus order
	<p>Within this range it may not be necessary both to fix a longer custodial period and increase the number or length of requirements. The increased onerousness of the order may also be satisfied by increasing the period of time for which the requirements are imposed rather than by imposing additional requirements.</p>	<p>Within this range it may not be necessary both to fix a longer custodial period and increase the number or length of requirements. The increased onerousness of the order may also be satisfied by increasing the period of time for which the requirements are imposed rather than by imposing additional requirements.</p>

E. Sentencing multiple offences

Imposing two or more custody plus orders

61. Where a court imposes two or more custody plus orders to be served consecutively, statute provides for the maximum custodial period to be increased from 13 to 26 weeks (an increase of 100%).⁴⁸ The overall term of the sentence, however, rises only from 51 to 65 weeks (an increase of only 27%) and the minimum length of time for which the licence period must run (26 weeks) is not changed.
62. Therefore, there is potential to increase substantially the period of time spent in custody without making any significant consequential change to the length of the licence period. However, since the overall term must be the shortest term that is commensurate with the seriousness of the offence, the court may decide to increase the onerousness of the licence requirements and the period of time during which the offender must comply with them. Where all sentences are custody plus orders, the licence period will be the longest of the licence periods imposed.⁴⁹
63. In deciding the length and terms of sentence for multiple offences, the same approach should be adopted as for a single offence. That will require a court first to determine the provisional overall term of the order and then to determine the appropriate length of the custodial period for each offence. The length and nature of the licence period can then be determined in the same way as for a single offence. A court may wish to increase the length of the licence period or the nature of the requirements to reflect the seriousness of multiple offending and to address any possibility that the offender is proportionately more likely to re-offend.

Imposing a sentence of 12 months or more and a custody plus order

Where a court is imposing a custody plus order to be served concurrently with or consecutively to a sentence of 12 months or over, it may sensibly recommend interventions that might be useful when passing sentence but the only requirement it should impose for the licence period is a supervision requirement.

When imposing a sentence of 12 months or more, a court should make it clear that the requirements to be included in the licence will be the responsibility of the Governor and the Probation Service who are entitled to review the recommendations made by the court in the light of any changed circumstances.

64. More complex issues arise where a court is intending to impose a custodial sentence of 12 months or more and a custody plus order either concurrently or consecutively. This is most likely to occur in the Crown Court. Where appropriate, a Court may consider that one or more sentences of 12 months or more can be a proper response to the totality of the offences. In such circumstances, it may be appropriate to impose “no separate penalty” for those offences which would otherwise have received a custody plus order.

⁴⁸ Although some academic commentators suggest that the wording of the statute restricts the custodial period to 13 weeks even for consecutive sentences, the Council has adopted the standard approach to the interpretation of this provision.

⁴⁹ Criminal Justice Act 2003, s.263(2)(c) and s.264(4),(5)

65. Separate provisions govern the length of the licence period to be completed by the offender where concurrent or consecutive sentences are imposed on the same or on different occasions.

- (i) Where at least one sentence is for 12 months or more and the sentences are concurrent, the length of the licence period will be the longest period of any of the sentences imposed.⁵⁰ The terms of the licence will be set by the Secretary of State without regard to the requirements of the custody plus order.⁵¹
- (ii) Where at least one sentence is for 12 months or more and at least two sentences are imposed consecutively, the licence period will be for the length of time from release to the end of the overall total of all the sentences in aggregate.⁵²

66. The Council has already published a definitive guideline stating that a court imposing a custodial sentence of 12 months or more should only make specific recommendations about licence requirements when announcing relatively short sentences and where it is reasonable to anticipate their relevance at the point of release.⁵³ A court imposing a custody plus order is, however, required to specify in the order the requirements to be complied with during the licence period.

67. Where a custody plus order and a custodial sentence of 12 months or more are imposed concurrently or consecutively, it would be unreasonable to expect a court to specify the requirements that are likely to be most appropriate at the point of release. In such cases, a court should require the licence to be granted subject to a supervision requirement only, on the basis that the Governor and the Probation Service will be best placed to decide on suitable requirements at the point of release.

68. The court might wish to make a recommendation about the nature of the requirements it considers would be most effective in achieving its purpose in sentencing and the Probation Service should have due regard to any recommendation at the point of release. However, it will also need to take into account any interventions during the custodial period and any change in the offender's circumstances. This point must be made clear at the point of sentence.

F. Reduction for a guilty plea

The appropriate reduction for a guilty plea should be applied to any or all of the punitive elements of a custody plus order depending on the circumstances of the case. This may include reducing the sentence to a suspended sentence order or a community order.

69. The guideline on reduction for a guilty plea⁵⁴ states that a reduction in sentence should be applied only to the *punitive* elements of a sentence. It also states that the

⁵⁰ *ibid.* s.263(2)(c)

⁵¹ *ibid.* s.263(3)

⁵² *ibid.* s.264(3)

⁵³ *New Sentences: Criminal Justice Act 2003*, page 19, published December 2003, www.sentencing-guidelines.gov.uk

⁵⁴ *Reduction in Sentence for a Guilty Plea*, page 4, published December 2004; www.sentencing-guidelines.gov.uk

application of a reduction may properly form the basis for imposing a fine or a discharge instead of a community order, or a community order instead of a custodial sentence.

70. When applied to a custody plus order, a reduction for a guilty plea might reduce the overall term of the order or might be applied to one or more of its constituent elements i.e. the custodial period, the licence period or the licence requirements. In general, a reduction for a guilty plea applied to a custodial sentence should result in a shorter sentence; when such a reduction is applied to a custody plus order this should ordinarily result in a reduced overall term.

71. However, circumstances will arise where the custody plus order that would have been imposed before applying a reduction for a guilty plea would have been for the minimum 28 weeks. Since the guideline does not require sentencers to apply the reduction for a guilty plea to *all* of the punitive elements of a sentence, there is sufficient flexibility to enable a court to apply the principles on which the reduction is based whilst imposing a sentence appropriate to the offence committed.

72. In such circumstances, a court has three equally legitimate options:

- (i) to suspend the custody plus order that would have been imposed, or
- (ii) to reduce the sentence to a top end community order with requirements suitable for the **High** level of seriousness identified in the Council guideline,⁵⁵ or
- (iii) where the court considers that an immediate custodial sentence is still justified in all the circumstances of the case, to apply the reduction to any or all of the punitive elements of the licence requirements.

73. In all cases, but most particularly where the court applies the reduction only to certain elements of the order, it will be important for the court to explain clearly how the reduction has been applied and why. Where, as a result of the reduction attributable to a guilty plea, a magistrates' court has retained a case for sentencing that it would otherwise have sent to the Crown Court, it is important that that is stated clearly, particularly where the sentence imposed is at (or close to) the maximum available in that court.

G. Time spent on remand

Where the court considers that the correct sentence is a custody plus order and, because of the period of time the offender has spent on remand in custody, he or she will be eligible for immediate release, the court should still impose the custody plus order to mark the seriousness of the offence, unless it considers that a community order is more appropriate in all the circumstances, having particular regard to the desirability of reducing the risk of re-offending.

It is not appropriate to impose a community order instead of a custody plus order solely because of the period of time spent on remand. The sentence must reflect the true seriousness of the offending behaviour.

18.

⁵⁵ *New Sentences: Criminal Justice Act 2003*, page 10, published December 2003, www.sentencing-guidelines.gov.uk

Where an offender has spent more time in custody on remand than the custodial period of the custody plus order, the court might wish to consider whether the length or severity of the licence period should be reduced.

74. By virtue of sections 240 to 242 of the Criminal Justice Act 2003, a defendant will normally receive credit against sentence for time spent in custody on remand as a result of a court order in connection with the offence concerned or any other offence the charge for which was founded on the same facts or evidence. This period will reduce the time spent in custody but will not affect the length of the licence period.

75. Save for a small number of situations where there is potential for duplication of reduction,⁵⁶ a court must direct that the time on remand is to count as time served unless the court considers it just not to give that direction.⁵⁷

76. Given the relatively short period of custody that can be imposed as part of a custody plus order, there may be situations where the imposition of a custody plus order will result in the immediate release from custody of the offender. In those circumstances, a court may be tempted to consider whether it should impose a community order with its longer period of supervision. In the guideline *New Sentences: Criminal Justice Act 2003*,⁵⁸ the Council considered the equivalent position in relation to sentences of 12 months and above and stated that, in such circumstances, the court should continue to impose a custodial sentence. The Council's view is that this should also be the position with a custody plus order. Such a sentence properly marks the seriousness of the offence.

77. Nothing in this proposal is intended to discourage sentencers from imposing a non-custodial sentence (for example a community order with a drug treatment requirement) where the court considers that, even though the offence has crossed the custody threshold, a community order is likely to be more effective in rehabilitating the offender and reducing the likelihood of re-offending.

H. A custody plus order or a custodial sentence of 12 months?

A magistrates' court will rarely impose a sentence of 12 months but may consider such a sentence where the seriousness of the offence requires the more significant impact of a longer custodial period, rather than a longer licence period.

A 12 month custodial sentence should be imposed when a one third reduction for a guilty plea is applied to an 18 month custodial sentence.

78. Once the relevant provisions are implemented, a magistrates' court will have the power to impose a fixed term custodial sentence of 12 months.⁵⁹ This is close in length to the maximum overall term of a custody plus order, and it is therefore important to be clear about the circumstances in which a court should decide upon one type of custodial sentence rather than the other. 19.

⁵⁶ see the Remand in Custody (Effect of Concurrent and Consecutive Sentences of Imprisonment) Rules 2005, SI 2005/2054

⁵⁷ Criminal Justice Act 2003, s.240(3),(4)

⁵⁸ at paras. 1.1.37-1.1.39

⁵⁹ Criminal Justice Act 2003, s.154(1)

79. Subject to the early release provisions, a 12 month sentence would result in the offender:

- ❖ being in custody for 6 months and
- ❖ being on licence for 6 months
- ❖ the terms of the licence being determined by the Governor and the Probation Service at the time of release

80. A custody plus order will:

- ❖ vary in length from 28 weeks to 51 weeks;
- ❖ consist of a custodial period ranging from 2 weeks to 13 weeks for a single offence; and
- ❖ consist of a licence period of between 26 weeks and 49 weeks
- ❖ have conditions of the licence set primarily by the court at the time that sentence is imposed

81. The custodial element of any sentence imposes the maximum restriction on liberty and an offender will spend a significantly longer period in custody if a 12 months sentence is imposed. Therefore, the Council considers that this sentence should be imposed for a single offence only where the court is satisfied that the seriousness of the offence requires 6 months in custody as the shortest period of punishment. This is most likely to be the case where the impact of the custodial period better fulfils the purposes of sentencing that the court had in mind when imposing sentence, or where the offender has pleaded guilty at the first reasonable opportunity to an offence that would have warranted a sentence of 18 months following a not guilty plea.

82. A sentence of 12 months or more triggers a statutory duty on local probation boards to take reasonable steps to find out whether a victim of a sexual or violent offence wishes to be informed and consulted about arrangements for the offender's release from custody.⁶⁰ One consequence of imposing a custody plus order will be that this statutory obligation will not be triggered. The general sentencing principle that a sentence must be for the shortest period that is commensurate with the seriousness of an offence should be applied and the decision on sentence length should not be influenced by trigger points for ancillary provisions.

⁶⁰ Criminal Justice and Courts Service Act 2000, s.69 and Domestic Violence Crime and Victims Act 2004, s.35