

A Missing Step?

The interaction of *the guidelines on the imposition of community and custodial sentences* and the specific offence guidelines

1. On 24 April 2018 Lord Justice Treacy, Chairman of the Sentencing Council, wrote to all courts to remind them of the duty to follow the Council's Imposition of Community and Custodial Sentences Definitive Guidelines ('the Guidelines'). The letter can be found [here](#). The Guidelines can be found [here](#).
2. These Guidelines had been in force since February 2017 but the Council was concerned that they were not being followed. The concern raised was that the Guidelines were not being followed in relation to the imposition of suspended sentences. New guidelines, not yet published, on how courts are to deal with breaches of suspended sentences may lead to more defendants having their suspended sentences activated for breaches. This will put more pressure on the prisons, something the government and the courts are trying to avoid.
3. However, there is another element of the Guidelines which are helpful to those mitigating for clients at sentencing hearings.
4. Page 7 of the Guidelines is headed Imposition of Custodial Sentences. Stage 1) requires the court to ask Has the custody threshold been passed? Taking a case of Assault Occasioning Actual Bodily Harm that involves the use of a shod foot (higher culpability) against a vulnerable dependent (higher culpability) then the specific guideline for assaults stipulates that this is a Category 1 Offence with a starting point of 1 year and 6 months custody and a range of 1 – 3 years.
5. However, there is a vital second step that the court must ask itself at Stage 2) of those Guidelines Is it unavoidable that a sentence of imprisonment be imposed? That means that custody should not be imposed where a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.

Is it unavoidable that a sentence of imprisonment be imposed?

- *Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.*
- *For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.*

6. This is reinforced in Lord Justice Treacy's letter where he writes of suspended sentences that *they can only be imposed where the court has determined first that the custody threshold has been crossed and second that custody is unavoidable. Only once these two decisions have been made following the structured exercise set out in the Imposition guideline, can custody be imposed.* This structure applies to custodial sentences, suspended or not.

Before introducing the breach guideline, we decided that in the interests of effective and fair sentencing, this issue needed to be addressed. This is why the Council developed the Imposition guideline, which makes it clear that a suspended sentence is a custodial sentence and not a more severe form of community order. They can only be imposed where the court has determined first that the custody threshold has been crossed and second that custody is unavoidable. Only once these two decisions have been made following the structured exercise set out in the Imposition guideline, can custody be imposed. At that point the court may then undertake a weighted assessment of the various factors which may lead the court to consider that it is possible to suspend the sentence.

7. For the assault example given above it is arguable that the offender could be punished by a significant number of unpaid work hours, attached to a community order, with an exclusion requirement and rehabilitation activity requirement days would punish the offender, protect the specific victim and the wider public and provide rehabilitation.
8. Take the example of a defendant convicted of dealing class A drugs at street level. Assuming he is a significant role, the normal categorisation for a dealer operating for financial gain, then the starting point is 4 years and 6 months with a range of 3 years 6 months to 7 years. Even with a maximum discount of 1/3 a custodial sentence would not be capable of suspension. However, applying the Guidelines it is arguable that a custodial sentence is not unavoidable. Instead, it may be submitted, that a youthful offender with limited previous convictions could be punished with a strict curfew and onerous unpaid work and rehabilitated with RAR hours. By the same token, the public could be protected by the imposition of a curfew and by an exclusion zone excluding the offender from the dealing location.

The Missing Step

9. All of the offence specific guidelines have steps that court must go through when sentencing offenders.

10. The majority go like this:

Step 1: Determining the Offence Category

Step 2: Starting point and category range

Step 3: Consider any other factors which indicate a reduction, such as assistance to the prosecution

Step 4: Reduction for guilty pleas

Step 5: Dangerousness [if relevant]

Step 6: Totality principle

Step 7: Compensation and ancillary orders

Step 8: Reasons

Step 9: Consideration for remand time

Where should the missing step of 'is custody unavoidable' be placed?

- 11. Clearly it should be before Steps 7, 8 and 9. And arguably it should be before Step 6, Totality, as the court will have to check any sentence it has arrived at against totality after coming up with an initial sentence.
- 12. The most suitable place for this step, mandated as it is by the Guidelines on the Imposition of Community and Custodial Sentences, is after Step 2. The court should consider where in the sentence specific guidelines the offence falls and then consider whether a community order, with the many different options that can be attached, can fulfil the sentencing objectives. As the Guidelines themselves say at page 3, 'a community order can fulfil all of the purposes of sentence.' The most important of these being punishment of offenders, protection of the public and rehabilitation.

The missing step restored

Step 1: Determining the Offence Category

Step 2: Starting point and category range

Step 2a: is a custodial sentence unavoidable? Can an imaginative community sentence fulfil the necessary requirements of sentencing?

Step 3: Consider any other factors which indicate a reduction, such as assistance to the prosecution

Step 4: Reduction for guilty pleas

Step 5: Dangerousness [if relevant]

Step 6: Totality principle

Step 7: Compensation and ancillary orders

Step 8: Reasons

Step 9: Consideration for remand time

- 13. Of course, Steps 3, 4 and 6 may be applied out of order to suggest, due to credit and other factors, that a community sentence is suitable instead of a custodial sentence. Even if the custody threshold is passed AND it is considered that a custodial sentence must be imposed, the court should consider the Guidelines on the imposition of such sentences to see if the sentence can be suspended. The relevant factors to consider are these:

Factors indicating that it would <u>not</u> be appropriate to suspend a custodial sentence	Factors indicating that it may be appropriate to suspend a custodial sentence
Offender presents a risk/danger to the public	Realistic prospect of rehabilitation
Appropriate punishment can only be achieved by immediate custody	Strong personal mitigation
History of poor compliance with court orders	Immediate custody will result in significant harmful impact upon others

- 14. For offenders on the cusp of custody there is the consideration, mirrored at page 8 of the Guidelines on suspended sentences, that custody should not be imposed when the impact on dependants would be disproportionate.

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