JUDICIAL COLLEGE

The Crown Court Compendium

Part II: Sentencing

December 2019

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The first version of this Sentencing Compendium was published in May 2016. It was written by Sir David Maddison, His Honour Simon Tonking and His Honour John Wait and Professor David Ormerod QC.

This latest revision continues the process of substantially revising and updating that original version. HHJ Jonathan Cooper and Lyndon Harris have taken the lead in carrying out a substantial revision of much of the content working closely with HHJ Martin Picton (lead editor) in that endeavour.

The editing team of Part 1 of the Compendium have also assisted.

The principal changes made in the course of this revision are by way of referencing new case law that has emerged since the last edition. Those include but are not limited to:

- *PS and Ors*[1] – relevance of a defendant's mental health to the sentencing process;
- *DPP v Giles*[2] – need for a Newton hearing to resolve matters that represented statutory aggravating factors;
- What may or may not trigger the award of full credit for plea – *West*[3] (informal discussions), *Davids*[4] (entry on BCM form that a plea is 'likely'), *Yasin*[5] (indictable only offence but no indication of plea sought in the Magistrates' Court – still 25%), *Bold*[6] (admissions in interview but no plea in Magistrates' Court);
- *Hussain*[7] – guilty plea cannot be reflected in decision to suspend;
- *Robinson*[8] – where reasons given for the decision not to suspend the Court of Appeal should be slow to interfere;
- *Middleton*[9] – examination of the balancing exercise when considering whether to suspend;
- Dawes[10] – wrong to impose a suspended sentence when time on remand *means* there is no effective period of custody that might be served if breached;
- *Fisher*[11] – sentencing options for mentally disordered offenders with expanded text to cover this issue;

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1 [2019] EWCA Crim 2286
2 [2019] EWHC 2015 (Admin)
3 [2019] EWCA Crim 497
4 [2019] EWCA Crim 553
5 [2019] EWCA Crim 1729
6 [2019] EWCA Crim 1539
7 [2018] EWCA Crim 780
8 [2019] EWCA Crim 1619
9 [2019] EWCA Crim 663
10 [2019] EWCA Crim 848
11 [2019] EWCA Crim 1066

- *Almilhim*[12] – Goodyear procedure is not a bargaining exercise;
- *Utton*[13] – a Goodyear indication has to be accepted in a reasonable time to be binding and what will amount to a reasonable time will depend on the circumstances.

HHJ Martin Picton, HHJ Jonathan Cooper and Lyndon Harris
24th December 2019

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12 [2019] EWCA Crim 220
13 [2019] EWCA Crim 1341

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S1 STYLE AND ABBREVIATIONS

Unless the context indicates otherwise: any reference to a person in the masculine is to be read as including the feminine; and 'Judge' includes 'Recorder'.

Cases are usually referred to by the name of the defendant only, and by neutral citations.

The following abbreviations are used:

AJA	Administration of Justice Act 1970
CDA	Crime and Disorder Act 1998
CAJA	Coroners and Justice Act 2009
CCA	Crime and Courts Act 2013
CDDA	Company Directors Disqualification Act 1986
CJA	Criminal Justice Act 2003
CJCA	Criminal Justice and Courts Act 2015
CJPOA	Criminal Justice and Public Order Act 1994
CJIA	Criminal Justice and Immigration Act 2008
CJPA	Criminal Justice and Police Act 2001
CrimPD*	Consolidated Criminal Practice Directions
CrimPR*	Criminal Procedure Rules 2016
CYPA	Children and Young Persons Act 1933
D	The/a defendant
DPP	Detention for Public Protection
DTO	Detention and training order
IPP	Imprisonment for Public Protection
LASPO	Legal Aid and Sentencing and Punishment of Offenders Act 2012
LP(ECP)A	Licensed Premises (Exclusion of Certain Persons) Act 1980
MDA	Misuse of Drugs Act 1971
MHA	Mental Health Act 1983
ORA	Offender Rehabilitation Act 2014
OWA	Offensive Weapons Act 2019
PCC(S)A	Powers of Criminal Courts (Sentencing) Act 2000

PoCA	Proceeds of Crime Act 2002
PSA	Psychoactive Substances Act 2016
SC	Sentencing Council
SGC	Sentencing Guidelines Council
SOA	Sexual Offences Act 2003
YOI	Young Offender Institution

***NOTE:**

CrimPR and Crim PD are available at – http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015

S2 STATUTORY PRINCIPLES OF SENTENCING

The principles underpinning the sentencing system

1. The overarching principle is proportionality, requiring that a sentence is proportionate to the seriousness of the offence [CJA 2003 s.143].

2. Determining seriousness involves numerous components:

   (1) Assess culpability and harm (actual, intended or foreseeable) [CJA 2003 s.143(1)].

   (2) Previous convictions [CJA 2003 s.143(2)] to be treated as an aggravating factor. A previous conviction is an offence for which the conviction was obtained prior to the commission of the offence(s) before the court for sentence.[14]

   (3) Offence committed while on bail [CJA 2003 s.143(3)] to be treated as an aggravating factor.

   (4) Further aggravating factors:

      (a) hostility by reason of race or religion [CJA 2003 s.145];

      (b) hostility by reason of disability, sexual orientation or transgender identity [CJA 2003 s.146 as amended by s.65 LASPO];

      (c) supply of controlled drug outside of a school [MDA 1971 s.4A];

      (d) supply of a psychoactive substance in the vicinity of school premises, using a courier who is aged under 18 or in a custodial institution [PSA 2016 s.6];

      (e) using a person under 18 to mind a weapon [VCRA 2006 s.29];

      (f) offence committed against an emergency worker exercising their functions as such [AEW(O)A 2018 s.2];

      (g) in relation to statutory aggravating factors, the CACD has observed that it is difficult to conceive of a case in which the presence of such a factor would be immaterial to sentence and therefore a *Newton* hearing would not be necessary: *DPP v Giles*.[15]

3. Every court MUST in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and MUST, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function [CJA 2009 s.125] unless the court is satisfied that it would be contrary to the interests of justice to do so. This may involve considering the category of offence within a SC Guideline or more generally as part of the statutory duty explained in SGC Guideline: Overarching Principles: Seriousness. Reference should also be made to the SC Guideline: Imposition of Community and Custodial Sentences.

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[14] *Darrigan* [2017] EWCA Crim 169; [2017] 1 Cr.App.R. (S.) 50
[15] [2019] EWHC 2015 (Admin)

4. The seriousness of an offence may be reduced by a guilty plea [CJA 2003 s.144 and SC Guideline: Reduction in Sentence for a Guilty Plea]. To attract a reduction for a guilty plea, the defendant must enter/indicate a guilty plea. The following circumstances will be insufficient to attract a reduction:
   (1) Informal discussions regarding a guilty plea to a lesser offence: *West*;[16]
   (2) An entry on the Better Case Management Form to the effect that the defendant is likely to plead guilty: *Davids*;[17]
   (3) A plea entered in the Crown Court because in indictable offences the practice may be for the magistrates' court to not ask for an indication of plea: *Yasin*;[18]
   (4) Admitting the offence at the police station but not entering a plea at the magistrates' court: *Bold*.[19]

5. Guilty plea cannot be reflected in the decision to suspend a sentence: *Hussain*:[20]

6. When determining the proportionate sentence to be imposed, the court will have regard to the various purposes of sentencing:

7. In cases involving those aged 18 and over at date of conviction the court must have regard to the following:
   (1) Punishment
   (2) Crime reduction (including deterrence)
   (3) Reform and rehabilitation
   (4) Public protection
   (5) Making of reparation [CJA 2003 s.142]

7. In cases involving those aged under 18 the court must have regard to the following:
   (1) The welfare of the child or young person and in a proper case take steps for removing the child or young person from undesirable surroundings and for securing that proper provision is made for their education and training [CYPA s.44]
   (2) The need to prevent offending by children and young persons [CDA s.37]

Thresholds for imposing custodial and community sentences

8. Discretionary custodial sentences:
   (1) The offence, or the combination of the offence and any other/s associated with it, must be such that neither a fine alone nor a community sentence can

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16 [2019] EWCA Crim 497
17 [2019] EWCA Crim 553
18 [2019] EWCA Crim 1729
19 [2019] EWCA Crim 1539
20 [2018] EWCA Crim 780

be justified [CJA 2003 s.152(2) and SC Guideline: Imposition of Community and Custodial Sentences].

(2) If the court is not imposing a minimum sentence, the sentence imposed must be for the shortest term commensurate with the seriousness of the offence/combination of offences [CJA 2003 s.153(2)].

9. Community sentences: the offence/combination of offences must be serious enough to warrant such a sentence [CJA 2003 s.148].

S3 APPROACH TO SENTENCING

This note seeks to assist sentencers in following the process required by statute, the Guidelines of the SC and SGC and the Court of Appeal.

1. In every case the sentencer is required to determine the seriousness of the offence (see S2 above).

2. In cases where there is an offence-specific sentencing guideline, reference must be made to that (see S12 Appendix SI below).

3. In cases in which there is an offence-specific guideline, the following language should be used:

   (1) "**Category starting point**" describes the figure provided for by the category which the sentencer determines best represents the offence.

   (2) "**Upward adjustment**" describes the increase for aggravating features.

   (3) "**Downward adjustment**" describes the reduction for mitigation (including personal mitigation).

   (4) "**Appropriate figure for sentence following a contested trial**" describes the appropriate sentence prior to a reduction for a guilty plea.[21]

4. In cases in which there is no applicable guideline, the above language should be used, save that "**starting point**" rather than "category starting point" should be used.

5. The process to be followed is:

   (1) Determine offence seriousness (i.e. harm and culpability).

   (2) Consider aggravating factors (i.e. those increasing seriousness), both statutory (e.g. previous relevant convictions, on bail, racial, religious, disability or sexual aggravation) and other non-statutory matters (e.g. alcohol, abuse of power, breach of trust).

   (3) Consider mitigating factors (i.e. those reducing seriousness), e.g. those relating to the offence, such as provocation or excessive self-defence; and those relating to the offender, such as positive good character, offender's vulnerability, mental health[22], remorse or other personal mitigation.

   (4) Consider any assistance given to the prosecution.

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21 *Bush* [2017] EWCA Crim 137; [2017] 1 Cr.App.R. (S.) 49

22 *PS and Ors* [2019] EWCA Crim 2286 – [18] "It follows that in some cases, the fact that the offender suffers from a mental health condition or disorder may have little or no effect on the sentencing outcome. In other cases, it may have a substantial impact. Where a custodial sentence is unavoidable, it may cause the sentencer to move substantially down within the appropriate guideline category range, or even into a lower category range, in order to reach a just and proportionate sentence. A sentence or two in explanation of those choices should be included in the remarks.

(5) Consider the appropriate reduction for any guilty plea by reference to the SC Guideline: Reduction in Sentence for a Guilty Plea.

(6) Consider dangerousness in the following order (reference should be made to the relevant sections of the Compendium):

(a) If the offender is not dangerous and CJA 2003 s.224A does not apply, a determinate sentence should be passed.

(b) If the offender is not dangerous and the conditions in CJA 2003 s.224A are satisfied then, subject to s.224A(a) and (b), a life sentence must be imposed.

(c) if the offender is dangerous, consider whether or not the seriousness of the offence, and offences associated with it, justify a life sentence.

(d) if a life sentence is justified then in accordance with CJA 2003 s.225 a life sentence must be passed and, if CJA 2003 s.224A also applies, the judge should record that fact in open court.

(e) if a life sentence is not justified, then the sentencing judge should consider whether or not CJA 2003 s.224A applies and, if it does, then, subject to the terms of CJA 2003 s.224A, a life sentence must be imposed.

(f) if CJA 2003 s.224A does not apply, the provisions of s.226A or s.226B should be considered although the judge must consider a determinate sentence before passing any extended sentence.

(7) Consider whether the special sentence regime for offenders of particular concern applies (under CJA 2003 s.236A) where the offence is listed in Sch.18A.

6. Totality must be considered. This may relate to multiple offences to be sentenced and/or to a sentence the offender is already serving: the SC Guideline: Offences Taken into Consideration and Totality must be followed.

7. Appropriate ancillary orders must be considered e.g. compensation, disqualification, forfeiture, restraining order, costs, surcharge, Criminal Courts Charge.

8. In any case where PoCA proceedings are adjourned the court may pass sentence but must not impose most financial orders (a fine, compensation, unlawful profit, forfeiture, deprivation, statutory surcharge, costs) [PoCA s.14(12)]. Curiously, the court is formally obliged to make a criminal courts charge albeit in the sum of £0 [POA 1985 s.21A].

9. An explanation must be given to the offender, in ordinary language, of the reasons for passing the sentence and its effect [CJA 2003 s.174]. This must be

done in open court at the time sentence is passed. It is not permissible to pass sentence on the basis that written reasons will be given at a later date.[23]

10. So far as the style and content of sentencing remarks are concerned consideration should be had to the guidance from the LCJ in *Chin-Charles and Cullen*.[24] The court criticised the length of sentencing remarks that were being delivered and suggested that they should be shorter and more focussed. The court observed that arguments on appeal based upon a failure of a judge to mention a particular point "rarely prospered". It was further suggested that normally sentencing remarks would not need to reference case law. The court stated that in general a court only needed to identify: (i) the category in which a count sat by reference to harm and culpability; (ii) the consequent starting point and range; (iii) the fact that adjustments had been made to reflect aggravating and mitigating factors; (iv) credit for plea where appropriate; (v) the resulting sentence. It might be necessary to briefly identify the factors relevant to culpability and harm, but only where the conclusion was not obvious or was in issue. It was stated that a court may also need to explain why it had moved from the starting point. It was suggested that findings of fact should normally be announced without supporting narrative. Contextualising facts only had to be set out if essential to understanding a finding. If the court determined that a defendant was dangerous then it should so state. Victim personal statements were suggested to have the potential for brief reference. Reference to the contents of probation and other reports would be required only if essential to an understanding of the court's decision.

11. Where a determinate or extended sentence is passed, time spent on remand in custody will count towards the sentence automatically without any direction.[25] The judge has no discretion about this [CJA s.240ZA (as inserted by LASPO s.108)].[26] Where a life sentence is passed (whether or not for murder), the minimum term must be adjusted to take account of time spent on remand in custody. In any event the sentencer must give credit for time spent on an electronically monitored curfew, or give reasons why it would be unjust to do so, applying the 5 step process set out in LASPO s.109(3) [CJA 2003 s.240A (as amended) – see ss.108 and 109 LASPO and chapter S4-8 below]. The position so far as a youth is concerned who has spent a period of remand in local authority accommodation under s.91(3) of the 2012 Act is complex and reference will need to be had to *A*.[27] The time so spent does not count automatically towards any custodial sentence subsequently imposed.

12. In a case where the offender has been held in custody abroad awaiting extradition, it is necessary for the court to make a direction if such time is to count; the reduction is not automatic [s.243 CJA 2003].

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23 *Billington* [2017] EWCA Crim 618
24 [2019] EWCA Crim 1140
25 There is an exception for detention and training orders. See S4-8 below.
26 *Lovelace* [2017] EWCA Crim 1589
27 [2019] EWCA Crim 106

13. Where applicable, the court must order payment of the statutory surcharge [see chapter S7-14 below].

    NOTE: A template for constructing sentencing remarks in accordance with guidelines appears at Appendix S II below.

S4 CUSTODIAL SENTENCES

S4-1 Mandatory life sentences

CJA 2003 s.269 and **Sch.21**

ARCHBOLD 5A-741; BLACKSTONE'S E3.1; CURRENT SENTENCING PRACTICE I1-100; SENTENCING REFERENCER §64-001

1. Criteria for sentence

   The offence must be an offence for which the sentence is "fixed by law": i.e. Murder.

2. Nature of sentence

   (1) Imprisonment for life [age 21 or over at date of conviction unless aged under 18 at date of offence]

   (2) Custody for life [age 18 to 20 inclusive at date of conviction unless aged under 18 at date of offence: see PCC(S)A s.93]

   (3) Order for Detention during Her Majesty's pleasure [age under 18 at the time of the offence was committed: see PCC(S)A s.90.
   Note: this will lead to much older offenders being detained at Her Majesty's pleasure if convicted as adults of offences committed when under age 18: s.90 takes precedence over the other age provisions.]

3. Fixing the minimum term (offences committed on/after 18 December 2003)

   (1) To fix the minimum term the court must consider the seriousness of the offence/s. In doing so the court must have regard to the general principles in CJA 2003 Sch.21 and follow any relevant guidelines which are not incompatible with the provisions of that schedule.

   (2) Sch.21 sets five starting points: whole life (for offenders aged 21 or over at the time of the commission of the offence), 30 years, 25 years, 15 years (for all offenders aged 18 or over at the time of the commission of the offence) and 12 years (only for offenders aged less than 18 at the time of commission of the offence).

   (3) Having chosen a starting point, the court should take into account any aggravating and mitigating factors, noting that: (i) the lists of such factors set out in Sch.21 paragraphs 8 – 11 are not exclusive and (ii) other aggravating factors may include previous convictions and the offence/s having been committed whilst on bail. This exercise may result in fixing a minimum term of any length.

   (4) Credit should (almost invariably) be given for (a) a plea of guilty and (b) time spent on remand in custody or on qualifying electronically monitored curfew. Credit which may be given for a plea of guilty in such cases is set by the SC Guideline Reduction in Sentence for a Guilty Plea which states "the maximum reduction [is] one-sixth or five years (whichever is less)". There is obviously no reduction for a guilty plea in the case of a whole life term,

although the plea may be a factor in deciding whether a whole life term is appropriate.

(5) If the court is of the opinion because of the seriousness of the offence/s, that a whole life order must be made, the court must order that the early release provisions are not to apply.

(6) In any other case, the court must order that the early release provisions are to apply when the offender has served the minimum term.

4. Passing the sentence

(1) State that the sentence is one of imprisonment for life/custody for life/detention during Her Majesty's pleasure.

(2) **Either**, if D is 21 or over and it is the case, state that because of the [extreme] seriousness of the offence/combination of offences, the early release provisions are not to apply and so the sentence is a whole life order.

(3) **Or**, in any other case, state the minimum term, giving reasons for having fixed it at the level stated, in particular by reference to the applicable provision/s of Schedule 21 and the aggravating and mitigating factors. E.g. (having given reasons), "…so having regard to all the aggravating and mitigating features in your case, I fix the minimum term which you will serve in custody, before the Parole Board may consider your possible release, at 18 years."

(4) Credit should (almost invariably) be given, in this order, for:

(a) any plea of guilty.

Example

But for your plea of Guilty I would have fixed the minimum term which you would have to serve in custody, before being able to apply to the Parole Board for your release, at 18 years. Giving you credit for your plea of Guilty, I reduce that by one sixth and fix the minimum term at 15 years.

(b) any time spent on remand in custody or half the time spent on remand on qualifying electronic curfew.

Example

From this will be deducted the 157 days which you have already spent on remand in custody so that the minimum term which you will serve is 14 years and 208 days.

(5) Explain the consequences:

(a) The minimum term will be served in full before D is eligible to be considered for release by the Parole Board;

(b) The decision about whether or when D will be released on licence will be taken by the Parole Board upon consideration of the risk(s) of D causing further harm;

(c) If D is released D will be on licence for the rest of his/her life;

(d) The licence will be subject to conditions, which will be set at the time of D's release, and if D were to break any condition he/she would be liable to be returned to prison to continue to serve his/her sentence and may not be released again.

S4-2 Life sentences and extended sentences for dangerous or repeat offenders

CJA 2003 ss.225-229

ARCHBOLD 5A-732 (life: adults), 5A-1036 (life: youths), 5A-698 (extended sentences: adults), 5A-1029 (extended sentences: youths); BLACKSTONE'S E3 and E4; CURRENT SENTENCING PRACTICE A2 (life), A3 (extended sentences); SENTENCING REFERENCER § 59-001 (life), 43-001 (extended sentences)

1. This section covers life sentences (other than the mandatory life sentence for murder) and extended determinate sentences and is divided into five parts:
   (1) the criteria for making a finding of dangerousness;
   (2) "dangerousness" life sentences (CJA 2003 ss.225 and 226);
   (3) automatic "two strikes" life sentence (CJA 2003 s.224A);
   (4) "dangerousness" extended sentences (EDS) (CJA 2003 ss.226A and B);
   (5) common law life sentence;

2. These sections reflect the order in which a judge should approach sentencing:[28]
   (1) Consider the question of dangerousness. (See section 4-2-1 below: *"Dangerousness"*).
   (2) If the offender is dangerous under CJA 2003:
      (a) consider whether the seriousness[29] of the offence and offences associated with it justify a life sentence, in which case the judge must pass a life sentence in accordance with s.225. If s.224A also applies ("two strikes"), the judge should record that fact in open court. (See section 4-2-2 below: *"Dangerousness – life")*
      (b) if a life sentence for the individual offence is not justified, then the sentencing judge should consider whether s.224A applies. If it does then (subject to the terms of s.224A) a life sentence must be imposed. (See section 4-2-3 below: *"Auto-life")*
      (c) if no life sentence is imposed the judge should consider whether a determinate sentence alone would suffice. (See section 4-4 below: *"Determinate sentences"*)
      (d) but if a determinate sentence would not suffice, the judge should consider an extended sentence pursuant to s.226A. (See section 4-2-4 below: *"Extended Determinate Sentence"*)
   (3) If the offender is not dangerous under CJA 2003
      (a) this may be because the offence is "specified", (i.e. a violent or sexual offence listed in Sch.15 to the CJA 2003) but occurred before 4 April 2005 and so cannot attract a CJA 2003 life sentence (although note it

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28 Adapted from the step by step guide provided in the case of *AG's Reference (No. 27 of 2013) (Burkinskas)* [2014] EWCA Crim 334; [2014] 1 W.L.R. 4209

29 Ibid, para 22

may still attract an EDS since that sentence is not time-barred). Alternatively, this may be because the offence is not "specified", and so falls outside the dangerousness regime altogether. In either case the court has a residual discretion to impose a discretionary life sentence 'at common law' where the maximum sentence for the offence so allows and it is necessary to do so. An example of the first situation might be serious historical offending occurring before the commencement of the CJA 2003, and an example of the second situation may include extremely serious drug supply. (See section 4-2-5 below: *"Common law life sentence"*)

(b) the conditions in s.224A may yet be satisfied, in which case (subject to ss.[224A] 2 (a) and (b)), a life sentence must still be imposed. (See section 4-2-3 below: *"Auto-life")*

(c) in all other cases, if a custodial sentence is necessary then a determinate sentence should generally be passed. (See section 4-4 below: *"Determinate sentence")*

4-2-1. Criteria for a finding of dangerousness

3. The offence must be a "specified" offence (i.e. listed in CJA 2003 Sch.15).

4. The court must find that there is a significant risk that:

   (1) D will commit further specified offences; and

   (2) by doing so D will cause serious physical or psychological harm to one or more people.

5. Additional provisions concerning the finding of dangerousness are found in CJA 2003 s.229.

4-2-2. "Dangerousness" life sentences (s.225 (18+) and s.226 (Under 18))

2A. Discretionary "dangerousness" life sentence (18+)

6. The court must impose a life sentence where:

   (1) the defendant is convicted of a "serious offence" (i.e. an offence listed in CJA 2003 Sch.15 where, apart from under CJA 2003 s.224A, the offender is liable to a sentence of 10 years or more) committed on or after 4 April 2005;

   (2) the court considers that the criteria for a finding of dangerousness are met;

   (3) the offence is one in respect of which the offender would apart from s.225 be liable to imprisonment for life; and

   (4) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life [CJA 2003 s.225(1) and (2)].

7. A discretionary life sentence will only be 'justified' if the sentencer considers EDS is not sufficient, perhaps bearing in mind the likelihood that there would still be a significant ongoing risk to the public at the conclusion of any EDS that could be passed.[30]

8. In the case of a person aged 18–20 at conviction, the court must impose a sentence of custody for life, [CJA 2003 s.225(2)].

2B. Discretionary "dangerousness" life sentence (under 18)

9. The court must impose a life sentence under PCC(S)A 2000 s.91 where:

   (1) the defendant is convicted of a "serious offence" (i.e. an offence listed in CJA 2003 Sch.15 where, apart from under CJA 2003 s.224A, the maximum sentence is 10 years or more) (committed on or after 4 April 2005);

   (2) the court considers that the criteria for a finding of dangerousness are met;

   (3) the offence is one in respect of which the defendant would apart from this section be liable to detention for life under PCC(S)A 2000 s.91; and

   (4) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of detention for life under s.91 [CJA 2003 s.226(1) and (2)].

2C. Fixing the minimum term

10. If a sentence of imprisonment/custody/detention for life is passed it is necessary to fix a minimum term to be served in custody before the Parole Board may consider the offender's release on licence, unless a sentence of imprisonment is imposed with a "whole life" order. A whole life order is not available for detention/custody for life.

11. The court must consider the seriousness of the offence/s, following any applicable guidelines, to determine what would have been the notional determinate term.

12. Credit should then (except in the most exceptional circumstances) be given for any guilty plea, in accordance with the Sentencing Council's guilty plea guideline.

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30 *A(A)* [2014] EWCA Crim 2483 – If […] an offender will cease to be a risk in the predictable future, that is a factor militating against the imposition of a life sentence and in favour of an extended sentence which imports a backstop release date. Conversely if the same court, having considered the evidence, considers that there may be a risk long into the future and is unable to say when the risk will cease, that might militate in favour of a life sentence which imports no backstop release date.

13. This term should almost always be halved to reflect the time that would have been served in custody on a determinate sentence. If the court takes any other course it must explain its reasons [PCC(S)A 2000 s.82A].[31]

14. Time spent on remand in custody or the proportion of time spent on qualifying electronically monitored curfew calculated by reference to the 5 step test [see chapter S4-9 below] should then (except in the most exceptional circumstances) be deducted. This must be done notwithstanding the fact that in the case of all other custodial sentences (with the exception of a Detention and Training Order) time spent on remand in custody is automatically deducted from the sentence.

2D. Passing a life sentence

15. The court must:

    (1) Set out findings in relation to those matters described in paragraphs 1 – 3 of chapter S3 above.

    (2) State that the sentence is one of imprisonment/custody/detention for life because no lesser sentence is appropriate.

    (3) EITHER state that because of the [extreme] seriousness of the offence/combination of offences, the early release provisions will not apply and that the sentence is a whole life order.

        OR (in any other case) state the minimum term by explaining:

        (a) what the determinate sentence would have been after a trial (taking account of any aggravating and mitigating factors);

        (b) any reduction which would have been given for a guilty plea;

        (c) that the minimum term is almost always one half of that notional sentence (explaining that this would have been the custodial element of a determinate term); and

        (d) the deduction made for days spent on remand in custody and/or on qualifying electronically monitored curfew.

    (4) Explain the consequences:

        (a) The minimum term will be served in full before D is eligible to be considered for release by the Parole Board.

        (b) The decision about whether or when D will be released will be taken by the Parole Board.

        (c) If D is released then he/she will be on licence for the rest of his/her life.

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[31] A recent example of a judge taking a different course can be seen in the sentencing remarks of Edis J in *McCann* CCC 9.12.19 and there are other examples where such has been done and considered by the CACD: *Rossi* [2014] EWCA Crim 2018; *Jarvis* [2006] EWCA Crim 1985; *Szczerba* [2002] EWCA Crim 440; *Marklew and Lambert* [1999] 1 Cr App R (S) 6; and *Vale* [1996] 1 Cr App R (S) 405. In terms of general policy on this issue see *Burinskas* [2014] EWCA Crim 334 at. [31]-[40]

(d) The licence will be subject to conditions, which will be set at the time of D's release, and if D were to break any condition he/she would be liable to be returned to prison to continue to serve his/her sentence and might not be released again.

Example

[As I have already told your advocate] I am satisfied that you present a significant risk of causing serious harm by committing further similar offences, a risk that is likely to carry on long into the future. I am satisfied that your offence is so serious that a sentence of life imprisonment is required; and that is the sentence which I impose.

As to the minimum term which you must serve: if I had been sentencing you to a determinate sentence, taking account of all the aggravating and mitigating factors in this case, after a trial I would have sentenced you to 15 years' imprisonment. Giving you full credit for your prompt plea of guilty I would have reduced that to 10 years. Because you would have served up to half of that sentence in custody I fix the minimum term which you will serve at half of 10 years: that is 5 years. Finally, I reduce that minimum term of 5 years by the number of days which you have spent on remand in custody: 71 days. This means that the minimum term which you will serve before the Parole Board may consider your possible release is one of 4 years and 294 days.

It is most important that you and everyone concerned with this case should understand what this means. The minimum term is **not** a fixed term after which you will automatically be released but is the [initial] term that must be served before the Parole Board can undertake their first review of the case. They will review the risk that you then present and will consider whether you can properly be released from custody subject to licence at that stage and if so on what terms.

If and when you are released you will be subject to licence; and this will remain the case for the rest of your life. If for any reason your licence is revoked, you will be recalled to prison to continue to serve your life sentence in custody.

It follows that unless and until the Parole Board consider that your release is appropriate then you will remain in custody.

4-2-3. Automatic "two-strikes" life sentence (s.224A)

CJA 2003 s.224A

ARCHBOLD 5A-736; BLACKSTONE'S E4.15; CURRENT SENTENCING PRACTICE A2-2600; SENTENCING REFERENCER § 15-001

16. Where:
    (1) an offender aged 18+;
    (2) is convicted of an offence listed in CJA 2003 Sch.15B;
    (3) the sentence condition is met; and
    (4) the previous offence condition is met,

    the court must impose a life sentence, CJA 2003 s.224A(1) and (2).

17. However, where the court is of the opinion that it would be unjust to do so, the court need not impose a life sentence, CJA 2003 s.224A(2).

18. The sentence condition is that the court would otherwise impose a sentence of imprisonment (or DYOI) for 10 years or more, CJA 2003 s.224A(3).

19. The previous offence condition is that:
    (1) at the time the offence was committed, the offender had been convicted of an offence listed in Sch.15B, and
    (2) a relevant life sentence or a relevant sentence of imprisonment or detention for a determinate period was imposed on the offender for the previous offence, CJA 2003 s.224A(4).

20. For the purposes of the previous offence condition:
    (1) A life sentence is relevant if:
        (a) the offender was not eligible for release during the first 5 years of the sentence, or
        (b) the offender would not have been eligible for release during that period but for the reduction of the period of ineligibility to take account of a relevant pre-sentence period;
    (2) An extended sentence is relevant if the appropriate custodial term is 10 years or more;
    (3) Any other sentence of imprisonment or detention for a determinate period is relevant if the custodial term was 10 years or more;
    (4) Any extended sentence or determinate sentence is relevant if, but for the reduction of sentence to take account of a pre-sentence period, if the custodial period was 10 years or more, CJA 2003 s.224A(5)-(10).

21. A sentence imposed under s.224A is not a sentence fixed by law, CJA 2003 s.224A(11).

Fixing the minimum term

See the section above in relation to discretionary "dangerousness" life sentences.

Passing a life sentence

See the section above in relation to discretionary "dangerousness" life sentences.

4-2-4. Dangerousness extended sentences (ss.226A and B)

4A. Extended determinate sentence (EDS) (aged 18+)

22. An extended sentence is available where:
    (1) The offender is convicted of an offence listed in CJA 2003 Sch.15 (whenever the offence was committed);
    (2) The test for dangerousness is satisfied;
    (3) The court is not required to impose a life sentence under CJA 2003 ss.224A or 225; and
    (4) Either:
        (a) the offender has a previous conviction listed in CJA 2003 Sch.15B; or
        (b) if the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least 4 years [CJA 2003 s.226A(1)-(3)].

23. Where those four steps are met, there is a *discretion* to impose an extended sentence. The court should however consider whether a determinate sentence would be a sufficient sentence and if imposing an extended determinate sentence, should explain its reasons for concluding that a determinate sentence was not appropriate.[32]

4B. Extended determinate sentence (EDS) (aged under 18)

24. An extended sentence is available where:
    (1) The offender is convicted of an offence listed in CJA 2003 Sch.15 (whenever the offence was committed);
    (2) The test for dangerousness is satisfied;
    (3) The court is not required to impose a life sentence under ss.224A or 225; and
    (4) If the court were to impose an extended sentence of imprisonment, the term that it would specify as the appropriate custodial term would be at least 4 years [CJA 2003 s.226A(1)-(3)].

25. Where those four steps are met, there is a *discretion* to impose an extended sentence. The court should, however, consider whether a determinate sentence would be a sufficient sentence and if imposing an extended determinate sentence, should explain its reasons for concluding that a determinate sentence was not appropriate.[33] When addressing that issue it is important to bear in mind

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32 *Bourke* [2017] EWCA Crim 2150
33 *Bourke* [2017] EWCA Crim 2150

the potential for increasing maturity to impact on the risk that a young person may present as at the time of sentence and the fact that young people may be more receptive to the rehabilitating potential represented by the sentence being imposed – see *Lang*[34] at [17], *Chowdhury*[35] at [22] and *Miller*[36] at [38].

NOTE: that for those aged under 18 at conviction, an extended sentence is not available for any offence for which s.91 detention is not available.

4C. Fixing the custodial term and the length of the licence

26. Where the court passes such a sentence, it must set the custodial term and the (licence) extension period. These must not, in total, exceed the maximum sentence permitted for the offence.

27. In setting the custodial term the usual principles of sentencing apply. The extension period is a further period of licence which is imposed if necessary to protect members of the public from the significant risk of serious harm caused by D's commission of further specified offences.

28. Maximum and minimum periods: For offences prior to 1st February 2015 there is no minimum period of extension but for offences thereafter the minimum extension period is 1 year: CJA 2003 ss.226A and 226B as amended by ORA s.8. The maximum periods of extension are 5 years (specified violent offence) or 8 years (specified sexual offence).

29. Within these parameters, the length of the extension period is a matter for the discretion of the sentencer. The extended licence period is not tied to the seriousness of the offending; its purpose is protective. Like all sentences, it should not be longer than necessary and should be just and proportionate, see *Phillips*.[37]

30. Any extended sentence must be expressed to be imposed in relation to an individual offence or individual offences for which the criteria are satisfied. It cannot be imposed as a global sentence. It is not possible to make multiple extended sentences partly consecutive and partly concurrent, e.g. by imposing the custody consecutively but the licence periods concurrently, see *Francis*;[38] *DJ*.[39]

31. Consecutive extended determinate sentences may exceed the limitation on the length of the licence period imposed under a single extended determinate sentence (5 years in the case of a violent offence, 8 years in the case of a

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34 [2005] EWCA Crim 2864
35 [2016] EWCA Crim 1341
36 [2018] EWCA Crim 500 and see also Difficulties with dangerousness: determining the appropriate sentence – Part 2 [2018] Crim. L.R. 782-807
37 [2018] EWCA Crim 2008
38 [2014] EWCA Crim 631
39 [2015] EWCA Crim 563

sexual offence) in exceptional cases. However, this should not be used to impose what is in effect a life licence, see *Thompson and Others*.[40]

32. Where imposing an extended sentence consecutively with a determinate sentence it is considered better sentencing practice for the determinate sentence to be imposed first with the extended sentence to run consecutively to it.[41]

4D. Passing an extended sentence

33. The court must:

    (1) Set out findings in relation to those matters described in paragraphs 1 – 3 of chapter S3 above.

    (2) Set out the reasons for finding that D is dangerous within the meaning of CJA 2003 Part 12 Chapter V.

    (3) Set out the reasons for passing an extended sentence.

    (4) Explain that the sentence is an extended sentence of imprisonment/detention in a Young Offender Institution, which has two parts: a custodial term and an extended licence period.

    (5) Fix the custodial term. In doing so, credit should (almost invariably) be given for any plea of guilty and this should be spelt out clearly.

Example

But for your plea of Guilty the custodial term of your sentence would have been 6 years. Giving you [full] credit for your plea of Guilty, I reduce this to 4 years.

34. Give credit for time spent on remand subject to a qualifying electronically monitored curfew: time spent on remand in custody counts automatically. For a full explanation of the provisions relating to time on remand, see chapter S4-9 below.

35. Where the court makes a direction in relation to time spent on remand subject to a qualifying electronically monitored curfew it should also state that if the calculation of days is not correct, a correction will be made administratively without the need for a further hearing.

36. Fix the extension period. This is to be such period as the court thinks appropriate having regard to the risk posed.

37. Explain the consequences:

    (1) Every D subject to an extended sentence will serve at least two thirds of the custodial term in custody before their case is referred to the Parole Board for

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40 [2018] EWCA Crim 639

41 As *Ulhaqdad* [2017] EWCA Crim 1216 made clear, the Prison Service is able to make a proper sentence calculation whichever order is used. Notwithstanding this, the guidance from the Court of Appeal (Criminal Division) remains that in such cases, the determinate sentence should be imposed first, with the extended sentence to run consecutively.

them to consider their release. D will not serve more than the whole of the custodial term (unless they are recalled once on licence).

(2) On release D will be on licence, which will last until the end of the custodial term (if any of this period remains), and D will then serve the extended period of licence: this begins when the custodial term expires and lasts until the end of the extended licence period.

(3) D's licence will be subject to conditions; and if any of the conditions are broken, D would be liable to have the licence revoked and be returned to custody to serve the rest of the total sentence in custody.

Example (offender does not have a previous Sch.15B conviction)

Because you have been convicted of a *specified* offence I am required to consider the issue of dangerousness, that is, whether you present a significant risk of causing serious harm by committing further specified offences. I am satisfied that you do present such a risk, as I have already told your advocate, because (…)

(if this is also a *serious* offence – i.e. max sentence life or 10 years+ - and a life sentence is not considered necessary or appropriate, explain why.)

I have considered whether a standard determinate sentence is appropriate. If imposing such a sentence the least period of imprisonment I could have imposed in all the circumstances of your case (including credit for plea) would have been one of 6 years.

Such a sentence would not fully address the risk you represent and I do consider it necessary to impose an extended sentence in order to protect the public in the future.

The extended sentence is made up of two parts: a custodial period, which will be no longer than the 6 year period I mentioned, and an extended licence period of 4 years making an extended sentence of 10 years duration in total.

You will serve 2/3 of the custodial period in prison before the Parole Board will consider whether it is safe to release you, and if so on what terms.

Once released, you will serve on licence any part of the custodial period which remains, and you will then be subject to an extended licence for a further period of 4 years, making 10 years in all.

If, when you are subject to licence, you commit another offence or fail to comply with the terms of your release, you are liable to be recalled to custody and may serve the entire sentence in custody.

[**Where time spent on remand in custody:** The days which you have spent on remand in custody will automatically count towards the custodial term of your sentence.]

[**Where time spent on qualifying electronically monitored curfew:** I certify that you have spent 47 days on a qualifying curfew and I direct that 24 days will count towards the custodial term of your sentence. If this calculation is later found to be wrong it will be put right by correcting the record administratively without any further hearing.]

[Mention notification requirements if the offence is a sexual offence to which the notification regime under the SOA 2003 applies.]

Example (offender has previous Sch.15B conviction)

Because you have been convicted of a *specified* offence I am required to consider the issue of dangerousness, that is, whether you present a significant risk of causing serious harm by committing further specified offences. I am satisfied that you do present such a risk, as I have already told your advocate, because…

(if this is also a *serious* offence – i.e. max sentence life or 10 years+ - and a life sentence is not considered necessary or appropriate, explain why.)

I have considered whether a simple determinate sentence is appropriate. If imposing such a sentence the least period of imprisonment I could have imposed in all the circumstances of your case (including your guilty plea) would have been one of 3 years.

However you have a previous conviction for [section 18 GBH with intent], an offence listed within Sch.15B to the Criminal Justice Act 2003. Accordingly I must consider whether to impose a standard determinate sentence or an extended sentence.

I do not consider that a sentence of three years imprisonment would fully address the risk you represent and so it is necessary to impose an extended sentence to protect the public in the future.

The extended sentence is made up of two parts: a custodial period, which will be no more than the 3 years I mentioned, and an extended licence period of 2 years making an extended sentence of 5 years duration in total.

You will serve 2/3 of the custodial period in prison before the Parole Board will consider whether it is safe to release you, and if so on what terms.

Once released, you will serve on licence any part of the custodial period which remains, and you will then be subject to an extended licence for a further period of 2 years, making 5 years in all.

If, when you are subject to licence, you commit another offence or fail to comply with the terms of your release, you are liable to be recalled to custody and may serve the entire sentence in custody.

[**Where time spent on remand in custody:** The days which you have spent on remand in custody will automatically count towards the custodial term of your sentence.]

[**Where time spent on qualifying electronically monitored curfew:** I certify that you have spent 47 days on a qualifying curfew and I direct that 24 days will count towards the custodial term of your sentence. If this calculation is later found to be wrong it will be put right by correcting the record administratively without any further hearing.]

[Mention notification requirements if the offence is a sexual offence to which the notification regime under the SOA 2003 applies.]

4-2-5. Common law life sentence

38. Prior to CJA 2003 the criteria for imposing a discretionary life sentence centred around continuing serious danger for an indeterminate time.[42] These considerations are now likely to be reflected in a finding of dangerousness, thereby triggering the CJA 2003 sentences set out above. However there is a residual category of offender or offence where a CJA 2003 discretionary life sentence cannot be imposed and where a common law life sentence may yet be justified. This will include any offence which pre-dates 4 April 2005, and a non-"specified" offence committed at any time. Note that the power to impose a CJA extended sentence is available for offences both before and after the date of the CJA 2003 coming into force. There may be some rare cases, for example a campaign of historical rapes involving different victims over decades prior to CJA 2003 implementation, where the sentencer cannot impose a CJA life sentence, but concludes that both an extended sentence or determinate sentence would be inadequate. In those circumstances, a common law life sentence could be considered.

39. A discretionary "common law" life sentence is available where:

    (1) the offender had been convicted of a "very serious offence" (whether or not classified as a "specified offence" for the purpose of consideration of dangerousness) and for which the maximum sentence is one of life imprisonment;[43]

    (2) there are good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence.[44]

    An example of a case which could fall into this category is *R v Saunders* [2013] EWCA Crim 1027, where the offence (described as 'very serious drug supplying') fell outside the CJA dangerousness provisions, since it was neither a violent nor sexual offence, yet gave rise to a very clear and substantial risk of serious harm to members of the public.

Fixing the minimum term

See the section above in relation to discretionary "dangerousness" life sentences.

Passing a life sentence

See the section above in relation to discretionary "dangerousness" life sentences.

42 *Attorney General's Reference (No.32 of 1996) (Whittaker)* [1997] 1 Cr.App.R. (S.) 261
43 i.e. otherwise than by virtue of CJA 2003 s.224A
44 *Attorney General's Reference (No.32 of 1996) (Whittaker)* [1997] 1 Cr.App.R. (S.) 261

S4-3 Offenders of Particular Concern

CJA 2003 ss.236A and 244A and Sch.18A

ARCHBOLD 5A-646; BLACKSTONE'S XX; CURRENT SENTENCING PRACTICE A4; SENTENCING REFERENCER § 65-001

1. These provisions have been introduced by CJCA s.6 and Sch.1 in respect of offences where the offender is convicted on and after 13 April 2015 whatever the date of the commission of the offence.

2. By these provisions additional restrictions are placed upon "offenders of particular concern" i.e. those convicted of certain serious sexual offences (rape of a child under 13 and sexual assault by penetration of a child under 13) and certain terrorism offences. The full list of offences is set out in CJCA Sch.1, which inserts Schedule 18A CJA 2003.

3. These provisions apply if D is convicted of a Sch.18A offence, was aged 18 or over at the commission of the offence, and the court imposes an immediate custodial sentence which is not a life sentence or an extended sentence.

4. The Court of Appeal gave guidance in *LF*[45] to the effect that if the court would otherwise have proposed to impose a suspended sentence order, then it should impose a community order instead to avoid conflict between the suspended sentence order and the "offender of particular concern order".

5. Once the court has decided to impose a sentence of imprisonment, the term of the "offender of particular concern order" must be equal to the aggregate of the "appropriate custodial term" and an additional period of one year during which the offender will be subject to licence. The "appropriate custodial term" is the term which the court considers will ensure that the sentence is appropriate.

6. The term of the overall sentence must not exceed the statutory maximum applicable at the date of the commission of the offence.

7. The appropriate custodial term will usually be the term commensurate with the seriousness of the offence. Certain sexual offences which have now been repealed have low maximum sentences which will require a reduction to the appropriate custodial term in order to accommodate the mandatory 1-year licence period.

8. When the offender has served one half of the custodial term the case will be referred to the Parole Board for consideration whether and on what terms it may be safe to order release on licence.

9. The offender must be released at the latest at the end of the custodial term but will then be on licence for the remainder of the custodial term (if any) and the additional licence period of one year.

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[45] [2016] EWCA Crim 561

10. The provision is designed to ensure that:

    (1) Offenders convicted of offences in the Schedule are always referred to the Parole Board for consideration of licence; and

    (2) There is always a minimum period of one year to be served on licence even if the offender has served the entire custodial term in custody.

Example 1

You will serve one half of your custodial term in custody before your case is referred to the Parole Board for consideration of whether and on what terms it is safe for you to be released. You may be released at the direction of the Parole Board at some point not later than the end of the custodial term. You will then serve the remainder of the custodial term (if any) and 12 months in the community on conditional licence and subject to supervision. You must abide by the conditions of your release, or you will be liable to serve the full sentence in custody.

Example 2

I have to sentence you for two offences. The sentence on the first count will be six years' imprisonment. The sentence on the second count will be two years' imprisonment, to run consecutively. That makes a total of eight years' imprisonment.

Both of your offences fall within s.236A of the Criminal Justice Act 2003. I am required by that section to impose on you a special custodial sentence for offenders of particular concern which will combine the custodial periods I have referred to and an extended licence period of one year in relation to each count.

This means that I impose custodial terms of eight years in total, together with further licence periods of two years in total, making 10 years in all.

The effect of this is that you will serve one half of your total custodial term in custody before your case is referred to the Parole Board for consideration of whether and on what terms it is safe for you to be released. In your case, this means you will serve at least four years' imprisonment before that reference to the Parole Board can take place. Whatever view the Parole Board takes you will be entitled to release as of right no later than the end of the custodial term, which in your case is eight years.

At whatever point you are released you will then serve the remainder of the custodial term (if any) and the additional licence period of two years in the community on conditional licence and subject to supervision. You must abide by the conditions of your release, or you will be liable to serve the full sentence in custody.

S4-4 Determinate sentences of imprisonment

PCC(S)A 2000 s.76; CJA 2003 ss.152 – 154;

ORA 2014 s.2 (inserting CJA 2003 ss.256AA and 256AB – licence and supervision provisions)

ARCHBOLD 5A-236, 5A-625; BLACKSTONE'S E2.1; CURRENT SENTENCING PRACTICE A1-300 and A8-2000; SENTENCING REFERENCER § 25-001

1. Criteria for sentence

   (1) The offence/s is/are so serious that neither a fine alone nor a community sentence can be justified.

   (2) The sentence is the least that can be imposed having regard to the seriousness of the offence.

   (3) The defendant is aged 21 or over at conviction.

2. Passing the sentence

   (1) All determinate sentences of imprisonment

      (a) Set out findings in relation to those matters described in paragraphs 1 – 3 of chapter S3 above.

      (b) The offence by itself or in combination with other offences must be so serious that neither a fine alone nor a community sentence can be justified [CJA 2003 s.152(2)] ***or*** the offender refuses to express willingness to comply with a requirement of a community order proposed by the court for which the offender's willingness to comply is necessary i.e. a drug rehabilitation requirement, an alcohol treatment requirement or a mental health treatment requirement.

      (c) The sentence must be the shortest term that is commensurate with the seriousness of the offence, either by itself or in combination with others [CJA 2003 s.153(2)].

      (d) All offenders are released having served no more than half their sentence. This is the "requisite custodial period": see CJA 2003 s.244(3). Many offenders are released earlier on Home Detention Curfew or under other early release provisions but such earlier release is at the discretion of the Secretary of State exercised through the Prison Governor and not the court and no reference should be made to the likelihood or otherwise of such release.

Example

The offence is so serious that only a custodial sentence can be justified and the least possible sentence I can impose having regard to the seriousness of the offence is one of ……months'/years' imprisonment.

3. Spelling out the effect of the sentence.

   (1) **Unconditional release** applies to:

   (a) a prisoner serving a sentence of one day;

   (b) a prisoner serving a term of less than 12 months who is aged under 18 on the last day of the requisite custodial period; and

   (c) a prisoner serving a sentence of less than 12 months imposed for an offence committed before 1 February 2015 [CJA 2003 s.243A].

Example

You will serve up to half of your sentence in custody and then you will be released.

   (2) **Licence and post-sentence supervision** will generally apply for sentences under two years. First, there will generally be a licence period (the second half of the custodial sentence) and second, there will be a post-sentence supervision period which in combination will run for 12 months from the defendant's release. This is to ensure that there is an appropriate period of engagement with probation services on the expiry of the custodial element of a short sentence.

   The period of licence plus post-sentence supervision will be **12 months** from release if an offender sentenced between one day and less than two years is:

   (a) aged 18+ on the last day of the requisite custodial period;

   (b) not serving sentences under ss.226A, 226B or 236A;

   (c) not serving sentences for offences committed before 1 February 2015 [CJA 2003 s.256AA].

   The period of licence plus post-sentence supervision will be **3 months** from release if an offender sentenced between one day and less than two years is:

   (a) aged under 18 on the last day of the requisite custodial period, serving a sentence under s.91 of the PCC(S)A 2000 of less than 12 months;

   (b) serving a sentence of detention under s.91 or 96 of the PCC(S)A 2000 of less than 12 months for an offence committed before 1 February 2015 [CJA 2003 s.256B].

Release on licence with post-sentence supervision

Example

You will serve up to one half of your 12 month sentence in custody before you are released on licence. When you are released, you will be on licence and then post-sentence supervision for a total of 12 months after that. You must comply with the terms of the licence and supervision and commit no further offence or you will be liable to serve a further period in custody.

(3) Release on **licence** applies to prisoners serving determinate sentences of two years duration or longer, other than sentences under CJA 2003 ss.226A, 226B or 236A:

Release on licence with no post-sentence supervision

Example

You will serve up to one half of your five year sentence in custody. You will serve the remainder on licence. You must keep to the terms of your licence and commit no further offence or you will be liable to be recalled and you may then serve the rest of your sentence in custody.

(4) Concurrent and consecutive sentences

(a) Where D is to be sentenced for more than one offence, sentences should be imposed in respect of each offence of which D has been convicted (unless the offence is to be marked with "no separate penalty").

(b) Sentences may be ordered to run concurrently or consecutively. In the absence of express order, sentences will be served concurrently.

(c) A determinate sentence of imprisonment may be ordered to run consecutively to any other custodial sentence (including a minimum term of an indeterminate sentence): PCC(S)A s.154.

(d) A sentence cannot be ordered to be served consecutively to a sentence from which D has already been released: CJA 2003 s.265.

(e) When passing consecutive sentences the sentencer must have regard to the principle of totality, applying the SC Guideline: Offences Taken into Consideration and Totality.

Example: Court has to sentence for two offences

On count 1 of this indictment, the charge of wounding {name} on {date}, the sentence will be two years' imprisonment. On count 2, the charge of assaulting {name} occasioning actual bodily harm on {date}, the sentence will be one year's imprisonment. The sentence on count 2 will run consecutively to the sentence on count 1, making a total sentence of three years in all. That is the least sentence that I can impose to mark the totality of your offending. You will serve up to half of your total sentence in custody and then …..

Example: where D is already serving a life sentence with a minimum of 10 years

For this offence of wounding you will serve a sentence of 18 months' imprisonment. You will serve no more than half of this sentence in custody – i.e. 9 months. However, this sentence will be served consecutively to the minimum term of 10 years which you are currently serving. This means that when you have completed the minimum term of 10 years you will then serve the custodial portion of this sentence – namely 9 months – and you will not be eligible to be considered for parole until you have served that additional period.

S4-5 Detention in a Young Offender Institution

PCC(S)A 2000 s.96; ORA 2014 s.2 (inserting CJA ss.256AA and 256AB – licence and supervision provisions)

ARCHBOLD 5A-643; BLACKSTONE'S E7.4; CURRENT SENTENCING PRACTICE F2-2050; SENTENCING REFERENCER § 32-001

1. Detention in a Young Offender Institution is the custodial sentence for offenders between the ages of 18 and 21 at the date of conviction where the sentence is not an extended or life sentence.
   (1) The minimum sentence is 21 days.
   (2) The maximum is the term available for the offence.
   (3) Release provisions relating to sentences of detention in a Young Offender Institution in respect of offences committed on or after 1 February 2015 are the same as those relating to determinate sentences of imprisonment [CJA 2003 s.237 (see chapter S4-4 above)].
   (4) In respect of offences committed before 1 February 2015, on release, offenders serving a sentence of less than 12 months, are subject to a supervision period of 3 months [CJA 2003 s.256B inserted by s.115 LASPO].

2. Criteria for sentence
   (1) The offence/s is/are so serious that neither a fine alone nor a community sentence can be justified.
   (2) The sentence is the least that can be imposed having regard to the seriousness of the offence.

3. Passing the sentence

   The court must:

   (1) Set out findings in relation to those matters described in paragraphs 1 – 3 of chapter S3 above.
   (2) State that
      (a) the seriousness of the offence is such that neither a fine alone nor a community order can be justified. (These are the words of the statute but are commonly expressed in sentencing remarks as *"the offence is so serious that only a custodial sentence can be justified"*);
      (b) the sentence is the least that can be imposed having regard to the seriousness of the offence.
   (3) Explain the effect of the release provisions.

Example

The offence is so serious that only a custodial sentence can be justified and the least possible sentence I can impose having regard to the seriousness of the offence is one of [XX] months/years detention in a Young Offender Institution of which you will serve up to half in custody.

NOTE: here explain the effect of the release provisions, examples of which, dependent on length of sentence, are to be found in chapter S4-4 above.

S4-6 Minimum Custodial Sentences

PCC(S)A ss.110 and 111

Firearms Act 1968 s.51A

Violent Crime Reduction Act 2006 s.29

Prevention of Crime Act 1953 s.1A and Criminal Justice Act 1988 s.139A

Prevention of Crime Act 1953 s.1 and Criminal Justice Act 1988 s.139 and 139A

ARCHBOLD 5A-653 – 5A-670; BLACKSTONE'S E5; CURRENT SENTENCING PRACTICE A5; SENTENCING REFERENCER § 69-001 – 72-001

1. Minimum sentences are attracted by:

   (1) A third Class A drug trafficking offence (the latest of which must have been committed after 30.9.97, and commission and conviction for each before the next) [PCC(S)A s.110] unless there are circumstances relating to the offence or to the offender which would make it unjust to do so (D aged 18 or over at the time of offence);

   (2) A third domestic burglary (all committed after 30 November 1999, and commission and conviction for each before the next) [PCC(S)A s.111] unless there are circumstances relating to the offence or to the offender which would make it unjust to do so (D aged 18 or over at the time of offence);

   (3) Certain firearms offences (committed on/after 22 January 2004) [Firearms Act 1968 s.51A] and also offences of minding specified firearms [Violent Crime Reduction Act 2006 s.29] unless there are exceptional circumstances relating to the offence or to the offender which justify the court in not doing so (D aged 16 or over at the time of offence).

   (4) Bladed articles/Offensive weapons

      (a) Prescribed sentence for offenders aged 16+ at the time of conviction:

         (i) CJA 1988 s.139AA (Offence of threatening with article with blade or point or offensive weapon)

         (ii) PCA 1953 s.1A (Offence of threatening with offensive weapon in public)

      The requirement to impose a minimum sentence does not apply where there are particular circumstances relating to the offence or to the offender which make it unjust to do so.

      (b) Prescribed sentence for offenders aged 16+ at the time of conviction and who, at the time of the offence have a relevant previous conviction:

         (i) CJA 1988 s.139 (Offence of having article with blade or point in public place)

         (ii) CJA 1988 s.139A (Offence of having article with blade or point (or offensive weapon) on school premises)

         (iii) PCA 1953 s.1 (Prohibition of the carrying of offensive weapons without lawful authority or reasonable excuse)

> The requirement to impose a minimum sentence does not apply where there are particular circumstances relating to the offence, the previous offence or to the offender which make it unjust to do so.

2. Where a minimum sentence must be passed this must be stated and, if D has pleaded guilty, it must be made clear what, if any, credit has been given.

3. It is important not to 'water down' the statutory purpose of the minimum sentence regime, see *Chaplin*.[46] There is no power to suspend a sentence imposed under the minimum sentence provisions under the Prevention of Crime Act 1953 or the Criminal Justice Act 1988: *Whyte.*[47]

Third class A drug trafficking offence

4. In the context of the minimum sentence for a third Class A drug trafficking offence, a regrettable but unexceptional history of recruitment to gang-related drug dealing should not be elevated to the status of "particular circumstances" justifying a disapplication of the minimum sentence for a third class A drug trafficking offence, see *AG's Ref (2018) (Usherwood).*[48]

Possession of a prohibited firearm

5. In the context of the minimum sentence for possessing a prohibited firearm, *Nancarrow*[49] reviewed the authorities, endorsing the following principles:
   (1) The purpose of the mandatory minimum term is to act as a deterrent.
   (2) Circumstances are "exceptional" if to impose five years' imprisonment would be arbitrary and disproportionate.
   (3) It is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional.
   (4) It is necessary to look at all the circumstances of the case together, taking a holistic approach rather than looking at the features in isolation.
   (5) The four questions set out in *Avis*[50] should always be considered, namely: (a) What sort of weapon was involved? (b) What use, if any, was made of it? (c) With what intention did the defendant possess it? (d) What is the defendant's record?

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46 [2015] EWCA Crim 1491; [2016] 1 Cr.App.R. (S.) 10

47 In *Whyte* [2018] EWCA Crim 2437 the court found that, even though the minimum term specified for a second bladed article offence was short enough to be capable of being suspended, the reference to "imprisonment" under the minimum sentencing provisions is a reference to a term of "immediate imprisonment". Whether that assertion may be open to debate in terms of statutory interpretation, it is clearly consistent with the perceived legislative intent behind the minimum sentence regime.

48 [2018] EWCA Crim 1156; [2018] 2 Cr.App.R. (S.) 39

49 [2019] EWCA Crim 470

50 [1998] 2 Cr App R (S) 178

(6) It is relevant that an offender is unfit to serve a five-year sentence or that such a sentence may have a significantly adverse effect on his health.

(7) Limited assistance is to be gained from referring the court to decisions in cases involving facts that are not materially identical.

(8) Unless the judge is clearly wrong in identifying exceptional circumstances where they do not exist or clearly wrong in not identifying exceptional circumstances where they do exist, this Court will not readily interfere (*Rehman* at paragraph 14).

Third domestic burglary

6. To reflect the policy of deterrence in the legislation, where an offender is liable to be sentenced for multiple offences it is not generally appropriate to impose a concurrent sentence in respect of a burglary to which the minimum sentence applies, see *Haddock*.[51]

7. Where a sentence of more than the minimum is passed, credit is to be given for plea in accordance with the SC Guideline Reduction in Sentence for Guilty Plea. Save in the case of firearms offences, where a minimum sentence applies, a reduction in sentence for a guilty plea may not reduce the sentence below 80% of the prescribed minimum (see for example *Jones*[52]).

[51] [2018] EWCA Crim 2860
[52] [2015] EWCA Crim 1258

Minimum sentences and maximum credit for plea of guilty			
Offence	**Age at offence**	**Minimum**	**Minimum sentence where defendant pleads guilty**
Class A drug trafficking (3rd offence)	18 or over	7 years	2045 days (that being 80% of the 7-year minimum)
Domestic burglary (3rd offence)	18 or over	3 years	876 days (that being 80% of the 3-year minimum)
Firearms	18 or over	5 years	5 years (no reduction for guilty plea may be made)
	16 or 17	3 years	3 years (no reduction for guilty plea may be made)
Minding firearms	18 or over	5 years	3 years (no reduction for guilty plea may be made)
Threatening with offensive weapon in public; Threatening with article with blade or point or offensive weapon in public or on school premises	18 or over	6 months	146 days (that being 80% of the 6-month minimum)
	N/A[53]	4 months DTO	No restriction – the court may impose any available sentence where the defendant pleads guilty
Second offence of possession of an offensive weapon or bladed article in a public place or on school premises – offence committed on or after 17 July 2015	18 or over	6 months	146 days (that being 80% of the 6-month minimum)
	16 or 17[54]	4 months DTO	No restriction – the court may impose any available sentence where the defendant pleads guilty

[53] The minimum term provisions apply even where D was under 16 as at the date of the offence as long as D is 16 as at the date of conviction. It might be thought, however, that, in conjunction with any other points that might be relied upon in support of an argument that the imposition of the minimum term would be unjust, the age of the offender at the date of the offence should carry some additional weight bearing in mind the other minimum term provisions as they apply to Ds aged under 18 but who have to have attained 16 years as at the date of the offence before they bite.

[54] However it is important to note that one of the criteria for imposing the minimum sentence for this offence is that at the time of the offence, the defendant was aged 16 or over and had a relevant previous conviction.

Example 1: (2nd knife/3rd domestic burglary/3rd class A trafficking: where proportionate sentence would be less than the minimum, but minimum term applied with permitted reduction for plea of Guilty)

The proportionate sentence in your case, taking into account the aggravating and mitigating factors, would be X months / X years' imprisonment. That is less than the minimum sentence which I am required to pass for this offence which is a term of 6 months' / 3 years' / 7 years' imprisonment. I am satisfied that there are no particular features of the offence, or the previous offence or relating to you, the offender, that would make it unjust to pass such a sentence. As you pleaded guilty to this offence at the first reasonable opportunity I shall give you the credit which I am permitted to give. I therefore reduce the term of your sentence by 20 percent, so that the sentence is one of 146 days / 876 days / 2045 days' imprisonment. [Explain release on licence etc.]

Example 2: (firearm: minimum term where no reduction permissible for plea of Guilty)

The proportionate sentence in your case, taking into account the aggravating and mitigating factors, is beneath the minimum sentence which I am required to impose for this offence, that being a term of 5 years' imprisonment. I am satisfied that there are no particular features of the offence or relating to you, the offender, that would make it unjust to pass such a sentence. Although you pleaded guilty to this offence at the first reasonable opportunity I am not permitted to give you any credit for that plea and so the sentence which you will serve is one of 5 years' imprisonment. [Explain release on licence etc.]

Example 3: (firearm: sentence after trial would have been above the minimum term but reduced to minimum term for plea of Guilty)

The minimum sentence which I am permitted to pass for this offence is one of 5 years' imprisonment, but given the seriousness of your offence, having taken account of all the aggravating and mitigating factors, I am satisfied that the least sentence that I could have passed after a trial would have been one of 7 years. You pleaded guilty to this offence at the first reasonable opportunity and are entitled to receive credit for that plea. Normally I would have reduced your sentence by a full 1/3rd, but given the minimum sentence which I must impose unless it is unjust to do so, the sentence must be one of 5 years' imprisonment. I am satisfied that there are no particular features of the offence or relating to you, the offender, that would make it unjust to pass such a sentence and so the sentence will be 5 years' imprisonment. [Explain release on licence etc.]

Example 4: (drug trafficking: particular circumstances justifying sentence below minimum term)

There are no aggravating factors in this case which would have required a longer sentence than the minimum sentence of 7 years' imprisonment that I am ordinarily required to pass. Indeed, there are particular circumstances of the offence {namely…}, of the previous offence {namely…} or relating to you, the offender {namely…} which make it unjust to impose a sentence of that length. The sentence which I would have imposed after a trial, taking account of the seriousness of your

offence and all of the mitigating factors, is one of 4 years' imprisonment. I reduce that to take account of the fact that you have pleaded Guilty, not at the first reasonable opportunity but at the plea and trial preparation hearing. I therefore allow a 25% reduction for your plea of guilty and sentence you to 3 years' imprisonment. [Explain release on licence etc.]

S4-7 Suspended Sentence Orders

CJA 2003 ss.189 – 193

ARCHBOLD 5A-609; BLACKSTONE'S E6.1; CURRENT SENTENCING PRACTICE A6; SENTENCING REFERENCER § 93-001

1. The power to order that a custodial sentence be suspended applies to sentences of imprisonment:
   (1) For those aged 21+ at conviction, the term of imprisonment must be not less than 14 days and not more than two years.
   (2) For those aged 18-20 at conviction, the sentence is one of detention in a Young Offender Institution and must be not less than 21 days and not more than two years.
   (3) Where consecutive suspended sentences are passed the aggregate sentence must not exceed two years.

2. Criteria for sentence
   (1) The offence/s is/are so serious that neither a fine alone nor a community sentence can be justified: i.e. the sentence passes the "custody threshold".
   (2) The length of that sentence is the least that can be imposed to mark the seriousness of the offence.
   (3) Defendant aged 18 or over at conviction.
   (4) There are factors which make it appropriate to suspend the sentence.

   NOTE: the SC: Imposition of Community and Custodial Sentences Definitive Guideline provides guidance on when it might be appropriate to suspend a sentence.

3. The absence of a guilty plea *may* provide a justification for not suspending a sentence where it bears upon the judicial assessment of whether there is a realistic prospect of rehabilitation: *Evans*.[55]

4. Where the sentence is capable of suspension but the court has concluded that an immediate custodial sentence is the only appropriate sentence, the reason for so concluding should be identified. A failure so to do is going the make the sentence more susceptible to a successful appeal and an absence of reasoning will result in the court having to reach its own conclusions on the issue. Where reasons are given then the CACD should be slow to interfere with the decision, see for example *Robinson*.[56]

5. When considering the factors listed in the SC's Imposition of Community and Custodial Sentences Definitive Guideline, the exercise to be performed is a

[55] [2019] EWCA Crim 606
[56] [2019] EWCA Crim 1619

balancing exercise in which one factor *may* outweigh a number of other factors on the other side of the scales: *Middleton.*[57]

6. In appropriate cases, the court may impose a fine in addition to a suspended sentence order. In the case of *Butt*[58] the Court of Appeal considered Health and Safety Offences by an individual in relation to the letting of a residential property which had a substantial capital value and generated significant income. The Court indicated that the imposition of a fine together with suspended sentence was particularly apt when the offending is related to a defendant's business or employment, when dealing with offenders with substantial means, or when the sentence allows an offender to continue in well-remunerated work.

7. Where an offender has spent time on remand equal to, or in excess of, the appropriate sentence, there may be no circumstances in which additional punishment in the form of a suspended sentence order could be justified and the court may consider imposing a conditional discharge: *Dawes.*[59] The court held that it is illogical to impose a suspended sentence that, if breached, would not result in the offender serving any of the sentence in custody given that the remand time would be automatically deducted.

8. Passing the sentence

   The court must:

   (1) Complete the steps set out in chapter S3 above.

   (2) State that:

      (a) the seriousness of the offence is such that neither a fine alone nor a community order can be justified;

      (b) the sentence of [XX] months is the least that can be imposed to mark the seriousness of the offence/s.

      (c) Direct that the sentence will be suspended (for a period of not less than 6 months or more than 2 years): the “operational period”.

   (3) Consider whether any requirement(s) from the list specified in CJA s.190 (identical to Community Order requirements: see chapter S5-1 below) should be attached to the order to be completed within, or complied with for, a period of not less than 6 months or more than 2 years: the “supervision period”. It is no longer mandatory to impose any requirement on a suspended sentence.

   (4) Explain the consequences of any further offending and/or breach of a requirement if one or more have been imposed and at which court any breaches will be considered. (Usually breaches of suspended sentences are retained by the Crown Court.).

   (5) If the court is ordering reviews, specify the date of the first review.

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57 [2019] EWCA Crim 663
58 [2018] EWCA Crim 1617
59 [2019] EWCA Crim 848

Example: with requirement for supervision (offence committed before 1st February 2015)

For the offence of (X) there will be a suspended sentence order of 2 years' duration.

There will be a custodial term of ….. months/weeks* which will be suspended for 2 years. If in the next 2 years you commit any offence you will be brought back to court and it is likely that this sentence will be brought into operation.

Also, for the next 12 months, you will be supervised by a Probation Officer. That means you must meet the officer when and where you are required to and cooperate fully. If you fail to comply with this requirement you will be in breach of this order, which means that you will be brought back to court and you will be liable to serve the sentence.

Example: with requirement for Rehabilitation Activity Requirement (offence committed on or after 1 February 2015)

For the offence of (X) there will be a suspended sentence order of 2 years' duration.

There will be a custodial term of ….. months/weeks* which will be suspended for 2 years. If in the next 2 years you commit any offence you will be brought back to court and it is likely that this sentence will be brought into operation.

Also for the next 12 months you will be subject to a rehabilitation activity requirement. That means that you must meet with the officer supervising this requirement as and when required and you must attend and co-operate fully with any activities that are arranged. If you fail to comply with this requirement you will be in breach of this order, which means that you will be brought back to court and you will be liable to serve the sentence.

[If reviews are ordered: … and you must return to court at {specify} on {date} when your progress will be reviewed. At that review the court will have a short report on your progress from your supervising officer. If you are doing well the order will continue, but if you are failing to comply with it, you will be in breach of this order and liable to serve the sentence.]

Note:

1. The original stipulation that a suspended sentence had to be expressed only in weeks no longer applies.
2. The possible consequences of reoffending/breach are simplified in the above example with a view to D being able to understand them. The court's full powers are set out in chapter S9-3.

S4-8 Determinate Custodial Sentence for those under 18

Detention under PCC(S)A s.91

ARCHBOLD 5A-1020; BLACKSTONE'S E7.9; CURRENT SENTENCING PRACTICE F2-2600; SENTENCING REFERENCER § 34-001

1. Introduction

   (1) Detention under PCC(S)A s.91 is a custodial sentence for offenders aged under 18 at the date of conviction who have been convicted of "grave crime/s".

   (2) While there is no statutory minimum term, in practice the offence should merit a sentence of significantly more than 2 years. (If it merits detention of 2 years or less, a Detention and Training Order is likely to be appropriate.)

   (3) The maximum is the term available for an adult for the offence.

   (4) Where the offender is to be sentenced for one or more offences which qualify for a sentence under s.91 and others which do not, a term of detention commensurate with the seriousness of all of the offences should be passed under s.91 only on the/those offence/s which so qualify. The court should order "no separate penalty" on those which do not.

   (5) A Detention and Training Order and an order for detention under s. 91 cannot be ordered to run consecutively.

   (6) All offenders are released having served no more than half their sentence. This is the "requisite custodial period": see CJA 2003 s.244(3).

   (7) An offender sentenced to a term of 12 months or more will be subject to licence for the remainder of the sentence.

   (8) In the rare instance of an offender sentenced to a term of less than 12 months under s.91, he/she will be supervised for 3 months on release.

2. Criteria for sentence

   (1) The offence/s must be a "grave crime", namely:

      (a) offences punishable, if 21 or over, with 14 years' imprisonment or more, not being a sentence fixed by law. This includes a common law offence where the sentence is at large; or

      (b) offences under SOA ss.3, 13, 25 or 26; or

      (c) various offences under the Firearms Act 1968 if the firearm is of a type which attracts a minimum sentence and the offender is aged 16 or over at the time of the offence (minimum term for an offender under 18 at the time of conviction is 3 years, subject to exceptional circumstances); or

      (d) an offence under Violent Crime Reduction Act 2006 s.28 (using someone to mind a weapon) if the weapon is a firearm of a type which attracts a minimum sentence and the offender is aged 16 or over at the time of the offence (minimum term for an offender under 18 at the time of conviction is 3 years, subject to exceptional circumstances).

(2) The court must have regard to the welfare of the offender and shall, in a proper case, take steps to remove the offender from undesirable surroundings and for securing proper provision for the offender's education and training.

(3) The court must have regard to the need to prevent offending by children and young persons.

(4) The court must be of the opinion that no other form of sentence is suitable.

3. Passing the sentence

The court must:

(1) Complete the steps set out in chapter S3 above.

(2) State that it has had regard to the welfare of the offender and the need to prevent the offender from further offending.

(3) (In an appropriate case) state that it is taking steps to remove the offender from undesirable surroundings and/or secure proper provision for their education and training.

(4) Also state that

(a) the seriousness of the offence is such that only a sentence under s.91 can be justified;

(b) the sentence is the least that can be passed to mark the seriousness of the offence/s.

(5) Explain that up to one half of the sentence will be served in custody and on release D will be on licence/supervision (as appropriate) and if D reoffends or does not cooperate with the terms of licence/supervision D will be liable to be returned to custody.

Example

In deciding what is the right sentence in your case I have had regard to your welfare and the need to prevent you from committing any more offences and I am satisfied that the best way of achieving these things is to sentence you to a term of detention under section 91* and that despite your age your offence is so serious that nothing but a substantial custodial sentence can be justified. The least sentence that I can pass is one of 3 years' detention.

You will serve up to half this sentence in custody and then you will be released on licence. Your licence will be subject to a number of conditions and if you break any of those conditions your licence may be revoked and you will be liable to serve the rest of the sentence in custody.

*Reference to s.91 is not for the benefit of D (although D may already have had this possibility explained to him/her and understand what it means) but so that there is no ambiguity in the minds of all other parties, including the CACD, about the provision under which the sentence has been imposed.

4. Time spent on remand in custody or subject to a qualifying electronically monitored curfew

   For a full explanation of the provisions relating to time on remand, as amended by LASPO see chapter S4-9 below.

Detention and Training Orders: PCC(S)A ss.100 – 107

ARCHBOLD 5A-1002; BLACKSTONE'S E7.15; CURRENT SENTENCING PRACTICE F2-3200; SENTENCING REFERENCER § 31-001

5. Introduction

   A Detention and Training Order is a custodial sentence available for those aged between 12 and 17 inclusive at the date of conviction.

   (1) The minimum sentence is 4 months. The maximum sentence is 24 months.

   (2) Only sentences of 4, 6, 8, 10, 12, 18 or 24 months may be imposed in respect of any one offence. The total of consecutive sentences does not have conform to these numbers although it must not exceed 24 months.

   (3) If the offender is under the age of 15 a sentence may only be imposed if they are a "persistent offender" within PCCS(A) s.100(2)(a).

6. Criteria for sentence

   (1) The offence by itself or in combination with other offences must be so serious that neither a fine alone nor a community sentence can be justified [CJA 2003 s.152(2)] ***or*** (though this is very rare in practice) the offender refuses to express willingness to comply with a requirement of a Youth Rehabilitation Order for which the offender's willingness to comply is necessary i.e. a drug treatment requirement, a drug testing requirement, an intoxicating substance treatment requirement or a mental health treatment requirement.

   (2) The sentence must be the shortest term that is commensurate with the seriousness of the offence, either by itself or in combination with others associated with it [CJA 2003 s.153(2)].

   (3) There is no power to give credit for time served on remand within the term of a sentence of Detention and Training, so the sentencer must "take account" of time served on remand when fixing the term.

   (4) In a case sent to the Crown Court as a "grave crime" it is permissible to impose a sentence of 2 years' Detention and Training on a plea of guilty entered at the first reasonable opportunity in a case in which, but for the plea of guilty, an order would have been made for detention under PCC(S)A s.91. If this situation arises it must be explained clearly.

7. Passing the sentence

The court must:

(1) Complete the steps set out in chapter S3 above.

(2) State that it has had regard to

(a) the welfare of the offender; and, if appropriate, that it is taking steps to remove the offender from undesirable surroundings and/or secure proper provision for their education and training;

(b) the need to prevent him/her from further offending.

(3) Also state that

(a) the seriousness of the offence is such that a fine or a youth rehabilitation order cannot be justified; and that

(b) the sentence is the least that can be passed to mark the seriousness of the offence/s;

(4) In relation to time spent on remand in custody/secure accommodation/qualifying curfew, as there is no power to order this to count towards the sentence, the court must take this into account when fixing the term. This has not been affected by the provisions of LASPO 2012.

(5) Explain that up to one half of the sentence – the "detention" part of the sentence **-** will be served in custody and the remainder – the "training" part - will be served on supervision.

(6) If the offence is committed on or after 1 February 2015 and the offender is aged 18 at the time of the expiry of half the sentence (the requisite custodial period) he/she will be subject to supervision for 12 months from the date of the end of the requisite custodial period.

(7) Explain the consequences of

(a) Reoffending during the currency of the supervised term of the order – if the offence is punishable with imprisonment, he/she may be ordered to be detailed for the period outstanding) and

(b) Failing to co-operate with supervision, he/she may be taken before the Youth Court and either fined or ordered to serve the remainder of the order or 3 months, whichever is less.

(c) Failing to co-operate with any further supervision period (age 18: see above) – a sentence of curfew, unpaid work or up to 14 days in a Young Offender Institution.

Example

I have had regard to your welfare and to the need to provide for your education and training and I am satisfied that your offence is so serious that only a custodial sentence can be justified.

But for your plea of guilty and the fact that you have spent 76 days on remand in custody I would have sentenced you to a term of 2 years' Detention and Training, this being the least sentence which I could have imposed to mark the seriousness of your offence. Giving you full credit for your prompt plea of guilty, and taking account of the time you have spent on remand, I reduce that term to one of 12 months' Detention and Training.

Either: Of this sentence you will spend up to one half in detention – that is custody – and then you will be released to serve the other half of the sentence – the training part – on supervision in the community.

Or – if the offender is 18 by the time the requisite custodial period expires: Of this sentence you will spend up to one half in detention – that is custody – and then you will be released and then be supervised in the community for 12 months.

In any case: If, once you have been released and while you are on supervision, you commit any offence punishable with imprisonment or if you fail to co-operate with your supervising officer you will be liable to be returned to custody.

S4-9 Time spent on remand

Remand in Custody

CJA 2003 s.240ZA

ARCHBOLD 5A-631; BLACKSTONE'S E2.12; CURRENT SENTENCING PRACTICE A7; SENTENCING REFERENCER § 94-001

1. When passing a determinate custodial sentence (whether or not extended) other than a Detention and Training Order the time spent on remand in custody will, subject to certain qualifications, count automatically (CJA 2003 s.240ZA): see **Example 1**.

2. A suspended sentence is to be treated as: (a) a sentence of imprisonment when it takes effect and (b) as being imposed by the order under which it takes effect [CJA 2003 s.240ZA(7)]. Thus time spent on remand in custody before the sentence was imposed will not lead to any reduction in the length of that sentence, but will count when the sentence takes effect: see **Example 2**.

3. It is still necessary for the court to make a reduction for the number of days spend on remand in custody when setting a minimum term to be served on a life sentence: see the **Example** under the heading "passing a life sentence" in chapter S4-2 above.

4. In the case of young offenders, time spent on remand in youth detention will count against a custodial sentence, whereas time spent on remand in local authority accommodation will not (LASPOA 2012 s.91; *A*[60]).

Example 1

The days which you have spent on remand in custody will automatically count towards your sentence.

Example 2: when suspended sentence brought into operation

The days which you spent on remand in custody before you were originally sentenced will automatically count towards the [part of the] sentence which I have now brought into operation.

[60] [2019] EWCA Crim 106

Remand on Qualifying Electronically Monitored Curfew

CJA 2003 s.240A

ARCHBOLD 5A-632; BLACKSTONE'S E2.16; CURRENT SENTENCING PRACTICE A7; SENTENCING REFERENCER § 95-001

1. When passing a determinate custodial sentence (whether or not extended) the court must certify the number of days spent on remand under a curfew with relevant conditions i.e. (a) a curfew for 9 hours or more and (b) which is electronically monitored and must direct that the appropriate proportion of those days will count towards the sentence. The sentencer has no discretion in this regard and this continues to be the case when activating an extended sentence in respect of which D spent time subject to a qualifying curfew prior to being made subject to such a sentence.[61]

2. The same considerations apply when setting the minimum term to be served in relation to a life sentence.

3. The proportion of those days is to be calculated by reference to the 5 step test prescribed by CJA 2003 s.240A(3) [as substituted by LASPO s.109(3)]. It is anticipated that this calculation will be done by the advocates and/or the clerk of the court but, since it is a judicial obligation to do so, the test is explained below.

4. The court should also direct that if the calculation of days is not correct, a correction will be made administratively without the need for a further hearing.

5. The 5 step test
   (1) Calculate the days on bail with the relevant conditions (namely (a) curfew for 9 hours or more and (b) electronic monitoring) beginning on the day on which the conditions were imposed and ending on the day before the day of sentence.
   (2) Deduct any days where the offender has been subject, at the same time, to:
      (a) a Community Order, Youth Rehabilitation Order or requirement of a suspended sentence with a similar qualifying curfew; or
      (b) release on Home Detention Curfew or other temporary release with a similar qualifying curfew.
   (3) Deduct any days on which he/she has been in breach of any part of the relevant conditions.
   (4) Divide the resultant days by 2.
   (5) Round up if there is a half day.

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[61] *Lovelace* [2017] EWCA 1589 (Crim)

Example

I certify that you have spent 47 days on remand subject to a qualifying curfew and I direct that 24 days will count towards your sentence. If this calculation is later found to be wrong it will be put right by correcting the record administratively without any further hearing.

S5 NON-CUSTODIAL SENTENCES

S5-1 Community Orders

CJA 2003 s.177 et seq.

ARCHBOLD 5A-494; BLACKSTONE'S E8; CURRENT SENTENCING PRACTICE B1; SENTENCING REFERENCER § 18-001

1. A Community Order is a community sentence for offenders who are aged 18 or over on the date of conviction.
   (1) The maximum length of a community order is 3 years.
   (2) A community order must have at least one requirement (see below) and requirements must be compatible one with another.
   (3) Requirement/s must avoid conflict with the offender's religious beliefs and/or interference with the offender's times of work and/or education.
   (4) The SGC guideline "New Sentences: Criminal Justice Act 2003" sets out a recommended approach to the nature and extent of requirements to be made.
   (5) The court may have regard to any period spent on remand, or qualifying electrically monitored curfew, when determining the restrictions/s on liberty which such a sentence imposes.

2. Criteria for sentence
   (1) The offence, or combination offences, is serious enough to warrant such a sentence.
   (2) The requirement/s must be the most suitable for the offender.
   (3) The restriction/s on liberty imposed by the requirement/s must be commensurate with the seriousness of the offence/s.

3. The Requirements [sections in CJA 2003]
   - an unpaid work requirement [s.199]
     40 - 300 hours to be completed within 12 months
   - a rehabilitation activity requirement [s.200A]
     this replaces supervision and activity requirements in respect of offences committed on and after 1 February 2015. The supervising officer (who may not be a probation officer) may require the offender to attend for appointments and for any appropriate activity.
   - an activity requirement [s.201]
     only for offences committed before 1 February 2015. Up to 60 days; must be consultation with the Probation Service
   - a programme requirement [s.202]
     must specify the number of days on which D must participate
   - a prohibited activity requirement [s.203]
     can only be imposed after consultation with the Probation Service

- a curfew requirement [s.204]
  2 - 16 hours in any 24 hours; maximum term 12 months; must consider those likely to be affected; must be electronically monitored unless a person whose cooperation is necessary does not consent or it is otherwise inappropriate
- an exclusion requirement [s.205]
  from a specified place/places; maximum period 2 years: may be continuous or only during specified periods; must be electronically monitored unless a person whose cooperation is necessary does not consent or the court has not been notified that arrangements for electronic monitoring are available or it is otherwise inappropriate
- a residence requirement [s.206]
  to reside at a place specified or as directed by the supervising officer

  NOTE: in respect of offences committed on or after 1 February 2015, in the absence of a specific residence requirement, the offender must not change residence without the permission of the responsible officer or the court. This obligation is enforceable as if it were a requirement imposed by the order: ORA s.18
- a foreign travel prohibition requirement [s.206A]
  not to exceed 12 months
- a mental health treatment requirement [s.207]
  may be residential/non-residential; must be by/under the direction of a registered medical practitioner or chartered psychologist. The court must be satisfied:

  (a) that the mental condition of the offender is such as requires and may be susceptible to treatment but it not such as to warrant the making of a hospital or guardianship order;

  (b) that arrangements for treatment have been made;

  (c) that the offender has expressed willingness to comply.
- a drug rehabilitation requirement [s.209]
  the court must be satisfied that the offender is dependent on or has a propensity to misuse drugs which requires or is susceptible to treatment; residential or non-residential; must have offender's consent; reviews, which the offender must attend (subject to application for amendment) at intervals of not less than a month (discretionary on requirements of up to 12 months, mandatory on requirements of over 12 months)
- an alcohol treatment requirement [s.212]
  residential or non-residential; must have offender's consent; court must be satisfied that the offender is dependent on alcohol and that the dependency is susceptible to treatment
- a supervision requirement [s.213]
  only for offences committed before 1 February 2015. Maximum 3 years
- an attendance centre requirement [s.214]
  only available for offenders under 25; 12 - 36 hours

- an electronic monitoring requirement [s.215]
  consent of householder (if someone other than D) is required. Mandatory, unless inappropriate, for curfew and exclusion; discretionary for unpaid work, rehabilitation activity, activity, programme, prohibited activity, residence, foreign travel prohibition, mental health treatment, drug rehabilitation, alcohol treatment, supervision, attendance centre.

4. In appropriate cases, the court may impose a fine in addition to a community order. It is particularly apt when the offending is related to a defendant's business or employment, when dealing with offenders with substantial means, or when the sentence allows an offender to continue in well-remunerated work. For many in those categories, a substantial fine coupled with a suspended sentence or community sentence will be an appropriate punishment, see *Butt*[62].

5. Passing the sentence

   The court must:

   (1) Complete the steps set out in chapter S3 above.

   (2) State that

      (a) the offence, or the combination offences, is serious enough to warrant such a sentence;

      (b) the sentence is the least that is commensurate with the seriousness of the offence/s;

      (c) (if it is the case) the court has had regard to time spent on remand in imposing the requirement/s attached to the order.

   (3) Specify and explain the requirement/s attached to the order including the requirement that the offender keep in touch with the responsible officer in accordance with such instructions as the offender may be given by that officer.

   (4) In the case of offences committed on or after 1 February 2015, specify that it is a requirement of the order that the offender obtains the consent of their supervising officer or the court before any change of residence.

   (5) Specify whether any breach of any requirement is to be dealt with in the Crown Court or the Magistrates' Court and explain the court's powers in the event of any such breach or conviction of another offence (see chapter S9-1 below).

62 [2018] EWCA Crim 1617

Example

Your offence is serious enough to require a community order – and you will be subject to these requirements:

1. You will complete 120 hours of unpaid work within the next 12 months, working when and where you are directed by your supervising officer;
2. You will be subject to – and cooperate with – supervision/a rehabilitation activity requirement for 12 months. That means you must meet your supervisor when and where you are told to and you must cooperate fully with any instructions that your supervisor gives you.

If you fail to complete the unpaid work or to do it properly, or fail to cooperate with supervision/the rehabilitation activity requirement you will be in breach of the order: that means you will be brought back before this court/the Magistrates' Court and may be given further requirements or resentenced or fined for this offence; and that may well mean custody.

S5-2 Youth Rehabilitation Orders

CJIA s.1

ARCHBOLD 5A-975; BLACKSTONE'S E9; CURRENT SENTENCING PRACTICE F3; SENTENCING REFERENCER § 99-001

1. A Youth Rehabilitation Order (YRO) is a community sentence available for offenders under the age of 18 at the date of conviction.[63]

   (1) The maximum length of a YRO is 3 years.

   (2) A YRO must have at least one requirement and requirements must be compatible one with another.

   (3) The court must obtain and consider information about the offender and the offender's family and the effect that any requirement will have on the family, attendance at work, place of education and avoid conflicts with religious beliefs. [CJIA Sch. 1].

   (4) The SC Sentencing Children and Young People Guideline sets out a recommended approach to the nature and extent of requirements to be made.

   (5) Requirements of intensive supervision and surveillance and fostering may only be made if the offence is punishable with imprisonment and the court is of the opinion that the offence is so serious that otherwise a custodial sentence would be appropriate and, if the offender is under 15, he/she is a persistent offender.

2. Criteria for Sentence

   (1) The offence or combination of offences is serious enough to warrant such a sentence.

   (2) The restrictions on liberty and/or requirements of the order must be commensurate with the seriousness of the offence.

   (3) The order is the most appropriate to achieve the aims of the youth justice system i.e. of preventing further offending while having regard to the welfare of the young person.

3. The Requirements [paragraphs in CJIA Sch.1]

   Full details of any proposed requirements will be in the report from the Youth Offending Service.

   - an activity requirement [6 – 8]
     residential or non-residential for up to 90 days

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[63] Section 8(2) of the Powers of Criminal Courts (sentencing) Act 2000 requires a Crown Court to remit an offender aged under 18 to the Youth Court for sentence "unless it would be undesirable to do so". The Youth Court has the power to impose a Referral Order which the Crown Court does not. For guidance on the topic of the approach to sentencing youths in the Crown Court see *Dillon* [2017] EWCA Crim 2671

- a supervision requirement [9]
  maximum 3 year
- an unpaid work requirement [10]
  offender must be 16 or 17 at the date of conviction; 40 - 240 hours; to be completed within 12 months
- a programme requirement [11
  only if recommended by the Youth Offending Team or a Probation Officer
- an attendance centre requirement [12]
  age 14 or over, 12 - 24 hours; age 16 or over, 12 < 36 hours
- a prohibited activity requirement [13]
  court must consult member of the Youth Offending Team or Probation Officer
- a curfew requirement [14]
  2 - 16 hours in any 24 hours; maximum term 12 months; must be electronically monitored unless the householder does not consent or the court considers it inappropriate
- an exclusion requirement [15]
  from a specified place or area; maximum period 3 months: must be electronically monitored unless a person whose cooperation is necessary does not consent or the court has not been notified that arrangements for electronic monitoring are available or it is otherwise inappropriate
- a residence requirement [16]
  to reside with a specified individual or, if 16 or over, to reside at a place specified or at a place approved by the supervising officer
- a local authority residence requirement [17]
  maximum period 6 months; not to extend beyond 18th birthday; must consult local authority and parent/guardian
- a mental health treatment requirement [20]
  may be residential/non-residential; must be by/under the direction of a registered medical practitioner or chartered psychologist. The court must be satisfied

  (a) that the mental condition of the offender is such as requires and may be susceptible to treatment but it not such as to warrant the making of a hospital or guardianship order;

  (b) that arrangements for treatment have been made;

  (c) that the offender has expressed willingness to comply.
- a drug treatment requirement [22]
  residential or non-residential; must be recommended; must have offender's consent
- a drug testing requirement [23]
  only available within a drug treatment requirement; must have offender's consent

- an intoxicating substance treatment requirement [24]
  must be recommended; must have offender's consent; cannot be imposed unless the court is satisfied that the offender is dependent on, or has a propensity to misuse, intoxicating substances
- an education requirement [25]
  must consult local education authority; not to extend beyond compulsory school age
- an electronic monitoring requirement [26]
  to secure compliance with other requirements
- A YRO may also be made with an intensive supervision and surveillance requirement [3] and/or a fostering requirement [4] but only if

  (a) the offence is punishable with imprisonment; and

  (b) the court is of the opinion that the offence is so serious that otherwise a custodial sentence would be appropriate; and

  (c) if the offender is under 15 he/she is a persistent offender.

  The full conditions for and detail of each requirement are set out in CJIA Sch.1 and summarised in the Sentencing Referencer.

4. Passing the sentence

   The court must:

   (1) Complete the steps set out in chapter S3 above.

   (2) State that

   (a) the offence, or the combination offences, is serious enough to warrant such a sentence;

   (b) the sentence is the least that is commensurate with the seriousness of the offence/s;

   (c) (if it is the case) the court has had regard to time spent on remand/in secure accommodation in imposing the requirement/s attached to the order.

   (3) Specify and explain the requirement/s attached to the order including the requirement that the offender keep in touch with the responsible officer in accordance with such instructions as he/she may be given by that officer.

   Specify whether any breach of any requirement is to be dealt with in the Crown Court or the Youth Court and explain the court's powers in the event of any such breach or conviction of another offence.

NOTE: the example given for a Community Order in chapter S5-1 above may easily be adapted for a YRO.

S5-3 Fines

CJA 2003 ss.163 - 165

ARCHBOLD 5A-407; BLACKSTONE'S E15; CURRENT SENTENCING PRACTICE B3; SENTENCING REFERENCER §49-001

1. A fine may be imposed instead of, or as well as, dealing in another way with a D who is:
   (1) convicted of any offence, other than one for which the sentence is fixed by law; or
   (2) proved to be in breach of a requirement of a suspended sentence or community order.
2. A fine must reflect the seriousness of the offence/s and account must be taken of D's financial circumstances.
3. In appropriate cases, the court may impose a fine in addition to a suspended sentence order or a community order. It is particularly apt when the offending is related to a defendant's business or employment, when dealing with offenders with substantial means, or when the sentence allows an offender to continue in well-remunerated work. For many in those categories, a substantial fine coupled with a suspended sentence or community sentence will be an appropriate punishment, see *Butt*.[64]
4. Time may be given for payment either by allowing a fixed term for payment of the full amount or by setting instalments, with a date for the first payment. Payments are made through the Magistrates' Court.
5. A period of custody must be set in default of payment, except in the case of a limited company, which must not exceed the maximum period set out in PCC(S)A 2000 s.139(4) (see table below). Consecutive terms may be set when more than one fine is imposed.

Example 1: D is a limited company

For this offence the company will be fined the sum of £250,000. This will be paid through the Magistrates' Court and must be paid within 28 days.

Example 2: D is an individual

For this offence you will be fined the sum of £250. This will be paid through the Magistrates' Court and you will receive a notice telling you where and how to make payment. The first instalment will be paid by {date}. If you fail to pay the fine, or any instalment of it, you will go to prison for 10 days.

[64] [2018] EWCA Crim 1617

6. Maximum periods in default

Amount	**Period**
Not exceeding £200	7 days
Exceeding £200 but not exceeding £500	14 days
Exceeding £500 but not exceeding £1000	28 days
Exceeding £1000 but not exceeding £2500	45 days
Exceeding £2500 but not exceeding £5000	3 months
Exceeding £5000 but not exceeding £10,000	6 months
Exceeding £10,000 but not exceeding £20,000	12 months
Exceeding £20,000 but not exceeding £50,000	18 months
Exceeding £50,000 but not exceeding £100,000	2 years
Exceeding £100,000 but not exceeding £250,000	3 years
Exceeding £250,000 but not exceeding £1,000,000	5 years
Exceeding £1,000,000	10 years

S6 OTHER ORDERS

S6-1 Absolute Discharge

PCC(S)A s.12

ARCHBOLD 5A-367; BLACKSTONE'S E12; CURRENT SENTENCING PRACTICE B5

1. An absolute discharge may be imposed in a case in which the court "is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender that it is inexpedient to inflict punishment".

2. An absolute discharge may be combined with the following orders, but no others:
   (1) Compensation
   (2) Deprivation
   (3) Restitution
   (4) any disqualification
   (5) recommendation for deportation
   (6) costs
   (7) confiscation order
   (8) exclusion order under LP(ECP)A 1980
   (9) unlawful profit order

3. Where an absolute discharge is imposed for an offence which is listed in Schedule 3 to the SOA 2003 (and would therefore ordinarily attract notification), the notification requirements are not triggered.

Example

You have pleaded guilty to/been convicted of the offence of {specify} but it is neither necessary nor appropriate to impose any punishment because {reason/s}. You will therefore be absolutely discharged. This means that you will hear no more about this: this case is at an end.

S6-2 Conditional Discharge

PCC(S)A 2000 s.12

ARCHBOLD 5A-367; BLACKSTONE'S E12; CURRENT SENTENCING PRACTICE B5; SENTENCING REFERENCER § 22-001

1. A conditional discharge may be imposed in a case in which the court "is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender that it is inexpedient to inflict punishment" but wishes to reserve the power to do so, for a fixed period, if there is any further offending of any kind.

2. The maximum period for a conditional discharge is 3 years from the date of the order.

3. A conditional discharge may be combined with the following orders:
   (1) Compensation
   (2) Deprivation
   (3) Restitution
   (4) any disqualification
   (5) recommendation for deportation
   (6) a football banning order
   (7) a criminal behaviour order (for proceedings commenced after 20 October 2014)
   (8) costs
   (9) confiscation order
   (10) exclusion order under LP(ECP)A
   (11) unlawful profit order
   (12) serious crime prevention order (see SCA 2007 ss.19(7))

4. If D commits a further offence during the period of the discharge he/she may be brought back before the court and sentenced for the original offence in any way that would have been possible if he/she had just been just convicted of it.

Example

You have pleaded guilty to/been convicted of the offence of {specify} but it is neither necessary nor appropriate to impose an immediate punishment and so I propose to discharge you conditionally for a period of …….months/years. That means that so long as you commit no further offence there will be no punishment, but if you commit a further offence in that period of …… months/years you will be brought back to court and sentenced in respect of this offence and the further offence.

S6-3 Binding Over

ARCHBOLD 5A-346; BLACKSTONE'S E13.8; CURRENT SENTENCING PRACTICE B4; SENTENCING REFERENCER § 16-001

To come up for judgment

1. The Crown Court has power on conviction to bind D over to come up for judgment. It is most used when a D from another jurisdiction has committed an offence, which is not the most serious, and D expresses a firm intent to return to his/her own country in the immediate future.

   (1) It is a common law power.

   (2) It is an alternative to a sentence.

   (3) The effect is to bind over D on a recognisance to come up for judgment and sentence in the event of breach of the condition specified in the order (usually to leave the country by a specified date)..

   (4) D's consent must be obtained.

Example

I have been told that you intend to leave this country on {date} and return to {place} and have been shown confirmation of your booking. In these circumstances, as an alternative to sentencing you for this offence, I am going to bind you over to come up for judgment.

This means that so long as you leave this country on {date} you will receive no punishment. But if you do not leave you will be brought back before the court for sentence. Do you understand? [Answer] Do you consent? [Answer]

To refrain from specific conduct or activity

2. Where it appears that there is a real risk of harassment or causing fear of violence to another, the court is likely to consider its powers to make a restraining order rather than a bind over: see chapter S7-11 below.

3. A power to bind over to keep the peace and be of good behaviour derives from the Justices of the Peace Acts 1361 and 1968. However, in light of the judgment of the ECHR in *Hashman and Harrup v. U.K.*.,[65] a binding-over order in such terms is too vague to comply with the requirement set out in the Convention that it should be "prescribed by law" (violation of Article 10). The court should therefore, rather than bind a person over to keep the peace and/or be of good behaviour, identify the specific conduct or activity from which that person must refrain.[66]

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65 [2011] ECHR 1658

66 CPD VII Sentencing J.2 and 3

4. This power does not depend on a conviction. It is a power that may be used against Ds, whether convicted or acquitted, or witnesses, but it is rarely used against anyone who is not convicted. In the absence of a conviction the court must be satisfied that a breach of the peace involving violence or an imminent threat of violence has occurred, or that there is a real risk of violence in the future.

5. On conviction, it can be used as an alternative to sentence.

6. In the absence of conviction, either D's consent must be obtained or the violence, imminent threat of violence, or real risk of violence in the future must be proved. This power is very rarely used in the absence of a conviction or consent.

7. The effect is to bind over D in a sum of money, to be set according to D's means, to refrain from specific conduct or activity for a set period.

8. D must be told that if he/she is proved to have been in breach of the bind over he/she is liable to forfeit all or part of the sum in which is to be bound.

9. A witness who has given evidence may be bound over.

Example

I have been told that you are prepared to be bound over to/not to {specify}. Is that right? [Answer]

In view of what I have been told about your means, I am going to bind you over to/not to {specify} for (period) in the sum of £……

This means that so long as you {specify} you will hear no more about this. But if in the next (period) it is proved to the court that you have {specify}, you will be liable to pay all or part of the sum of £….. Do you agree to be bound over on these terms? [Answer]

S6-4 Deferring Sentence

CJA 2003 s.278 and **Sch.23**

ARCHBOLD 5A-187; BLACKSTONE'S D20.103; CURRENT SENTENCING PRACTICE B7; SENTENCING REFERENCER § 28-001

1. The purpose of deferring sentence is to enable the court to have regard to D's conduct after conviction; in particular to see whether any positive change of circumstances is maintained and, if appropriate, any reparation is made. The circumstances in which such an order will be appropriate are relatively rare.

2. The court must identify the need for, and the purpose of, a deferment of sentence.

3. Deferment cannot be ordered without D's consent. Before seeking D's consent the court must explain to D the purpose of deferment and any requirements that are to be made of him/her in the intervening period.

4. The requirements that may be made of D may include residence in a particular place and the making of reparation.

5. The court may also impose conditions of residence and co-operation with the person appointed to supervise D.

6. D must consent to deferment and undertake to comply with any requirements in the intervening period.

7. Sentence should not be deferred unless the sentencer is prepared to pass a sentence that does not involve immediate custody if D complies with the requirements of deferment.

8. The date to which sentence is deferred must be specified and be within 6 months of the order for deferment.

9. The court may appoint a probation officer or any other person the court thinks appropriate to supervise D during the period of deferment.

10. If D fails to adhere to the requirements or commits a further offence D may be brought back before the court and sentenced on a date before that originally fixed.

11. A transcript must be ordered of the reasons given for, and the terms of, deferment; copies to be provided to D and the supervising officer.

12. The court should order a report upon D from the supervising officer or in the absence of supervision the probation service for the date of sentence.

13. The judge or recorder who defers sentence must make arrangements to hear the case on the date set for sentence; it is wrong for a sentencer to "release" such a case.

14. Imposing the deferment

The court must

(1) Explain the reasons for deferment.

(2) Identify clearly the requirements with which D would be expected to comply.

(3) Obtain undertakings and consent from D personally.

(4) Set the date for the deferred sentence.

(5) Direct that a short progress report should be written by the person supervising D.

(6) Explain the consequences of compliance with or failure to comply with the undertakings given.

(7) Direct that a transcript of the court's remarks must be prepared [within 14 days] and be served on D [via solicitor], on the court and on any person supervising D.

Example

As you have heard, I am thinking about deferring sentence: that means, in this case, putting it off for a period of 4 months. The reason I would do so is that {e.g. although your offence qualifies for a custodial sentence you have e.g. moved away from the area where these offences were committed/ ceased to associate with the people you committed this offence with/renewed your relationship with your parents/got a job/agreed to take part in the restorative justice programme with your victim/s}.

Because of this I am thinking of putting you to the test. But if I am to defer sentence I need you to agree and undertake to do these things;

1. To stay away from {place – e.g. as shown on a map};
2. To do your best to complete the last stages of your coursework and to take your final exams next month / to do your best to keep your job at {employer};
3. To take part in the restorative justice programme.

I know that your advocate has said that you would agree to this but I need to hear this from you. Do you undertake to do all of these things? [Answer]

In addition, I would make it a condition firstly that you continue to live with your parents at {place} and secondly that you co-operate fully with your supervising probation officer.

Do you agree to sentence being deferred – that is put off - on these terms? [Answer]

[Assuming D's consent] I will defer sentence for 4 months: that is until {date} and on that date you will either come back to this court or to another court where I shall be and I shall sentence you. In the meantime you must do all of the things which you have agreed to do and comply with the conditions which I have imposed. If you have succeeded, then I will not sentence you to an immediate term of imprisonment. If you have not succeeded, or if you have been convicted of any further offence, I will have no alternative but to send you to prison.

Your supervising officer will prepare a short report about your progress before we meet again; and I also direct that a transcript of what I have just said to you must be prepared by {date} and provided to you (through your solicitors), to your supervising officer and to the court.

S6-5 Hospital, Guardianship and Section 45A MHA Orders

MHA 1983 ss.37 – 41 and **45A and 45B**

ARCHBOLD 5A-11-88 – 5A-1221, and 5-1236; BLACKSTONE'S E22.1 and E22.5; CURRENT SENTENCING PRACTICE E1; SENTENCING REFERENCER § 55-001 – 57-001

The various sentencing options

1. Where an offender suffers from a mental disorder, the court has a number of sentencing options:

   (1) if the court is satisfied that the offender is suffering from a mental condition which is such that it may be appropriate to make a hospital order, it can make an interim hospital order under s.38 whilst that appropriateness is being considered.

   (2) the court may make a hospital order under s.37 with or without a restriction order under s.41 if it considers that it is, "the most suitable method of disposing of the case". Where a restriction order is made under s.41, the First-tier Tribunal (Mental Health Chamber) ("the FtT") decides when the offender should be released from the hospital order, either conditionally or unconditionally.

   (3) the court may impose a determinate or indeterminate sentence of imprisonment and leave it to the Secretary of State to exercise their administrative power under s.47 to transfer the prisoner to a hospital if they consider that (i) the prisoner is suffering from a mental disorder; (ii) the mental disorder is of a nature and/or degree that it is appropriate for him/her to be detained in hospital for medical treatment; and (iii) appropriate treatment is available. Whether such a direction is made is entirely in the hands of the Secretary of State.

   (4) the court may impose a "hybrid order" under s.45A if, when considering a hospital order under s.37 (i) the court is satisfied that the offender is suffering from a mental disorder; (ii) that mental disorder makes it appropriate for him/her to be detained in a hospital for medical treatment; and (iii) appropriate medical treatment is available. The effect of this is that instead of being removed to and detained in a prison (the hospital direction), the offender is removed to and detained in a hospital and is subject to the special restrictions set out in s.41 (the limitation direction).

   (5) where an indeterminate sentence is imposed with a s.45A "hybrid order" and the responsible clinician or the FtT notifies the Secretary of State that the offender no longer requires treatment in hospital or that no effective treatment for his disorder can be given at the hospital to which he has been removed, the Secretary of State will normally simply remit the offender to the prison estate under s.51, unless his minimum term has expired. Where the tariff has expired, the Secretary of State may notify the FtT that he/she should be conditionally discharged, in which case he/she is subject to mental health supervision and recall in the usual way; but the Secretary of State can, and in practice usually does, refer the offender to the Parole

Board as with any other post-tariff indeterminate sentence prisoner: *Fisher*.[67]

General approach

2. The various orders under the Mental Health Act 1983 should be considered in the following order:
   (1) Consider whether a hospital order may be appropriate.
   (2) If so, consider all sentencing options including a s.45A order.
   (3) In deciding on the most suitable disposal the judge should remind him or herself of the importance of the penal element in a sentence.
   (4) To decide whether a penal element to the sentence is necessary the judge should assess the offender's culpability and the harm caused by the offence. The fact that an offender would not have committed the offence but for their mental illness does not necessarily relieve them of all responsibility for their actions.
   (5) A failure to take prescribed medication is not necessarily a culpable omission; it may be attributable in whole or in part to the offender's mental illness.
   (6) If the judge decides to impose a hospital order under s.37/41, they must explain why a penal element is not appropriate.
   (7) The regimes on release of an offender on licence from a s.45A order and for an offender subject to s.37/41 orders are different but the latter do not necessarily offer a greater protection to the public, as may have been assumed in *Ahmed* and/or or by the parties in the cases before us. Each case turns on its own facts: *Edwards.*[68]

Criteria for making a s.37 order

3. MHA s.37 provides the court with power
   (1) where a mentally disordered D is convicted:
      (a) **either** to make an order for D to be admitted to and detained at a specified hospital;
      (b) **or**, in the case of a D who is aged 16 or over whose disorder can be managed without admission to hospital, to make an order placing D under guardianship of the local social services authority (or person approved by that authority);
   (2) where a mentally disordered D (a) having been found unfit to plead or stand trial, is found to have done an act/made an omission, or (b) is found not guilty by reason of insanity, to make an order for D to be admitted to and detained at a specified hospital.

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67 [2019] EWCA Crim 1066
68 [2018] EWCA Crim 595

4. The court must be satisfied as follows:

   (1) that, on the written or oral evidence of 2 registered medical practitioners, at least one of whom must be approved under MHA s.12(2)

      (a) D is suffering from mental disorder; and

      (b) **either** that the mental disorder is of a nature or degree which makes it appropriate for D to be detained in hospital for medical treatment **and** treatment is available;

      (c) **or**, if a convicted D is aged 16 or over, that the mental disorder is of a nature or degree which warrants D being received into guardianship; and

   (2) that, having regard to all the circumstances (including the nature of the offence, D's character and antecedents and the other ways of dealing with D), an order under s.37 is the most suitable way of doing so.

5. When making a hospital order the court must also be satisfied that arrangements have been made for D's admission to a specified hospital within 28 days of the date of the making of the order.

6. When making a guardianship order there is no requirement that the mental disorder is treatable but the court must be satisfied that the authority or approved person is willing to receive D into guardianship.

7. When making such orders it is important to demonstrate that all the statutory criteria have been met.

Example

[Having set out the facts of the case] Having heard the medical evidence which has been given in court today by Dr. …… and having read the reports prepared by Dr. ……. and Dr. ……. all of whom are approved by the Secretary of State under section 12(2) of the Mental Health Act 1983:

I am satisfied that

- You are suffering from a mental disorder, namely {disorder}
- This disorder is of a nature which makes it appropriate for you to be detained in a hospital for medical treatment; and
- Appropriate medical treatment is available for you at {place}.

I am of the opinion that

- because of all the circumstances of your case including
  - the nature of the offence of {offence} to which you have pleaded guilty/of which you have been convicted/of which you have been found not guilty by reason of insanity/the act which you are found to have done}; and
  - your character and your past [antecedents], which includes a longstanding and complicated history of mental illness;
- and having considered all the other available ways in which I might deal with you

the most suitable method of dealing with your case is by making an order under section 37 of the Mental Health Act 1983.

I therefore make an order that you will be {re-} admitted to and detained at {place}. I am satisfied that arrangements have been made for you to be {re-} admitted within 28 days to this hospital {where you have already been for many months}.

[In some cases it may be appropriate to add: I make it clear that the order which I have made is not a punishment but is for your own wellbeing and that of the public.]

Criteria for making a s.41 restriction order

8. MHA s.41 provides the court with power, on making a hospital order, to order that D is subject to special restrictions (a restriction order) if it appears to the court, having regard to the nature of the offence, D's antecedents and the risk of D committing further offences if at large, that it is necessary to do so in order to protect the public from serious harm.

9. At least one of the registered medical practitioners whose evidence is taken into account must have given evidence orally.

10. The court must make a restriction order when it makes a hospital order under s.37 in cases where the sentence is fixed by law (murder) and D (a) having been

found unfit to plead or stand trial, is found to have done an act/made an omission, or (b) is found not guilty by reason of insanity.

Example

I have also considered whether this order should be subject to special restrictions {which are specified in section 41 of the Act}. Having heard the evidence of Dr. ……. I am satisfied that because of the nature of your offence/act and also having regard to your past (including your history of mental illness) and to the risk that you will commit further offences if you are not detained, it is necessary to protect the public from serious harm and it is not possible to say for how long that will be so.

Accordingly I order that you will be subject to the special restrictions set out in section 41 of the Mental Health Act 1983 without limit of time.

Criteria for making a hybrid order under s.45A

MHA s.45A provides the court with power to make a hospital direction and a limitation direction in relation to a D who is also sentenced to imprisonment (i.e. D must be aged 21 or over at conviction) so that on completion of treatment D will be transferred to prison for the remainder of his/her sentence instead of being released from hospital.

Orders under this provision are usually made in conjunction with very long or life sentences. The CACD has given guidance on the order in which the criteria for the imposition of such orders should be addressed in the case of *Vowles*[69] as follows [para 54]:

> "i) As the terms of s.45A (1) of the MHA require, before a hospital order is made under s.37/41, whether or not with a restriction order, a judge should consider whether the mental disorder can appropriately be dealt with by a hospital and limitation direction under s.45A.
>
> ii) If it can, then the judge should make such a direction under s.45A(1). This consideration will not apply to a person under the age of 21 at the time of conviction as there is no power to make such an order in the case of such a person as we have set out at paragraph 19 above.
>
> iii) If such a direction is not appropriate the court must then consider, before going further, whether, if the medical evidence satisfies the condition in s.37(2)(a) (that the mental disorder is such that it would be appropriate for the offender to be detained in a hospital and treatment is available), the conditions set out in s.37(2)(b) would make that the most suitable method of disposal. It is essential that a judge gives detailed consideration to all the factors encompassed within s.37(2)(b). For example, in a case where the court is considering a life sentence under the Criminal Justice Act 2003 as amended in 2012 (following the guidance given in in *Attorney General's Reference (No.27 of 2013) (R v Burinskas)* [2014] 1 WLR 4209), if (1) the

[69] [2015] EWCA Civ 56

mental disorder is treatable, (2) once treated there is no evidence he would be in any way dangerous, and (3) the offending is entirely due to that mental disorder, a hospital order under s.37/41 is likely to be the correct disposal.

iv) We have set out the general circumstances to which a court should have regard but, as the language of s.37(2)(b) makes clear, the court must also have regard to the question of whether other methods of dealing with him are available. This includes consideration of whether the powers under s.47 for transfer to prison for treatment would, taking into account all the other circumstances, be appropriate."

11. Because directions under this section are made in conjunction with a sentence of imprisonment, if a hospital direction is made, a limitation direction must also be made.

Example

For the offence of {specify} I sentence you to {specify term} imprisonment and I direct, under the provisions of section 45A of the Mental Health Act 1983, that in the light of the psychiatric evidence namely {specify} the criteria for a hospital order are met; and so instead of being removed to and detained in a prison, you will be removed to and detained in {specify hospital}. You will be subject to the special restrictions set out in section 41 of the Mental Health Act 1983 without limit of time.

What this means is that you will be detained in hospital for as long as necessary. If and when it is no longer necessary and if your sentence has not expired you will be transferred to prison. Once in prison you will serve the remainder of the sentence which I have imposed.

[Here explain the prison sentence and release provisions as appropriate, but add: On release from prison, in addition to the conditions on your licence you will also be subject to the conditions of your release from hospital.]

S7 ANCILLARY ORDERS

S7-1 Compensation Orders

PCC(S)A 2000 s.130 and **LASPO 2012 s.63**

ARCHBOLD 5A-377; BLACKSTONE'S E16; CURRENT SENTENCING PRACTICE C1; SENTENCING REFERENCER § 20-001

1. A Compensation Order may be made instead of, or in addition to another sentence.

2. The court must consider making a Compensation Order in every case where it is empowered to do so: this includes most cases in which personal injury, loss or damage has been caused. There are restrictions on the circumstances in which compensation may be awarded in road traffic accident cases and it is essential to consider with care the provisions of PCC(S)A s.130(6).

3. If no order is made the court must give reasons.

4. The prosecution and defence should be invited to make submissions as to the appropriateness and amount of the proposed order.

5. The court in *York*[70] identified principles applicable to the imposition of compensation orders:

   (1) before making a compensation order, a judge must enquire about, and make clear findings about, an offender's means, and take them fully into account;

   (2) an order should not be made against an offender without means on the assumption that the order would be paid by somebody else, for example, by a relative;

   (3) an order should not be made unless it is realistic, in the sense that the court is satisfied that the offender has, or will have, the means to pay that order within a reasonable time. While a repayment period of two or three years in an exceptional case would not be open to criticism, in general, excessively long repayment periods should be avoided.

6. In making the order the full name of the recipient should be specified.

7. Time must be set for the payment of instalments but no sentence in default can be imposed unless the order is for £20,000 or more, in which case it is enforceable as a fine of such an amount.

8. Enforcement is through the Magistrates' Court. If the amount of the order exceeds £20,000 the Crown Court has power to enlarge the powers of the Magistrates' Court if it considers that the maximum term of 12 months is inadequate, as follows:

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70 [2018] EWCA Crim 2754

Amount	Maximum term
Not exceeding £50,000	18 months
Not exceeding £100,000	24 months
Not exceeding £250,000	36 months
Not exceeding £1,000,000	60 months
Over £1,000,000	120 months

A useful guide to quantum for personal injury awards may be found in the Magistrates' Court Sentencing Guideline: see Blackstone's supplement 1 SG-225.

Example: compensation and no separate penalty

For this offence of common assault you will pay £500 compensation to your victim {name}. This is not intended to be full compensation for the injury you caused, but it is the most that you can afford to pay within a reasonable time. Because of that I do not order any separate penalty, nor do I order you to pay any costs or statutory surcharge[71]. The compensation must be paid at the rate of £10 per week. This will be paid through the Magistrates' Court and you will receive a notice telling you where to make payment. The first instalment will be paid by {date}.

[71] See CJA 2003 s.161A(3): Where a court dealing with an offender considers (a) that it would be appropriate to make one or more of a compensation order, an unlawful profit order and a slavery and trafficking reparation order, but (b) that he has insufficient means to pay both the surcharge and appropriate amounts under such of those orders as it would be appropriate to make, the court must reduce the surcharge accordingly (if necessary to nil). However, the practical challenge of identifying circumstances where an offender can pay one but not the other is demonstrated by *Beckford* [2018] EWCA Crim 2997 and in particular by reference to the addendum to the judgment.

S7-2 Confiscation Orders

Various statutes – see below

ARCHBOLD 5B, 755 AND 785; BLACKSTONE'S E19; CURRENT SENTENCING PRACTICE D1; SENTENCING REFERENCER § 23-001

1. Confiscation orders may be made under the provisions of a number of statutes, depending on the date and type of offence, as shown in the table below. The procedures and timetables to be followed under each Act are mandatory and it is essential to know and to follow the statutory framework in each case.

Offence	**Statute**
Any offence committed before 1 November 1995	Criminal Justice Act 1988
Any offence committed on/after 1 November 1995 but before 24 March 2003 – except DT in circumstances below	Criminal Justice Act 1988 as amended by the Proceeds of Crime Act 1995
Drug Trafficking: where **every** offence was committed on/after 3 February 1995 but before 24 March 2003	Drug Trafficking Act 1994
Any offence committed on/after 24 March 2003	Proceeds of Crime Act 2002
Any offence committed on/after 24 March 2003, where the order is made after 1 June 2015	Proceeds of Crime Act 2002 as amended by the Policing and Crime Act 2009, the Crime and Courts Act 2013 and the Serious Crime Act 2015 – *see Home Office Circular issued 22.05.15*

2. Although often the parties agree some or all of the figures in such cases, ultimately it is for the Judge to make a proportionate order following his/her assessment of the facts.

3. Where an order is made following an agreement by the parties this should be recorded in the order and it is prudent to ensure that D signs the schedule of available or realisable assets (form 5050A). Where an order is made after a contested hearing, it will follow the court's findings of fact.

4. The full amount ordered to be paid under a confiscation order must be paid on the day on which the order is made unless the court is satisfied that D is unable to pay the full amount on that day in which case the court may make an order requiring whatever cannot be paid on that day to be paid in a specified period, or specified periods each of which relates to a specified amount. Any specified period must not exceed 3 months from the date of the order. If within any specified period D applies to the court for that period to be extended the court

may, on being satisfied that D has made all reasonable efforts to comply, make an order extending the period for up to 6 months from the date of the order.

5. Sentences in default:

   (1) In respect of orders made before 1 June 2015 the maximum period to be served in default is the same as for non-payment of fines: see the table in Chapter 5-3.

   (2) In respect of orders made on or after 1 June 2015 the following maxima apply (s.10 Serious Crime Act 2015):

Amount	**Period**
£10,000 or less	6 months
More than £10,000 but no more than £500,000	5 years
More than £500,000 but no more than £1,000,000	7 years
More than £1,000,000	14 years

Example

I find that:

- the benefit from your offending/criminal conduct is £ {amount};
- the available amount (that is the value of your realisable assets) is £ {amount};
- the recoverable amount (that is the smaller of the benefit figure and the realisable amount) is £ {amount}.

I therefore make a confiscation order in the sum of £ {amount}.

Either: I direct that the full amount must be paid today.

Or: I am satisfied that you are not able to pay the full amount of this sum today and so I direct that the sum of £x must be paid today and the balance, namely £y, must be paid on or before {specify date, not to be more than 3 months from the date of the order}.

In default of payment of the total sum of £ {full available amount} you will serve a sentence of {duration} [If appropriate: this will be served consecutively to the sentence for the offence/s {which you are already serving}].

S7-3 Deprivation Orders

PCC(S)A 2000 s.143

ARCHBOLD 5A-440; BLACKSTONE'S E18; CURRENT SENTENCING PRACTICE C3; SENTENCING REFERENCER § 30-001

1. The power to make a deprivation order arises where property, for example a motor vehicle, which was in D's possession at the time of committing an offence or has been seized from D, was used for the purpose of committing or facilitating any offence.

2. When considering an order the court must have regard to the value of the property and the likely financial and other effects of the making of an order on the defendant.

3. The prosecution and defence should be invited to make submissions as to the appropriateness of the proposed order.

4. The court must make a proper enquiry into the circumstances of the property which is the subject of the application for deprivation and, where necessary, make a formal finding.[72] Where appropriate, this may take the form of a *Newton* hearing.

5. It will sometimes be argued that an order is inappropriate because the property does not belong to the defendant. However, the effect of the order is merely to deprive the defendant of the property. It will then be held by police subject to any application from the purported owner made under the Police (Property) Act 1897. The procedure is spelt out under s.144. The position would be different if the property was forfeit (see S7-8 below), since forfeiture is intended to change the ownership of property rather than simply deprive the defendant of it.

Example

At the time you were arrested you were in possession of a car, index number (xx) which you had used for the purpose of committing your offence/s. I direct that you be deprived of this property under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000.

***NOTE:** see also forfeiture orders in chapter S7-8 below.

[72] See for example *Jones* [2017] EWCA Crim 2192

S7-4 Disqualification from acting as a Director of a Company etc.

CDDA 1986 s.1

ARCHBOLD 5A-831; BLACKSTONE'S E21.8; CURRENT SENTENCING PRACTICE C2-5825; SENTENCING REFERENCER § 36-001

1. Under CDDA 1986 ss.1 and 2 the court may make a disqualification order when D has been convicted of an indictable offence in connection with the promotion, formation, management, liquidation or striking off of a company or in connection with the receivership or management of a company's property.

2. It is not necessary that D was a director of any company involved in the offence(s).

3. Disqualification has the effect that D must not act as an insolvency practitioner or, without leave of the court, be a company director or act in the promotion, formation or management or liquidation of a company.

4. The maximum period for which disqualification may be imposed is 15 years. There is no minimum period.

Example

The offences of which you have been convicted were committed while you were dishonestly involved in the management of {company}. I direct that you be disqualified from acting as a director of any company for a period of {number} years. This means that you must not, without the court's permission, be a company director or act in the promotion, formation, management or liquidation of any company during this period.

NOTE: On application to the court where D has been a director of a company which has become insolvent, where D's conduct makes him/her unfit to be concerned in the management of a company the court must make a disqualification order (CDDA 1986 s.6).

S7-5 Disqualification from driving and endorsement of driving licence

Road Traffic Acts – Road Traffic Act 1988 and Road Traffic Offenders Act 1988

ARCHBOLD 5A-465, 32-236 and 32-249; BLACKSTONE'S C7.8 and E21.11; CURRENT SENTENCING PRACTICE C4-1000; SENTENCING REFERENCER § 37-001 – 40-001

1. An order of disqualification "for holding or obtaining a driving licence" is compulsory in the case of some offences and discretionary in others.

2. **Compulsory disqualification**

   (1) Disqualification is compulsory for some more serious motoring offences. The full list of offences which attract compulsory disqualification appears in RTOA 1988 s.34. There are a variety of minimum periods: e.g. for causing death by dangerous driving or causing death by careless driving while under the influence of drink or drugs the minimum period is 2 years' disqualification.

   (2) Certain repeat offences carry longer minimum disqualifications: e.g. for a second offence of driving with excess alcohol within 10 years the minimum period is 3 years' disqualification.

   (3) In the case of certain serious offences, e.g. dangerous driving, the disqualification must be accompanied by an order that upon completion of the disqualification the offender pass the extended driving test. An order of disqualification until an extended retest is passed shall not be imposed on an offender already subject to such an order.[73]

Example

You will also be disqualified from driving for a period of two years **and** until you have passed an extended driving test. That means that when your disqualification of two years has expired you can apply for a driving licence but the licence you get will be provisional until you have passed the extended test.

3. **Discretionary disqualification**

   A number of less serious road traffic offences, whilst they do not attract compulsory disqualification may be met with discretionary disqualification. These are identified in RTOA Sch. 2: see Archbold 32-312 and Blackstone's C8.1.

4. **Interim disqualification**

   The court has power to order an interim disqualification when adjourning or deferring sentence after conviction: RTOA s.26.

[73] RTOA 1988 s.36(7) and see *Mahmoud* [2017] EWCA Crim 1449

An interim disqualification may not extend beyond a period of 6 months [RTOA s.26(4)].

Any period of interim disqualification is to be deducted from the period of disqualification imposed under s.34 or s.35 [RTOA s.26(12)].

5. **Licence endorsement and totting up**

   (1) A wide variety of motoring offences require the sentencer to endorse any driving licence D has or may come to have with "penalty points". Disqualification is compulsory (subject to special reasons or mitigating circumstances) where 12 points have been accumulated within 3 years: RTOA s.35.

   (2) The list of offences where a licence must be endorsed with penalty points is set out in RTOA Sch. 2.

General Powers of Disqualification from Driving – PCC(S)A ss.146 and 147

ARCHBOLD 5-1106 and 5-1107; BLACKSTONE'S E21.11 and E21.14; CURRENT SENTENCING PRACTICE C4-100; SENTENCING REFERENCER 105

6. The court has a general power to disqualify from driving as a penalty instead of or in addition to any other penalty [s.146] and also a specific power on commission of a crime involving the use of a motor car [s.147].

Order to take re-test

7. If the defendant is convicted of manslaughter (by the driver of a motor vehicle), causing death by dangerous driving, causing serious injury by dangerous driving, or dangerous driving and disqualified under s.34, the court must order the defendant to be disqualified until an appropriate driving test is passed [RTOA s.36(1) and (2)].

8. If the defendant is convicted of another offence involving obligatory disqualification, the court may order disqualification until an appropriate driving test is passed [RTOA s.36(4)].

9. "Appropriate driving test" means:

   (1) An extended driving test where the offence involved obligatory disqualification or where disqualification was imposed under s.35;

   (2) A test of competence to drive, other than an extended test, in any other case [RTOA s.36(5)].

10. Where an offender is convicted of an offence to which s.36 applies in circumstances where they are already subject to an order under that section, the court does not make a further order for disqualification until an appropriate driving test is passed [RTOA s.36(7)].

Disqualification in conjunction with custodial sentence

11. In respect of any offences committed on or after 13 April 2015, where a court imposes a disqualification the court must impose:

    (1) an "extension period" on the disqualification in respect of any time that D is to be in custody for the same offence (usually one half of the sentence): RTOA s.35A and/or

    (2) an "adjustment" to the length of the disqualification to reflect imprisonment imposed on the same occasion for a different offence, or where the defendant is already serving a custodial sentence (again, usually one half of the relevant sentence): RTOA s.35B.

12. The Court of Appeal offered a step-by-step guide to imposing disqualification in conjunction with a custodial sentence (or sentences) in *Needham*:[74]

    Step 1 – Does the court intend to impose a "discretionary" disqualification under section 34 or section 35 for any offence?

    Yes – go to Step 2.

    Step 2 – Does the court intend to impose a custodial term for that **same** offence?

    Yes – section 35A applies and the court must impose an extension period (see section 35A(4)(h) for that **same** offence and consider Step 3.

    No – section 35A does not apply at all – go on to consider section 35B and Step 4.

    Step 3 – does the court intend to impose a custodial term for **another** offence (which is longer or consecutive) or is the defendant already serving a custodial sentence?

    Yes – then consider what increase ("uplift") in the period of "discretionary disqualification" is required to comply with section 35B(2) and (3). In accordance with section 35B(4) ignore any custodial term imposed for an offence involving disqualification under section 35A.

    Discretionary period + extension period + uplift = total period of Disqualification

    No – no need to consider section 35B at all.

    Discretionary period + extension period = total period of disqualification

    Step 4 – does the court intend to impose a custodial term for **another** offence or is the defendant already serving a custodial sentence?

    Yes – then consider what increase ("uplift") in the period of "discretionary disqualification" is required to comply with section 35B(2) and (3).

    Discretionary period + uplift = total period of disqualification.

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[74] [2016] EWCA Crim 455

13. Note that the s.35A extension is a strict calculation based on the custodial element of the sentence for the same offence. Where the defendant has spent time on remand, it may therefore be necessary to make a downward adjustment to the disqualification period to reflect that fact (however no reduction should be made to reduce the period below the statutory minimum). Such an adjustment is not arithmetical (i.e. it is not merely an exercise in dividing the time on remand by two): *Needham*.[75] Where such a reduction is necessary it will be the discretionary part of the disqualification that will be adjusted NOT the s.35A period. See examples 2 and 3 below.

Example 1: where the length of disqualification is "extended" (s.35A) because D will be serving a sentence of imprisonment in relation to the same offence and / or "uplifted" (s.35B) to reflect custody for a different offence

But for the fact that you are to serve a sentence of six months' imprisonment for the offence of dangerous driving I would have ordered you to be disqualified from driving for that offence for a period of two years. That disqualification will not serve its purpose when you are in custody so it will be **extended** to take your period of custody into account. Because you will serve half the sentence of imprisonment in custody, the disqualification must therefore be two years plus an extension period of three months imposed pursuant to ss.35A of RTOA 1988 making two years three months disqualification in all.

However, I also have to sentence you for failing to appear at court at an earlier stage in these proceedings. The least sentence I can pass for that offence will be 14 days' imprisonment to be served consecutively. Accordingly, the disqualification period will be subject to an **uplift** of a further period of 7 days pursuant to s.35B of the same Act so that the total disqualification, including extension period and uplift, will be two years three months and seven days.

Example 2: where the length of disqualification is "extended" (s.35A) because D will be serving a sentence of imprisonment in relation to the same offence but the discretionary period needs to be reduced because the defendant has spent a long time on remand in custody

But for the fact that you are to serve a sentence of 12 months' imprisonment for the offence of dangerous driving I would have ordered you to be disqualified from driving for that offence for a period of two years. That disqualification will not serve its purpose when you are in custody so it will be extended to take your period of custody into account. Because you will serve half the sentence of imprisonment in custody, the disqualification would therefore be of thirty months' duration comprising a two year disqualification plus an **extension** period of 6 months imposed pursuant to s.35A of RTOA 1988.

However, you have spent a period of four months on remand, and that means the period which remains to be served is reduced. Since your disqualification cannot be backdated I have therefore decided to **reduce the period** of discretionary

[75] [2016] EWCA Crim 455

disqualification to 20 months (i.e. 24 minus 4). That produces a total disqualification period of 26 months, or two years and two months.

This is not intended to be a mathematical calculation but it should ensure that upon your release, you will be subject to disqualification for a period of around two years.

Example 3: (as above, but with an additional custodial sentence)

For this combination of offences you have received custodial sentences of 24 months for dangerous driving and 12 months for affray to run consecutively, making a total of 36 months in all. You will serve no more than half of today's sentences – namely 18 months. You have spent four months on remand and that period will be taken into account automatically when calculating your earliest release date but it is also a factor for which I have to take into account in setting the period during which you are going to be disqualified from driving.

I intend to impose a disqualification from driving that will operate for a further two years after your eventual release. The total period of the disqualification from today's date will therefore be a combination of **extension** (s.35A) and **uplift(s)** (s.35B) to reflect the terms in custody you will serve, but with the discretionary period **reduced** to reflect your time in custody to date.

To spell this out: the period would (subject to the final point below) have comprised:

Discretionary disqualification of **24 months**;

PLUS **12 months** extension under s.35A representing half of the custodial term imposed for the offence to which the disqualification relates;

PLUS **6 months** uplift / uplifts under s.35B to reflect the sentence imposed on you for the other offence;

But since the disqualification cannot be backdated to the date you went into custody, I consider it right to REDUCE the discretionary period by **4 months** to **20 months** to take account of time spent in custody already.

The total disqualification from today's date will therefore be **38 months**. This is not intended to be a mathematical calculation but it should ensure that upon your release, you will be subject to disqualification for a period of around two years.

S7-6 Exclusion from licensed premises

LICENSED PREMISES (EXCLUSION OF CERTAIN PERSONS) ACT 1980

ARCHBOLD 5A-1326; BLACKSTONE'S E21.1; CURRENT SENTENCING PRACTICE C2-6900; SENTENCING REFERENCER § 42-001

1. Orders may only be made where D committed an offence in which violence was used or threatened on licensed premises.

2. An order may not be made as the only sentence or order for the offence.

3. Orders exclude D from entering specified licensed premises (by reference to named premises or premises otherwise specified, e.g. by area).

4. An order may be for no less than 3 months or more than 2 years.

5. The breach of an order is a summary offence punishable by a fine up to level 3 or one month's imprisonment.

Example

In addition to the sentence of {specify} for the offence of {specify} I make an Exclusion from Licensed Premises Order, which means that you must not go into {specify public houses}. This order will last for {period} from today.

If you disobey this order you will be committing a further offence, which is punishable with a fine or imprisonment.

S7-7 Football Banning Orders

Football Spectators Act 1989

ARCHBOLD 5A-839; BLACKSTONE'S E21.3; CURRENT SENTENCING PRACTICE C2-3475; SENTENCING REFERENCER § 50-001

1. A Football Banning Order operates:
   (1) to prohibit a D who has been convicted of a relevant offence from attending regulated football matches in England and Wales **and**
   (2) when a representative team from England or Wales or a Premier or Football League team from England, Wales or Scotland is playing a match outside the UK, to require D to surrender his/her passport from 5 days before the game until after it has been concluded.

2. When D is convicted of a relevant offence and the court is satisfied there are reasonable grounds to believe an order would help prevent violence or disorder at regulated football matches the court **must** make an order.

3. An order may only be imposed in addition to another sentence or a conditional discharge.

4. If the court does not make an order it must state the fact in open court and give reasons as to why the grounds are not made out.

5. If the offender is sentenced to custody on conviction of a relevant offence the banning order must be for not less than 6 nor more than 10 years.

6. If the offender is not sentenced to custody the banning order must be for not less than 3 nor more than 5 years.

7. A relevant offence is one listed in Schedule 1 of the Act.

8. The breach of an order is a summary offence punishable with a fine up to level 5 or 6 months' imprisonment.

Example

In addition to the sentence of {specify} for the offence of {specify}, because that offence was committed at the ground of {specify} you will be banned from attending any match at {specify ground} or any other football league ground as explained in the order for a period of {number} years. If you do not obey the order you will be committing another offence and may be fined or sent to prison.

*S7-8 Forfeiture Orders**

***NOTE:** see also deprivation orders in chapter S7-3 above.

MDA 1971 section 27

ARCHBOLD 5A-440; BLACKSTONE'S E18.7; CURRENT SENTENCING PRACTICE C3-1600; SENTENCING REFERENCER § 51-001

1. Where D is convicted of an offence under MDA or a drug trafficking offence as defined by PoCA the court may order forfeiture of anything (drugs, money, equipment, mobile phones etc.) that it is satisfied relate to the offence, and that it/they is/are to be destroyed or dealt with in such manner as the court may order.
2. Forfeiture is intended to affect property rights by changing the ownership of the property in question. Deprivation, by contrast, (which is dealt with at S7-3 above) merely deprives the defendant of any property (regardless of its true ownership) which was in the defendant's possession and used to commit or facilitate the commission of the offence. Deprivation is without prejudice to the right of the true owner (if not the defendant) to make a claim to police for the return of the property.
3. When ordering money to be forfeited under this section, the court may direct that the sum is to be paid to a specific charity. The charity must be registered with the Charity Commission and have indicated its willingness to receive the monies. The judge must have no substantive connection with the charity awarded the monies so as to avoid the appearance of a conflict of interest.[76]
4. A forfeiture order must not be made when the court postpones PoCA confiscation proceedings.
5. The usual order in respect of money forfeit under this provision is that it be forfeit and used by the police force conducting the investigation.
6. Where items have been exhibited in the case it is helpful to the court administration and the police to identify them by reference to their exhibit numbers.

[76] *Guidance on forfeiture of monies to specific charities*, Senior Presiding Judge, 10 June 2015.

Example

I order that the {item e.g. drugs, electronic scales, hydroponic equipment, money} seized by the police, exhibit numbers {specify} are forfeit under section 27 of the Misuse of Drugs Act 1971.

[As appropriate:

- The drugs will be destroyed
- The money recovered from D will be used by the {name of investigating Police Force}.
- The equipment will be sold and the proceeds used by the {name of investigating Police Force}.]

Other Forfeiture Orders

7. Other statutes give the court power to order forfeiture of items connected with crime. For example:
   (1) Firearms: Firearms Act 1968 s.52.
   (2) Offensive weapons: Prevention of Crime Act 1953 s.1(2).
   (3) Terrorism: Terrorism Act 2000 ss.17, 23, 23A, 23B and 120A; Terrorism Act 2006 ss.2 – 11A.
   (4) Crossbows: Crossbows Act 1987 s.6(3).
   (5) Knives: Knives Act 1997 s.6.
   (6) Obscene publications: OPA 1959 s.3 /OPA 1964 s.1(4).
   (7) Forged/Counterfeited items: FCA 1981 ss.7 and 24.
   (8) Written material (racial hatred): POA 1986 ss.25.
   (9) Magazines etc. likely to fall into the hands of children: CYP (Harmful Publications) A 1955 s.3.
   (10) Vehicle, ship, aircraft (immigration offences): IA 1971 s.25C.
   (11) Documents (incitement to disaffection offences): IDA 1934 s.3.

S7-9 Parenting Orders

CDA 1998 ss.8 – 10

ARCHBOLD 5A-1059; BLACKSTONE'S E14; CURRENT SENTENCING PRACTICE F4; SENTENCING REFERENCER § 67-001

1. An order requiring the parent of a young D convicted of an offence to comply with requirements set out in the order, which may include an order to attend for counselling.

2. A parenting order, while required by statute when the relevant condition is met, will normally be made only when specifically recommended by the Youth Offending Service in a PSR.

NOTE: No example is given for this order. If such an order is appropriate, its terms will be set out in the report from the Youth Offending Service.

S7-10 Restitution Orders

PCC(S)A 2000 s.148

ARCHBOLD 5A-457; BLACKSTONE'S E17; CURRENT SENTENCING PRACTICE C1-8000; SENTENCING REFERENCER § 82-001

1. A restitution order may be made for the return of goods that have been stolen or otherwise unlawfully removed, or the proceeds of their sale, to the person lawfully entitled to them.

2. The order should be made only where the evidence identifying the goods or the proceeds of their sale is clear and there is no issue as to title.

3. Because the order is for the return of goods no issue arises as to the means of the defendant: c.f. compensation orders.

4. Orders may be made before completion of PoCA proceedings.

Example

I make a restitution order in respect of {property} the subject of count 1 of the indictment and direct that it be returned to its owner {specify name} forthwith.

S7-11 Restraining Orders

PROTECTION FROM HARASSMENT ACT 1997 ss.5 and 5A

ARCHBOLD 19-357b; BLACKSTONE'S E21.34; SENTENCING REFERENCER § 83-001

1. A restraining order may be made following D's conviction or, if the court considers it necessary, on acquittal of a person for any offence, for the purpose of protecting a person from harassment or fear of violence.

2. If made on acquittal the court must be satisfied on the civil standard of proof of the facts that give rise to the necessity for an order.

3. A finding that a person has done the acts charged against them in proceedings under the Criminal Procedure (Insanity) Act 1964 is neither a conviction nor an "acquittal" and therefore there is no power to make a restraining order.

4. Any order should be in precise terms.

5. An order is usually made for a fixed period but may be "until further order".

6. Although not prevented by the statute, an order should not in general be made if it is opposed by the person whom the court might otherwise seek to protect.

7. A person affected by the order, including D and/or the person to be protected, may apply for the order to be varied or removed.

Example

In order to protect {name of victim} from further assaults / harassment you will be subject to a Restraining Order prohibiting contact with {name of victim} directly or indirectly. This means that you must have absolutely no contact with {name of victim} whatsoever: for example, you must not speak to {name of victim} if you see him/her in town and there must be no phone calls, no Facebook messages (either from you or anyone passing on messages from you) and you must not go to his/her home.

This order will last for five years from today.

(If appropriate – for example, in some domestic contexts: If for any reason the order is no longer necessary and appropriate then either you or {name of victim} may apply to the court for it to be amended or removed. But until that time it will remain in force and must be complied with to the letter.)

You will be given full details of the order before you leave court and I must warn you that if you were to disobey the order you would be committing a further offence, punishable with up to five years' imprisonment.

S7-12 Serious Crime Prevention Orders

SERIOUS CRIME ACT 2007

ARCHBOLD 5A-862; BLACKSTONE'S D21.42; CURRENT SENTENCING PRACTICE C2-4325; SENTENCING REFERENCER § 88-001

1. Serious Crime Prevention Orders may only be made in the Crown Court,[77] on conviction of an offender for a "serious offence", or in the High Court[78] on application. In every case such orders may only be made on the application of the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions or the Director of the Serious Fraud Office.

2. In the Crown Court an order may only be made against a person who has been convicted of a "serious offence", listed in Part 1 of Schedule 1 of the Act, as amended by s.47 Serious Crime Act 2015.

3. In the High Court an order may be made against a person who has been involved in "serious crime", as defined by ss.2 and 4 and Schedule 1 of the Act.

4. An order may only be made against a person who is over 18.

5. An order may last for up to 5 years; but with effect from 3 May 2015 may be extended in the effect of (a) breach or (b) charge with a further serious offence during the term of the order.

6. Any judge who is considering making such an order must refer to the legislation.

NOTE: No example is provided because these orders may only be made on the application of those named above and a draft order, which will reflect the particular circumstances of the case, will always be attached to the application. While the draft will be subject to amendment after representations are made on behalf of the offender, it will always provide the basis for the making of the order if one is made.

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77 Section 19, Serious Crime Act 2007
78 Section 1, Serious Crime Act 2007

S7-13 Sexual Harm Prevention Orders

SEXUAL OFFENCES ACT 2003 ss.103A – 103K, inserted by ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING ACT 2014 s.113 and Schedule 5

ARCHBOLD 20-313; BLACKSTONE'S E21.24; CURRENT SENTENCING PRACTICE C2-1250; SENTENCING REFERENCER § 89-001

1. This order, which has superseded the Sexual Offences Prevention Order, may be made on D's conviction of a relevant sexual offence i.e. one listed in Schedule 3 or Schedule 5 of the Act, where the court is satisfied that it is necessary to make an order for the purpose of protecting the public or a member of the public from sexual harm.

2. A draft of the order should be supplied to the court and to D by the prosecution not less than two days before the hearing.[79] It should not be drafted by the police.

3. Any order must be tailored to meet the harm D represents and made in terms that are enforceable.

4. The court ought to address three questions when considering making an order:
   (1) Is the making of an order necessary to protect from sexual harm through the commission of further scheduled offences?
   (2) If some order is necessary, are the terms proposed nevertheless oppressive?
   (3) Overall, are the terms proportionate?: *Allen*.[80]

5. Orders must be in clear terms and capable of being understood by D without recourse to legal advice.

6. Orders may be for a fixed period of not less than 5 years or without limit of time, although any sentencer considering a SHPO that will extend beyond the statutory notification period will wish to consider the principles set out at para 25 of *McLellan*[81] to the effect that i) an SHPO might extend beyond the statutory notification requirements but ii) no order should be longer than necessary and so iii) no indefinite SHPO should be made without careful thought and explanation, especially bearing in mind such an order will extend the significant consequences of the notification requirements [see chapter S8-1 below] until the expiry of the order: SOA 2003 s.107(4).

7. Orders may be renewed or varied on application to the court by D or an interested chief officer of police.

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79 CrimPR 31.3(5)
80 [2018] EWCA Crim 108
81 [2017] EWCA Crim 1464

8. When considering appropriate requirements, the court should note that the definition of a child for the purposes of the SHPO regime is a person aged under 18: [SOA 2003 s.103B].

9. In relation to notification requirements under the SOA 2003, the court should be mindful of the following:

   (1) an SHPO operates in tandem with the notification requirements; it must not, therefore, conflict: *Sokolowski*;[82]

   (2) an SHPO extending longer than the notification requirements applicable by virtue of the conviction/sentence has the effect of extending the length of the notification period [SOA 2003 s.103G]; and

   (3) there is no general principle that an SHPO should be imposed of a length equal to or less than the notification requirements: *McLellan*.[83]

10. A total prohibition on internet access would not be appropriate in anything other than exceptional cases. In all other cases, a blanket ban would be unrealistic, oppressive and disproportionate as it would cut the offender off from too much of everyday, legitimate living: *Parsons*.[84] *Hewitt*[85] provides a recent example of a blanket ban being found to be disproportionate. *Connor*[86] provides a recent example of SHPO terms being amended to remove a *de facto* blanket ban so as to permit internet usage for the ordinary tasks of everyday life while ensuring that usage was properly monitored.

11. The **Examples** on the next page are based on those approved by the CACD in *Smith and others*[87] and subsequent cases, most particularly *Parsons and Morgan*[88] which is now the leading case on SHPO terms. However, it must be remembered that the order should be tailored to the individual, and that prohibitions on computer use should reflect current technology. That was particularly so in relation to risk management monitoring software, cloud storage and encryption software. See *Parsons*[89] as to guidance on prohibitions containing such technology.

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82 [2017] EWCA Crim 1903
83 [2017] EWCA Crim 1464
84 [2017] EWCA Crim 2163
85 [2018] EWCA Crim 2309
86 [2019] EWCA Crim 234
87 [2011] EWCA Crim 1772
88 [2017] EWCA Crim 2163
89 [2017] EWCA Crim 2163

Example 1: Internet access

The defendant is prohibited from:

1. Using any computer or device capable of accessing the internet[90] unless:
   (i) he/she has notified the police VISOR team within 3 days of the acquisition of any such device;
   (ii) it has the capacity to retain and display the history of internet use, is at all times set so as to retain the history of internet use and he/she does not delete such history;
   (iii) he/she makes the device immediately available on request for inspection by a police officer, or police staff employee, and allows such person to install risk management monitoring software if they so choose;

   This prohibition shall not apply to a computer at his/her place of work, Job Centre Plus, Public Library, educational establishment or other such place, provided that in relation to his/her place of work, within 3 days of him/her commencing use of such a computer, he/she notifies the police VISOR team of this use.
2. Interfering with or bypassing the normal running of any such computer monitoring software.
3. Using or activating any function of any software which prevents a computer or device from retaining and/or displaying the history of internet use, for example using 'incognito' mode or private browsing.
4. Using any 'cloud' or similar remote storage media capable of storing digital images (other than that which is intrinsic to the operation of the device) unless, within 3 days of the creation of an account for such storage, he/she notifies the police of that activity, and provides access to such storage on request for inspection by a police officer or police staff employee.
5. Possessing any device capable of storing digital images (moving or still) unless he/she provides access to such storage on request for inspection by a police officer or police staff employee.
6. Installing any encryption or wiping software on any device other than that which is intrinsic to the operation of the device.

This order will last until {specify}/indefinitely.

Example 2: Contact with children

The defendant is prohibited from having any unsupervised contact or communication of any kind with any female/male/child under the age of 16/18, other than:

(i) such as is inadvertent and not reasonably avoidable in the course of lawful daily life, or

(ii) with the consent of the child's parent or guardian (who has knowledge of his convictions) and with the express approval of Social Services for the area.

This order will last until {specify}/indefinitely.

Example 3: Living with children

The defendant is prohibited from:

1. living in the same household as any male/female/child under the age of 16/18 unless with the express approval of Social Services for the area;
2. having any unsupervised contact or communication of any kind with any male/female/child under the age of 16/18, other than:
   (i) such as is inadvertent and not reasonably avoidable in the course of lawful daily life, or
   (ii) with the consent of the child's parent or guardian (who has knowledge of his convictions) and with the express approval of Social Services for the area.

This order will last until {specify}/indefinitely.

[90] Some SHPOs are being drafted so as to state "…capable of accessing the internet and downloading images…" given the growing prevalence of internet enabled central heating systems etc. There is also a growing concern about issues of practicability in the context of "smart" TVs, cars that are internet enabled and other manifestations of the ubiquity of the internet in modern life.

S7-14 Travel Restriction Orders

CRIMINAL JUSTICE AND POLICE ACT 2001 s.33

ARCHBOLD 5A-908; BLACKSTONE'S E21.40; CURRENT SENTENCING PRACTICE C2-5450; SENTENCING REFERENCER §96-001

1. A travel restriction order may be made on conviction of a drug trafficking offence as defined in CJPA s.34.

NOTE: this definition is not the same as that in PoCA 2002.

2. The effect of an order is to prohibit D from leaving the UK for the period of the order, commencing on the date of D's release from custody. D may be required to deliver up his/her passport, which is a natural pre-requisite to enforcing such an order.

3. The court has a power to make orders in all such cases. In particular
   (1) Where D is sentenced to a custodial sentence of 4 years or more the court must consider making an order and make one if appropriate; and if it does not make an order the court must give reasons.
   (2) It is appropriate to make an order where there is reason to believe that it will reduce the risk of re-offending on release from prison.

4. The minimum length of an order is 2 years from the date of D's release from custody.

Example

You will be subject to a Travel Restriction Order. This means that (if it is not already in the possession of the Police) you must arrange for the surrender of your passport to {specify} Police Station within 14 days; and for the period of {number} years following your release from custody you will not be allowed to leave the United Kingdom.

S7-15 Criminal Behaviour Orders

ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING ACT 2014 s.22

ARCHBOLD 5A-805; BLACKSTONE'S D25.16; CURRENT SENTENCING PRACTICE C2-100; SENTENCING REFERENCER § 24-001; CrimPR part 31

General

1. A criminal behaviour order (CBO) is an order designed to prevent behaviour which may lead to harassment, alarm and distress, ASBCPA s.22(2) and (3). A CBO is not a sentence. But the existence of, or the prospect of, a CBO which addresses particular behaviour in the future is a matter that a sentencer can take into account in deciding how to deal with an offender.

Making an order

2. An order is available where an offender has been convicted of an offence and the court has imposed a sentence or a conditional discharge, ASBCPA s.22(1) and (6), but only where the prosecution apply, ASBCPA s.22(7). If a sentencer wishes the prosecutor to consider applying for such an order, a sentencing exercise could be adjourned for that purpose.[91]

3. The court may impose an order where:
   (1) it is satisfied to the criminal standard that the offender engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person and
   (2) making the order will help in preventing the offender from engaging in such behaviour, ASBCPA s.22(3) and (4).

4. The court must receive evidence about the suitability and enforceability of any particular requirements or prohibitions from the officer who will supervise the order, ASBCPA s.24(1) and (2).

5. In the case of an offender aged 18+ at the date of the order, the order may be for a fixed period of not less than two years, or for an indefinite period, ASBCPA s.25(4). In the case of an offender aged under 18 when the order is made, the order may be for a fixed period of not less than one year and not more than three years, ASBCPA s.25(4).

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91 *Maguire* [2019] EWCA Crim 1193 left open the question of whether it is permissible for a judge other than the one who passes sentence to deal with the adjourned CBO application but did express the view that "*it might be thought at least undesirable for matters to be so organised and perhaps preferable for the judge who sentences the defendant to thereafter resolve any CBO application that has to be adjourned before it can be concluded.*"

Explaining the order

6. The order must be explained to the offender. The exact terms of the order must be pronounced in open court and the written order must accurately reflect the order as pronounced, see *Khan*.[92]

Contents of the order

7. The order may **prohibit** the offender from doing anything, or **require** the offender to do anything, described in the order, for the purpose of preventing the offender from engaging in behaviour which causes harassment, alarm or distress, ASBCPA s.25(6).

8. Prohibitions must be reasonable and proportionate, realistic and practical, and be in terms which make it easy to determine and prosecute a breach. Orders must be precise and capable of being understood by the offender [*Khan*]. For example, a clause seeking to provide protection to persons the defendant might start associating by requiring the offender to notify the police when he/she enters into an intimate relationship with a new partner was held to be "hopelessly vague" in *Maguire.*[93]

9. The obligation to receive evidence from the supervising officer about the suitability and enforceability of the terms of the order is likely to mean that the officer will be present in court to discuss the practicalities of the order.

92 [2018] EWCA Crim 1472
93 [2019] EWCA Crim 1193

Example

You were convicted by a jury of arson of a structure in the play area in Rutland Recreation Park. You claimed during the trial that you were living rough in or around that structure. You have resisted attempts to move you on the basis that you had some kind of right to live there, and you defended your trial on the basis that you were entitled to light fires in order to cook for yourself. I will have to sentence you for the offence of arson. I shall come back to that exercise in a moment.

During your trial I heard evidence from users of the play area who have witnessed you lighting fires in the park, and who said that you were often offensive to anyone who challenged your behaviour. They were in fear that you would further damage the play equipment, would injure yourself or injure others. Following the trial I heard an application for a Criminal Behaviour Order which included evidence from a number of neighbours about your behaviour, and from the Community Police Officer assigned to the park. You declined to give evidence. I was left in no doubt whatsoever that you have acted in a way that caused harassment, alarm and distress to users of the park, and that an order would be helpful to prevent you doing so in the future.

Accordingly, I will make a Criminal Behaviour Order. I have concluded that the right length of that order will be for three years from today's date with the following prohibition. I have heard from the supervising officer as to the suitability of the prohibitions and have taken his/her views into account. You will be prohibited from entering the Rutland Recreation Park. For others this will not be a criminal offence but for you it will be because as a result of your repeated behaviour you have simply lost the right, for the time being, to visit that location without consequences. If you breach the terms of the order you will commit a criminal offence punishable with imprisonment. If at some stage during the order it is no longer appropriate, it may be varied or removed on application either by you or the supervising officer. The order takes effect from today. You have been given a copy of that order. I am told that you have read it and that you understand it. Is that the case?

The Criminal Behaviour Order forms no part of the sentence for the offence of arson. However, I can take into account the fact that you will be subject to that order for a considerable time into the future and that if you set foot anywhere in the park you will be liable to arrest. It will therefore put a stop to some of the behaviour and the interactions that keep on occurring in the park.

Bearing that in mind, I can consider whether I can pass a sentence in relation to the arson count that is less severe than I otherwise would impose…

S8 REQUIREMENTS AND RECOMMENDATIONS

S8-1 Sexual offences notification requirement

SEXUAL OFFENCES ACT 2003 ss.80 – 91

ARCHBOLD 20-281; BLACKSTONE'S E23; CURRENT SENTENCING PRACTICE H4-2000 SENTENCING REFERENCER § 90-001

1. A defendant is subject to the notification requirements of the Act if he/she is convicted of an offence within Schedule 3 of the Act. The provisos contained in Sch.3 (concerning the sentence imposed or the defendant's or victim's ages) do not apply for the purposes of liability to notification.

2. The court is not required, and should not purport, to "order" a defendant to be "registered". The notification provisions are automatic.

3. The court has two functions:

   (1) to certify that the defendant has been convicted of a relevant offence and tell the defendant of his/her obligation to notify the police within 3 days of his/her conviction, if at liberty, or within 3 days of his/her release from custody of various personal particulars, including where he/she is living. See also CrimPR 28.3.

   (2) for offenders under 18, the court may also make a direction under s.89 of the SOA 2003 that the obligations imposed on the defendant are in fact to be imposed on the parent/guardian.

Example

I certify that you have been convicted of a sexual offence so that you must, for a period of {number} years from the date of your conviction/for the rest of your life, keep the police informed at all times of your personal particulars, the address at which you are living and any alteration in the name you are using. You will be given full details of these requirements on a form at the end of this hearing.

4. Notification periods:

Disposal	**Period**
30 months' or more custody or Hospital order with restriction	Indefinite
More than 6 but less than 30 months' custody	10 years
Up to 6 months' custody or Hospital order (without restriction)	7 years
Caution	2 years
Conditional discharge	The period of the discharge
Any other disposal (including all community orders, fines, a verdict of Not Guilty by reason of insanity or a finding of being unfit to plead or tried but to have done the act charged)	5 years

NOTE:

(1) Custody includes imprisonment, detention in YOI, DTO and custody under s.91 PCC(S)A.

(2) When a sentence of custody is suspended, the notification period is determined by the length of the term of custody. The fact that the sentence is suspended, or whether or not the sentence is ultimately served, does not affect this.

(3) When an extended sentence is imposed, the length of the sentence for notification purposes is the full length of the sentence and not only the custodial term.

(4) Periods must be halved for offenders under the age of 18 at the date of the conviction/caution/finding.

(5) When a DTO is imposed, the notification period is determined by the custodial element of the sentence. For example, the custodial element of a DTO of 12 months being 6 months, the notification period would normally be 7 years but, as the offender will be under 18 at the date of conviction, the notification period is 3½ years.

(6) An absolute discharge does not attract liability to notification.

S8-2 Barring Requirements

SAFEGUARDING VULNERABLE GROUPS ACT 2006 Schedule 3 paragraph 25 as amended by PROTECTION OF FREEDOMS ACT 2012 Part 5 Chapter 1

ARCHBOLD 5A-1104; BLACKSTONE'S E21.19; SENTENCING REFERENCER § 14-001

1. Paragraph 25 of Schedule 3 of the Safeguarding Vulnerable Groups Act 2006, as amended by Part 6 of Schedule 9 of the Protection of Freedoms Act 2012, provides as follows: "A court by or before which a person is convicted of an offence of a description specified for the purposes of paragraph 24(1)(a), or which makes an order of a description specified for the purposes of paragraph 24(1)(b), must inform the person at the time he is convicted, or the order is made, that that IBB [now the Disclosure and Barring Service] will, or (as the case may be) may, include him in the Barred list concerned".

2. The court has an obligation to inform (not "order") a defendant that he/she will or may be barred by the Disclosure and Barring Service from regulated activity with children and/or adults.

3. Whether a defendant must be barred or may, subject to making representations, be barred and whether the barring is from working in regulated activity with children or adults will depend on the type of offence and order/s made, subject in the case of some offences, to qualifications. This is a matter for the Disclosure and Barring Service and not for the Court.

Example

The offence of which you have been convicted is one which will (or may) make you subject to barring from working with children or others. You will be told of the restrictions under the Safeguarding Vulnerable Groups Act 2006 by the Disclosure and Barring Service.

S8-3 Deportation Recommendation

IMMIGRATION ACT 1971 s.6

ARCHBOLD 5A-1114; BLACKSTONE'S E20; CURRENT SENTENCING PRACTICE C5; SENTENCING REFERENCER § 29-001

1. No recommendation for deportation may be made unless D has been given at least 7 days' notice in writing.

2. A recommendation may be made if D is aged 17 or over and has been convicted of an offence punishable with imprisonment.

3. The criteria for making the recommendation is whether the defendant's continued presence in this country is to the detriment of the community.

4. Full reasons must be given if a recommendation is made.

5. The court should consider only the criminal conduct of the defendant while in this country; matters relating to conditions in the defendant's country of origin and/or the defendant's Convention rights are for the Home Secretary.

6. No recommendation should be made where the offender is sentenced to 12 months' imprisonment or more in respect of a single offence and is subject to the "automatic liability to deportation" provisions of ss.32-39 UK Borders Act 2007.

Example

You have committed an offence of {specify}. I am satisfied that your continued presence in this country is to the detriment of the community for these reasons {specify}.

I therefore recommend to the Secretary of State that you should be deported.

S8-4 Statutory Surcharge

CJA 2003 ss.161A AND B and SI 2012/1696

ARCHBOLD 5A-330; BLACKSTONE'S E15.24; CURRENT SENTENCING PRACTICE C1-8650; SENTENCING REFERENCER § 92-001

General

1. The court **must** impose a surcharge where the conditions are met: CJA 2003 s.161A.

2. The court must impose the order; it is not an automatic consequence of conviction. Failure to do so results in the order not being imposed.

3. There are multiple regimes and applicability depends on the date of the commission of the offence(s). The latest regime (currently reflected in Sch.1 to SI 2012/1696) applies where the offence(s) were committed on or after 28 June 2019.

4. Where a court "*deals with an offender*" for an offence committed before the relevant date, or for multiple offences where two or more offences fall into different regimes, no surcharge should be imposed: (SI 2019/985) art.3; (SI 2016/389) art.3.

5. The amounts to be imposed are set out in Sch.1 to SI 2012/1696.

Imposing the surcharge

6. Where a court deals with an individual for **one or more offences by way of a single disposal** described in column 1 of table 1 in the SI 2012/1696 Sch.1, and every one of those offences was committed when that individual was aged under 18, the surcharge payable under s.161A of the 2003 Act is the amount specified in the corresponding entry in column 2 of that table.

7. Where a court deals with an individual for **one or more offences by way of more than one disposal** described in column 1 of table 1 in SI 2012/1696 Sch.1, and every one of those offences was committed when that individual was aged under 18, the surcharge payable under s.161A of the 2003 Act is:
   (1) where the amount in column 2 of that table corresponding to each of those disposals is the same, that amount;
   (2) where the amount in column 2 of that table corresponding to each of those disposals is not the same, the highest such amount.

S9 BREACHES ETC. OF SUSPENDED SENTENCES AND COMMUNITY ORDERS

S9-1 Breach, Revocation or Amendment of Suspended Sentences and Effect of Further Conviction

CJA 2003 s.193 and Schedule 12

ARCHBOLD 5A-1303; BLACKSTONE'S E6.11; CURRENT SENTENCING PRACTICE A6, B2; SENTENCING REFERENCER § 93-012

Breach of requirement or conviction of an offence committed during the operational period: Sch. 12 para. 8

1. The offender will be brought before the court on summons or warrant.

2. If the offender has failed, without reasonable excuse, to comply with any community requirement or is convicted of an offence committed within the operational period:

   (3) Unless it would be unjust to do so, the court must order the sentence to be brought into operation either in full or in part.

   (4) If the sentence is brought into operation it may be ordered to run consecutively to or concurrently with any sentence imposed for any offence of which the offender has been convicted during the operational period. The default position is that it will be imposed consecutively.

   (5) If the suspended sentence order had community requirements and it would be unjust to order the sentence to take effect or order the offender to pay a fine the court may amend the order by imposing more onerous community requirements or by extending the supervision or operational period

   (6) If it would be unjust to order the sentence to take effect either in full or in part, the court may allow the original sentence to continue but impose further community requirements or order the offender to pay a fine not exceeding £2,500.

3. The question of whether it would be unjust to order the sentence to take effect is to be addressed by looking at all the circumstances including the extent to which the offender has complied with the community requirements and the facts of any further offence. If the court finds it would be unjust, reasons must be given.

4. The authorities show that there will generally be some reduction of the term of the suspended sentence if there has been substantial compliance with an unpaid work requirement. There may, however, sometimes be a case in which it

is nevertheless appropriate in all the circumstances to activate the suspended sentence in full.[94]

5. Where the activation of a suspended sentence order comprises two or more suspended sentence orders, the resultant sentence imposed will take effect as a single indivisible term of imprisonment: *Bostan*.[95]

6. A mental health treatment, drug rehabilitation or alcohol treatment requirement may not be amended without the offender's consent.

NOTE: The court has no power (a) to add requirements to a suspended sentence imposed without requirements or (b) to make "no order" on the breach of a suspended sentence.

NOTE: The Sentencing Council has issued a definitive guideline on the sentencing for breach offences (effective 1 October 2018).

94 *McDonagh* [2017] EWCA Crim 2193
95 [2018] EWCA Crim 494

Example 1: where suspended sentence brought into operation following breach of requirement, with the term not reduced

It is clear that you have not cooperated with the {specify requirement} at all since the sentence of {specify terms of the suspended sentence} was passed and that you are unable or unwilling to do so. Because of this the suspended sentence will be brought into operation in full: you will serve the sentence of {length of sentence}.

Example 2: where suspended sentence brought into operation following breach of requirement, with the term reduced because of some progress

Although you are in breach of the {specify} requirement of the suspended sentence imposed on {date} and it is not unjust to bring the sentence into operation, I give you credit for the fact that {e.g. initially you cooperated with the curfew requirement/you have performed some unpaid work} by reducing the length of the sentence. The sentence you will now serve is one of {specify}.

Example 3: where suspended sentence brought into operation following commission of a further offence, with the term reduced

The suspended sentence to which you were subject when you committed the offence of {specify} will be brought into operation but I take account of {e.g. your cooperation with the curfew requirement/the hours of unpaid work which you performed} by reducing the length of that sentence to {specify reduced term}. This will be served consecutively to the sentence of {specify} which you are to serve for {specify new offence/s}.

Example 4: where suspended sentence not brought into operation because it would be unjust to do so

Although you are in breach of the {specify requirement} of the suspended sentence passed on {date} I am satisfied that it would be unjust to bring the sentence into operation because {state reasons e.g. you only failed to do unpaid work on two occasions and you have since nearly completed all of the hours which were ordered}. In these circumstances the order will continue but you will {specify e.g. do 20 extra hours of unpaid work/be fined £{amount}}.

[The effect of the order should then be explained as per examples given earlier in this work.]

Amendment: Schedule 12 paragraphs 13 to 22

7. The offender or the responsible officer may apply to the court.

8. Amendment may be ordered

   (1) to cancel the community requirements if it is in the interests of justice;

   (2) because of any change or proposed change of the offender's residence;

   (3) to amend any community requirement, by cancelling or replacing it with another requirement listed in s.190(1) (though, as above, a mental health

treatment, drug rehabilitation or alcohol treatment requirement may not be amended without the offender's consent);

(4) to change a treatment requirement (mental health, drug rehabilitation, alcohol) on the report of a medical practitioner;

(5) for drug rehabilitation reviews to take place without/with a hearing;

(6) to extend, beyond 12 months, the period for completion of unpaid work.

S9-2 Breach, Revocation or Amendment of Community Order and Effect of Further Conviction

CJA 2003 s.79 and Schedule 8

ARCHBOLD 5A-1287 BLACKSTONE'S E8.30; CURRENT SENTENCING PRACTICE B2; SENTENCING REFERENCER 19-001

Breach of requirement: CJA 2013 Schedule 8 paragraph 10

1. The offender will be before the court on summons or warrant.

2. The court must take into account the extent to which the offender has complied with the order.

3. The court should have as its primary objective ensuring that the requirements of the order are completed if there is a realistic prospect of this being achieved.

4. On proof or admission that the offender has failed without reasonable excuse to comply with any requirement of the order the court must deal with the offender in one of the following ways:

   (1) By making the requirements of the order more onerous. If the original order did not contain an unpaid work requirement one may be imposed and the minimum number of hours may be 20 rather than 40.

   (2) By revoking the order and sentencing the offender for the offence in any way he/she could have been sentenced by the court that made the order. This applies to the breach of any original order, regardless of whether the offence giving rise to the original order carried a custodial sentence or not.

   (3) Where the offender has wilfully and persistently failed to comply with an order which was made in respect of an offence which was **not** an offence punishable with imprisonment, by imposing a custodial sentence not exceeding 6 months.

   (4) By ordering the offender to pay a fine of up to £2,500.

   NOTE: the power to take no action on the breach, provided by s.67 LASPO 2012 has been repealed by Sch. 16 para. 22 CCA 2015.

Revocation: CJA 2003 Schedule 8 paragraph 14

5. The offender or the responsible officer may apply to the court for one or more requirements to be revoked. The circumstances in which such applications are made may include good progress or a satisfactory response to the requirements of the order.

6. If the court is to exercise its powers on the application of the responsible officer, the offender is summoned to appear and, if the offender fails to do so, the court may issue a warrant.

7. The court may either revoke the order or revoke the order and deal with the offender in some other way for the offence which gave rise to the order if it is in the interests of justice to do so having regard to circumstances which have arisen since the order was made.

8. If the court re-sentences it must take into account the extent to which the offender has complied with the requirements of the order.

Amendment: CJA 2003 Schedule 8 paragraphs 16 to 20

9. The offender or the responsible officer may apply to the court.

10. Amendment may be ordered:
    (1) because of any change, or proposed change, of the offender's residence;
    (2) to cancel or replace any requirements. A mental health treatment, drug rehabilitation or alcohol treatment requirement may not be amended without the offender's consent but, if the offender does not express willingness, the court may revoke the order and deal with the offender for the offence in any way in which it could have done originally;
    (3) to vary or cancel a treatment requirement (mental health, drug rehabilitation, alcohol) on the report of a medical practitioner;
    (4) for drug rehabilitation reviews to take place without/with a hearing;
    (5) to extend, beyond 12 months, the period for completion of unpaid work: *NPS v Blackfriars Crown Court*.[96]

Subsequent conviction of an offence: CJA 2003 Schedule 8 paragraph 23

11. A subsequent conviction of an offence is not of itself a breach of an order.

12. Where an offender is convicted by the Crown Court or committed for sentence and it is in the interests of justice having regard to the circumstances which have arisen since the order was made, the Crown Court may (in respect of any community order still in force) either revoke the order or revoke the order and deal with the offender for the offence in respect of which the order was made in any way in which the offender could have been dealt with by the court which made the order.

13. If the court re-sentences it must take into account the extent to which the offender has complied with the requirements of the order.

NOTE: No examples are provided in this chapter because the consequences of breach etc. will be the imposition of orders of which examples have already been given.

NOTE: The Sentencing Council has issued a definitive guideline on sentencing for breach offences (effective 1 October 2018).

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[96] [2019] EWHC 529 (Admin)

S9-3 Breach, Revocation or Amendment of Youth Rehabilitation Orders and Effect of Further Conviction

CJIA 2008 Schedule 2

ARCHBOLD 5A-1079; BLACKSTONE'S E9.24; CURRENT SENTENCING PRACTICE F3-600; SENTENCING REFERENCER § 99-035

Breach of requirement: CJIA 2008 Schedule 2 part 2 paragraph 8

1. The offender will be before the court on summons or warrant.

2. The court must take into account the extent to which the offender has complied with the order.

3. The court should have as its primary objective ensuring that the requirements of the order are completed if there is a realistic prospect of this being achieved.

4. On proof or admission that the offender has failed without reasonable excuse to comply with any requirement of the order the court may deal with the offender in one of the following ways:
   (1) By allowing the order to continue as imposed.
   (2) By imposing a fine of up to £2,500.
   (3) By amending the terms of the order to impose any requirement that could have been imposed in addition to or in substitution for any requirement(s) already imposed (save that a fostering requirement or extended activity requirement may not be imposed if there was no such requirement in the original order).
   (4) By revoking the order and sentencing the offender in any way in which the court could originally have sentenced him/her for the offence.
   (5) By imposing a YRO with intensive supervision and surveillance (Sch.8 para.12).
   (6) By imposing a custodial sentence, where the YRO had a requirement of intensive supervision and surveillance and the offence in respect of which the order was made is punishable with imprisonment.
   (7) By imposing 4 months' DTO, where the YRO had a requirement of intensive supervision and surveillance and the offence in respect of which the order was made is not punishable with imprisonment.

Revocation: CJIA 2008 Schedule 2 part 3 paragraph 12

5. The offender or the responsible officer may apply to the court for one or more requirements to be revoked. The circumstances in which such applications are made may include good progress or a satisfactory response to the requirements of the order.

6. If the court is to exercise its powers on the application of the responsible officer, the offender is summoned to appear and, if the offender fails to do so, the court may issue a warrant.

7. The court may either revoke the order or revoke the order and deal with the offender in some other way for the offence which gave rise to the order if it is in the interests of justice to do so having regard to circumstances which have arisen since the order was made.

8. If the court re-sentences it must take into account the extent to which the offender has complied with the requirements of the order.

Amendment: CJIA 2008 Schedule 2 part 4 paragraph 13

9. The offender or the responsible officer may apply to the court.

10. Amendment may be ordered

    (1) because of any change, or proposed change, of the offender's residence;

    (2) to cancel or replace any requirements. A mental health treatment, drug treatment or drug testing requirement may not be imposed unless the offender has expressed willingness to comply with the requirement, though if the offender does not express willingness the court may revoke the order and deal with him/her for the offence in any way in which it could have done originally;

    (3) to extend, for up to 6 months after the original expiry date of the order, the period for completion of any requirement.

Subsequent conviction of an offence: CJIA 2008 Schedule 2 part 5 para. 19

11. A subsequent conviction of an offence is not of itself a breach of an order.

12. Where an offender is convicted by the Crown Court or committed for sentence and it is in the interests of justice having regard to the circumstances which have arisen since the order was made, the Crown Court may (in respect of any youth rehabilitation still in force) either revoke the order or revoke the order and deal with the offender for the offence in respect of which the order was made in any way in which the offender could have been dealt with by the court which made the order.

13. If the court re-sentences the offender it must take into account the extent to which the offender has complied with the requirements of the order.

NOTE: The Sentencing Council's definitive guideline on sentencing for breach offences (effective 1 October 2018) does not apply to the breach of youth rehabilitation orders.

S10 SLIP RULE / VARYING A SENTENCE

POWERS OF CRIMINAL COURTS (SENTENCING) ACT 2000 s.155

ARCHBOLD 5A-1228, BLACKSTONE'S D20.95, CURRENT SENTENCING PRACTICE H4-350, SENTENCING REFERENCER § 8-001, CrimPR 28, CrimPD VII

Availability

1. A sentence may be varied or rescinded within a period of 56 days beginning on the day on which the sentence was imposed, PCC(S)A s.155(1). Variation must be completed within the time limit. Once a sentence is rescinded, however, there must be a fresh sentencing exercise and so long as the power to rescind sentence was exercised within the time limit, the court may adjourn any new sentencing exercise for an appropriate period and the time limit ceases to apply.[97]

2. The 56 day time limit for varying or rescinding a sentence may not be extended.[98]

3. The power may be exercised even if an appeal is pending, but may not be exercised if an appeal, or application for leave to appeal, has been determined, PCC(S)A s.155(1A). In considering whether or not a material error was made, it may be relevant that the error might be corrected by the Court of Appeal on the Attorney General's application.[99]

Exercising the power

4. The sooner the slip rule is invoked, the better. Errors should therefore be identified and brought to the court's attention as soon as possible, to enable correction on the same day, if possible, rather than on a subsequent day. The passage of time from the first decision to the possibility of its revision may impact on how the power is exercised.[100]

5. The power to revise has until now vested only in the Court as originally constituted, see *Filer*.[101] Amendments to CrimPR 28.4 that came into force on the 7 October 2019 removed that requirement.[102] The revision hearing should be in open court in the presence of the offender[103] and listed publicly so that all interested parties may attend.[104]

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97 *Gordon* [2007] EWCA Crim 165
98 *AG's Ref (Nguyen)* [2016] EWCA Crim 448
99 *O'Connor* [2018] EWCA Crim 1417
100 *O'Connor* [2018] EWCA Crim 1417
101 [2018] EWCA Crim 2346
102 There will also be consequential amendments to CPD VII
103 *May* 3 Cr.App.R.(S.) 165
104 *Perkins* [2013] EWCA Crim 323

6. In the case of *O'Connor*[105] it was held that administrative convenience should not be allowed to degrade those principles, although on the particular facts the court had rightly exercised its discretion to proceed in the defendant's absence where he could not be brought to court within the 56-day period, and counsel on his behalf was fully briefed as to facts and law.

The scope of the power

7. The power **may** be exercised where the court is satisfied it has made a material error in the sentencing process whether of law or fact.

   (1) The power is frequently used to enable a formal (even if significant) correction to what would otherwise be an unlawful or incomplete sentence, such as to replace a term of imprisonment for a 20 year old defendant with detention in a YOI, or to add a compulsory element that was overlooked – such as a mandatory driving disqualification or the additional licence period that falls to be imposed in respect of an offence falling within s.236A of the CJA 2003.

   (2) It may be used to correct factual or legal assumptions made at the time of sentence, such as a factual error over the number of curfew days to be credited; or a legal error as to whether time on remand would automatically be credited towards a Detention and Training Order. A factual error might be a failure to appreciate a matter that was known at the time of the original sentence, or a matter that only came to light afterwards – such as the defendant admitting that he had 'conned' the sentencing judge.

   (3) Subject to paragraph 8 below, sentence may in principle be varied by way of a discretionary reduction OR an increase in sentence, although there will need to be exceptional reasons for a significant increase from the original sentence.

   (4) Where an error has not been induced by anything that D has said or done, the impact of the original sentence or the revision on D are relevant considerations and, in an appropriate case, could be reflected in a modest discount to the proposed revised sentence.[106]

8. The power **may not** be exercised where the court has simply changed its mind about the nature or length of sentence, nor due to the prospect of an Attorney General's reference. If the judge concludes that the sentence is not wrong in principle and is not unduly lenient, he/she should not be motivated to revise the sentence simply because there was the possibility of a reference.[107]

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105 [2018] EWCA Crim 1417
106 *O'Connor* [2018] EWCA Crim 1417
107 *O'Connor* [2018] EWCA Crim 1417

Example 1: Variation: correcting a formal error in the expression of the sentence

This case has been listed under Powers of Criminal Courts (Sentencing Act) 2000, s.155.

Earlier today I sentenced you to 2 years' imprisonment. It was my mistake to express the custodial term as "imprisonment". It should have been "detention in a Young Offender Institution" since you were of course only 20 years old when convicted.

I make clear that in arriving at the appropriate custodial term I had fully taken into account your age and I had considered and applied the sentencing guidelines I was referred to, including in particular the Overarching Principles for Sentencing Children and Young People. The appropriate custodial term remains 2 years but it must be detention in a Young Offender Institution. To that extent the original sentence is varied.

Example 2: Variation: material error of fact resulting in significant increase in sentence

This case has been listed under Powers of Criminal Courts (Sentencing Act) 2000, s.155.

Last Monday I sentenced you to 3 years' imprisonment on the basis that you had, in your words, "turned over a new leaf" and were committed to working hard in custody to address the issues that you have got. Whilst on your journey back to prison you attempted to escape from custody. You had made an elaborate plan that involved outside help and which must have been set up well in advance of the sentencing hearing. Your conduct on leaving court demonstrates that your promises prior to and at the hearing were entirely empty.

The case has been re-listed to enable me to take into account additional information available to the court which corrects an error of fact that was highly material to your original sentence.

I have heard submissions from both prosecution and defence about the circumstances as they are now known to be. I have concluded that the appropriate sentence for your original offence should be no less than four years and so to that extent the original sentence will be varied.

Example 3: Rescission: material error of fact resulting in adjournment for a fresh sentence exercise

This case has been listed under Powers of Criminal Courts (Sentencing Act) 2000, s.155.

You were charged with one offence of possessing criminal property. I was invited to sentence you on the basis that this was one-off offending by someone of good character who was only peripherally involved in criminal activity and that the offending that fell to be sentenced related to a discrete period. I imposed a suspended sentence order.

Almost immediately after your sentence, however, the officers involved in putting the results into the Police National Computer discovered that someone with a slight

variation in the spelling of your name had three ongoing cases in different courts relating to identical conspiracies over the same time period. Their enquiries have now established that you are the defendant in each case, at least one of which is awaiting sentence elsewhere. It follows that the assumptions that both counsel put before me on an agreed basis, and which lay behind the basis for your sentence in this court, were therefore entirely false. Almost everything said on your behalf has to be considered again in the light of this new material.

Accordingly, I have no hesitation in rescinding the sentence that was passed last week. The entire basis of that sentencing exercise was in error. The effect is that the sentence becomes a nullity and the sentencing exercise must start all over again. Your ultimate sentence will be determined on the basis of the material before the court at that future hearing and will not be limited by the outcome you heard last week.

You will therefore return to prison as an unsentenced prisoner. You will not be re-sentenced until the case is ready for that to occur. I will now make directions to ensure that the sentencing exercise can be undertaken as soon as possible…

S11 COSTS

PROSECUTION OF OFFENCES ACT 1985 Part II as amended by LASPO 2012 Schedule 7; CPR PART 45; PRACTICE DIRECTION (COSTS IN CRIMINAL PROCEEDINGS) 2015

ARCHBOLD 6-1; BLACKSTONE'S D33; CURRENT SENTENCING PRACTICE C1-5150 and C1-7700; SENTENCING REFERENCER § 75-001

1. Issues of costs will have to be considered in many cases.

2. Where a defendant is found guilty the prosecution will commonly ask for costs and an order may be made for the payment of all or part of the sum sought either by an order for payment forthwith or within a fixed period or by instalments subject to the ability of the defendant to pay: POA s.18.

3. While there is no strict limit to the period over which costs orders should be payable, the sum, rate and period over which payment will be made must be proportionate: *Reilly*.[108]

4. Where a defendant is acquitted or successfully appeals conviction or sentence from the Magistrates' Court, the defence will commonly apply for an order for payment of the defendant's costs from central funds (a DCO): POA s.16.

5. In proceedings commenced on or after 1 October 2012, LASPO Sch. 7 made changes to what costs may be included in a DCO by inserting a new s.16A into POA:

   (1) Where D is an individual and has paid for their own legal representation and appeals successfully against conviction or sentence in the Magistrates Court D will be entitled to recover D's reasonable legal costs incurred in the Magistrates Court and the Crown Court.

   (2) Where D is not an individual, it may not recover legal costs on a successful appeal from the Magistrates Court as part of a DCO.

6. Section 16A POA 1985 has been amended by paragraph 2 of The Costs in Criminal Cases (Legal Costs) (Exceptions) Regulations 2014. This provides that if a defendant, who is an individual who has applied for representation on or after 27 January 2014 and has been determined to be financially ineligible (i.e. has been refused legal aid on grounds of means), the court may extend the DCO to cover the defendant's legal costs of the proceedings. Proceedings are defined in the Regulations as being any of the following:

   (1) proceedings in the Crown Court in respect of an offence for which the accused has been sent by a magistrates' court to the Crown Court for trial;

   (2) proceedings in the Crown Court relating to an offence in respect of which a bill of indictment has been preferred by virtue of s.2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933;

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108 [2017] EWCA Crim 2240

(3) proceedings in the Crown Court following an order by the Court of Appeal or the Supreme Court for a retrial.

See also Practice Direction (Costs in Criminal Proceedings) 2015 para. 2.2.4.

7. Unless the criteria of s.16A POA 1985 as amended (as detailed in paragraph 5 above) are fulfilled, no legal costs are recoverable as part of a DCO in respect of proceedings on indictment whether D is an individual or not.
8. Where D is acquitted on some charges but convicted on others the court has discretion to order that part of D's expenses be met from central funds.
9. When making an order for costs, whether for the prosecution or defence, the court may either make a summary order for a fixed amount or order that the costs are to be determined by the appropriate authority in accordance with the Costs Regulations.
10. If the court decides to do the former, the amount of any defence costs in proceedings commencing after 1 October 2012 must be in accordance with the rates and scales issued by the Lord Chancellor.
11. Where the court considers a legal representative has acted in an improper, unreasonable or negligent manner it may be necessary to order:

    (1) The party to show cause why they should not pay the costs of other parties ascertained to have been wasted by their conduct and

    (2) If satisfied after giving all parties an opportunity to make representations that there was improper, unreasonable or negligent conduct order the costs to be paid: POA 1985 s.19A (wasted costs order).

12. Wasted costs orders require very careful consideration and are very rarely made in practice.
13. Where the court considers a third party (e.g. police, witness, probation service) has acted in an improper, unreasonable or negligent manner it may be necessary to order:

    (1) The party to show cause why he/she should not pay the costs of other parties ascertained to have been wasted by the conduct and

    (2) If satisfied after giving all parties an opportunity to make representations that there was improper, unreasonable or negligent conduct, order the costs to be paid: POA 1985 s.19B.

NOTE: Further information on costs regulation can be obtained from members of the National Taxing Team:

Mr. Peter FitzGerald-Morris	01622 680088 (National Taxing Office Maidstone)
Mr. Roger Pendleton	07717 851815 (Doncaster Office direct telephone)

Or at https://www.gov.uk/guidance/claim-back-costs-from-cases-in-the-criminal-courts

S12 APPENDIX S I SENTENCING GUIDELINES

Guidelines, whether in draft or definitive, must not be used prior to their 'in force' date: *R. v Smythe*.[109]

In previous editions this section has contained links to the individual guidelines as originally published by the Sentencing Council. At the request of the Sentencing Council, however, the links have been removed as amendments made subsequently are not reflected in the versions available by that route. The correct course, and one which we endorse, is for the guidelines to be accessed via the Sentencing Council website using the links below – one for the Crown Court and one for the Magistrates' Court. To do otherwise is to risk having regard to an out-of-date version of a guideline with a consequent risk of error.

Crown Court Guidelines

Magistrates' Court Guidelines

[109] [2019] EWCA Crim 90

S13 APPENDIX S II TEMPLATE FOR SENTENCE[110]

R. v.

Offences to be sentenced: (note max sentences)

Age at conviction:

Prosecution outline:

Impact statement: (victim, family, community or business)

Guidelines to consider: (e.g. Offence, G plea, Youth, Dom Abuse, TICs)

Culpability factors:

Harm factors (actual, intended or foreseen): (see s.143 CJA and Guidelines)

Guideline category:

[110] For guidance on the content of sentencing remarks see *Chin-Charles and Cullen* [2019] EWCA Crim 1140

Factors increasing seriousness: (including relevant antecedents)

Factors reducing seriousness:

Personal mitigation: (and/or assistance to Prosecution)

Appropriate figure for sentence following a contested trial:
(after upward/downward adjustment from category starting point for aggravation/mitigation)

Dangerousness: (if specified offence)

Credit for Guilty Plea: (applying Guideline)

Totality (if applicable): (applying Guideline)

Sentence(s) imposed: (including reasons – s.174 CJA)

Suspension possible? (reasons for doing so, reasons for not doing so – refer to Guideline)

Practical effect of sentence

Time on remand in custody (automatically credited) / qualifying electronically monitored curfew (identify appropriate number of days, with administrative variation if incorrect):

Statutory Surcharge:

Ancillary orders:

PoCA Timetable

S14 APPENDIX S III INDICATIONS OF SENTENCE

R. v. Goodyear

ARCHBOLD 5A-111; BLACKSTONE'S D12.60; CrimPD VII SENTENCING C; CURRENT SENTENCING PRACTICE H2-1850; SENTENCING REFERENCER § 52-001

1. Following the case of *Goodyear*[111] a court may, subject to strict conditions, give an indication of the sentence that would be imposed a court may, subject to strict conditions, give an indication of the sentence that would be imposed on that day if the defendant were to plead guilty. The conditions and procedure are set out in CrimPD VII Sentencing C. In *Utton*[112] the practice and procedure relating to *Goodyear* indications was reviewed and clarified.

2. Principal matters to note are:

   (a) D must give written authority to his/her advocate to seek an indication of sentence.

   (b) The defence must notify the prosecution and the court of any such application in advance of the hearing.

   (c) An indication may be sought only when:

      (i) the plea is entered on the full facts of the prosecution case; or

      (ii) a written basis of plea is agreed by the prosecution; or

      (iii) if there is an issue between the prosecution and the defence, this is properly identified and the judge is satisfied that the issue is not of significance and does not require a *Newton* hearing to resolve.

   (d) Although the *Goodyear* process enabled an indication of maximum sentence to be imposed, it should not be thought of as a bargaining process with the court: *Almilhim.*[113]

   (e) The judge must obtain the confirmation of prosecution and defence that the court has all relevant information including up to date antecedents, information as to whether the defendant is facing any other proceedings and all additional evidence.

   (f) The judge should receive submissions from counsel as to the appropriate level of sentence within any relevant Sentencing Guideline or guideline case.

   (g) It will not normally be appropriate to give an indication where:

      (i) there are co-accused pleading not guilty;

      (ii) the offence is one where the issue of dangerousness arises;

      (iii) medical or other reports are outstanding and the proper sentence may depend upon the content of such reports.

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111 [2005] EWCA Crim 888
112 [2019] EWCA Crim 1341
113 [2019] EWCA Crim 220

(h) Any indication must be given in open court and in precise terms: it should reflect the maximum sentence if a guilty plea were to be tendered at that stage of the proceedings only: not the maximum possible sentence following conviction by a jury after trial.

(i) Any indication will be valid only for a reasonable period. What constitutes a 'reasonable period' will depend on the circumstances: *Utton.*[114] However, in. most cases, a reasonable period will not extend beyond the day on which the indication is given. In a complex case where it is appropriate to give more time to a defendant to consider the implications of the indication, the judge should indicate the period for which the indication remains valid.

(j) An indication is binding on the judge for the period expressed.

(k) An indication expires at the conclusion of the period expressed but the fact of and, if given, the terms of an indication should remain on the court file in case there is a subsequent application for an indication.

(l) In an appropriate case the judge may remind the defence advocate of D's entitlement to seek an indication of sentence.

(m) Reporting restrictions should normally be imposed upon any *Goodyear* application: these may be lifted if the defendant pleads or is found guilty.

[114] [2019] EWCA Crim 1341