

**Sentencing Council meeting:** 13<sup>th</sup> April 2018  
**Paper number:** SC(18)APR05– Breach  
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## **1 ISSUE**

1.1 At the October 2017 meeting the Council signed off the definitive Breach guideline, subject to consideration of the resource assessment. Work to assess the impact of the guideline has now been conducted and the Council are asked to consider the information presented and to agree a publication and in force date for the definitive guideline.

## **2 RECOMMENDATION**

2.1 That the Council;

- Considers the information in relation to the impact of the Breach guideline;
- Agrees a publication and in force date for the definitive guideline for Breach offences.

## **3 CONSIDERATION**

3.1 At the October 2017 meeting the Council signed off the definitive Breach guideline. The Council were advised of difficulties in completing a resource assessment for some breaches within the guideline due to the lack of data on current sentencing practice, notably for breaches of Community Orders and Suspended Sentence Orders. The definitive guidelines for Breach of CO's and SSO's are attached at **Annex A** for reference.

3.2 The Council agreed that publication of the guideline should be paused to allow a data collection exercise to be undertaken this Spring, to provide for a more informed resource assessment.

3.3 This delay also provided for more time for work to be undertaken to raise the profile of the Imposition guideline, with the aim of addressing the trend for SSO's to be imposed as a more severe form of CO, to mitigate the risk of a high number of suspended sentence activations upon publication of the breach guideline. This paper provides information on work undertaken in this respect to provide a full picture of the potential impact of the guideline.

#### **Imposition related stakeholder engagement**

3.4 Significant stakeholder engagement has been undertaken in relation to the Imposition guideline since its publication, and has been more intensive over the past few months. Officials explored how the guidelines had been received during various meetings and events, and concluded that more direct and clear communication was necessary to ensure the guideline is being properly applied. Communications at the initial launch of the guideline were careful not to appear critical of prior sentencing behaviour, which in hindsight may have compromised the objective of ensuring the message in Imposition that a suspended sentence is a custodial sentence and not a more severe form of community order. As was discussed at a previous meeting, it is crucial that this is understood and embedded in practice to ensure the Breach guideline does not result in activation of suspended sentences when custody may not have been a fully intended or appropriate sentence.

3.5 A summary of work undertaken and engagement with various agencies and criminal justice partners is outlined below.

#### **Judicial College**

Upon publication of the Imposition guideline officials worked with Judicial College to develop training materials which could be incorporated in training packs for sentencers. However, this was targeted at new magistrates and did not address training of existing sentencers, as we were advised magistrates ongoing training is decided within the geographical areas within which they are based. Progress has been made recently following contact being made with agencies to secure their engagement and assistance with ensuring compliance with Imposition, and Judicial College have confirmed that Imposition related training material will be issued as mandatory training for all sentencers.

### Probation Service

The National Probation Service has been particularly responsive in relation to this issue. Following discussions held with them they have revised guidance for their officers and are instructing them not to recommend SSOs as a stand-alone sentence in PSR's, and align their recommendations with Imposition and refer only to custodial and community sentences with direct reference to the guideline. They are also arranging for the removal of SSOs as a sentence option from the systems used to prepare reports, and will include only custody and community orders. Sarah Munro participated in a video in explaining the reasons for this which will be issued to Probation Officers as part of a training package on 12<sup>th</sup> April. From that date they will be instructed not to recommend an SSO as a standalone sentence.

### Community Rehabilitation Companies

An event will be hosted by officials and Martin Graham on 3<sup>rd</sup> May for Community Rehabilitation Company Chief Executives. As well as discussing the Imposition and Breach guidelines, the changes NPS are making to PSR reports will be explained so that they can ensure alignment of their own operational guidance and information included in Breach referrals.

### Sentencers

Reaching sentencers with a view to disseminating a clear, consistent message proved problematic due to the various strands of the Judiciary and their differing governing bodies. The target audience includes magistrates, legal advisers, District and Circuit Judges, as well as Court of Appeal Judges. We initially contacted various bodies with responsibility for particular groups including the JCS, MA, NBCF, Judicial College and the Legal Trainers Network who largely suggested articles in publications which did not guarantee the reach we required, nor carried the impact of an instruction. For this reason we decided that the best approach would be a direct communication to sentencers from our Chairman. This letter was addressed and issued to Court of Appeal, Presiding and Resident Judges; District Judges and magistrates; and magistrates' court legal advisers. It informed them of the imminent change in Probation recommendations and to clarify the important reasons the guideline must be followed. The letter was approved by the SPJ and President of the Queens Bench Division, and was issued on 3<sup>rd</sup> April 2018. It is

attached at **Annex B**. Alongside this, articles will be published in various sentencer communications over the coming months to reiterate these messages.

### Court of Appeal

Following the assistance of Heather Hallett in her capacity as Vice President of the Court of Appeal (Criminal Division), Court of Appeal case summaries now include a note directly referencing the Imposition guideline where the original Crown Court sentence imposed is relevant.

3.6 This robust approach to raising awareness and compliance with the Imposition guideline is more likely to achieve the objective intended by publishing the guideline. It is also thought that once the Breach guideline is published and sentencers see the options which will be available to them on sentencing, this will reinforce the message that suspended sentences are custodial sentences.

### **Current evidence of impact of Imposition guideline**

3.7 The Imposition guideline came into force on 1 February 2017, and data are now available covering the period up to the end of September 2017. The published figures are very high level and are only available showing whole years, from the beginning of each October to the end of the following September. Therefore, the only analysis that can be conducted at this point is a comparison of figures for the year ending September 2017 with similar figures for previous years.

3.8 The number of offenders sentenced to a SSO increased almost year-on-year for at least the past ten years, and by the year ending September 2016, made up 4.6% of offenders sentenced. For the year ending September 2017, this decreased to 4.2%, the lowest proportion since the year ending September 2013 when SSOs made up 3.9% of offenders sentenced.

3.9 However, from the year ending September 2016 to the year ending September 2017, the proportions of offenders sentenced to immediate custody and COs also decreased, while the proportion receiving fines increased. This is likely to be because of a change in the offence mix, with a higher proportion of lower-level offences coming before the courts in the last year. Overall, this makes it difficult to assess whether the Imposition guideline has had the intended effect. The number of offenders sentenced to a SSO is at its lowest level for several years, but this may just reflect a change in the nature of the offences sentenced.

3.10 A richer dataset for the whole of 2017 will be available at the end of May, and then it will be possible to conduct more detailed analysis of the possible impact of the Imposition guideline on sentencing practice.

### **Data Collection/Resource Assessment**

3.11 The draft resource assessment for breach of a SSO and breach of a CO stated that:

- It is difficult to establish current sentencing practice, as there is no reliable data available on the total number of breaches or the sentencing outcomes of breaches sentenced at court;
- There is some evidence that some SSOs are being imposed as a more severe form of CO, so when a breach occurs, the custodial sentence may not be activated as it was not intended that custody actually be served for the original offence;
- The Imposition guideline was intended to address this issue, with the expectation being that the number of SSOs imposed would decrease (which in turn should cause a subsequent decrease in the number of breaches of SSOs);
- The Breach guideline, if implemented as intended, would be expected to cause an increase in the proportion of those SSOs which are imposed that are activated; and,
- Due to the lack of data and the unknown impact of the Imposition guideline, it was not possible to provide a precise estimate of the potential impact of the CO and SSO guidelines on prison, probation and youth justice resources.

3.12 The Breach guideline has the potential to affect the penalties imposed for a large number of offenders, and so any impact that the guideline may have could be substantial. There was therefore a need to collect new data to be able to provide a clearer estimate of the possible impact of the guideline on sentencing practice.

### Data collection at magistrates' courts

3.13 From November 2017 to the end of March 2018, a data collection exercise was conducted in a sample<sup>1</sup> of magistrates' courts across England and Wales. As part of this exercise, sentencers were asked to give details about how they dealt with breaches of COs and SSOs (plus four other offences). The topics covered in the data collection for breaches of COs and SSOs included:

- Details of the original order imposed, including the length and any requirements;
- Details of factors relating to the offender's compliance with the order:
  - the attitude or engagement of the offender with the order;
  - the proportion of requirements completed;
  - the proximity of the breach to the imposition of the order;
  - circumstances or offender characteristics that impeded the offender's compliance;
  - the number of previous breaches of the order; and,
  - any other factors taken into account in relation to compliance.
- Details of the relative seriousness of the new offence for which the offender was convicted (for breach of a SSO by conviction of a further offence); and,
- The penalty imposed for the breach, including, for breach of a SSO, the reasons for not activating or for reducing the custodial sentence (if applicable).

3.14 An early extract of the data was taken<sup>2</sup> to inform the Council's resource assessment of the Breach guideline. The analysis is presented below.

3.15 When considering the figures presented, it is important to bear in mind that the data represent a very small proportion of all breaches, and so may not be representative of all sentencing practice. If the figures are biased then any estimate of the impact will be incorrect. There is no straightforward way of checking how representative the data are, because there is no reliable alternative source to compare with.

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<sup>1</sup> In total, 80 magistrates' courts were selected to take part in the exercise.

<sup>2</sup> The early extract of the data included all electronic forms submitted by the end of 9 March 2018.

3.16 It should be noted that, while the data collection covered magistrates' courts only, a separate piece of work was conducted to analyse a sample of transcripts of judges' sentencing remarks for breaches of SSOs and COs sentenced at the Crown Court. This work covered only a very small sample of sentences, but found that the main points and themes were broadly similar to those presented below in the magistrates' courts data analysis.

#### Evidence from the data collection regarding the use of the Imposition guideline

3.17 The data collection did not directly capture any information regarding the use or understanding of the Imposition guideline, but several observations have been made that provide insight into potential issues:

- For the data collection form for breaches of COs by failing to comply with requirements, one of the questions asked sentencers if there was anything else they would like to tell us about how they sentenced the offence. On 15 (out of 762) forms, sentencers stated that they 'activated the order' or gave reasons why they did not 'activate the order'. This implies that they were actually dealing with a breach of a SSO, and had completed the wrong form, suggesting that some sentencers are still perceiving SSOs as community sentences. It is only because of this small number of sentencers spontaneously mentioning activation that we are aware of this. It is therefore possible that more sentencers also completed the incorrect form, but in a way that is not identifiable from the data.
- When dealing with breaches of COs, on four of the forms, sentencers indicated that they revoked the CO and imposed a new CO, but then stated that they suspended the sentence. In these cases, it seems that they actually had imposed a SSO and had completed the form incorrectly. If they had selected 'custody' then they would have been presented with the option to declare whether the sentence was suspended. One sentencer stated that "This form cannot accept all the things that need to be ticked". Again, this suggests that some sentencers consider SSOs to be community sentences.

#### Evidence from the data collection regarding breaches

3.18 For the data analysis presented below, records were excluded if the incorrect form was completed, but all other records were retained.

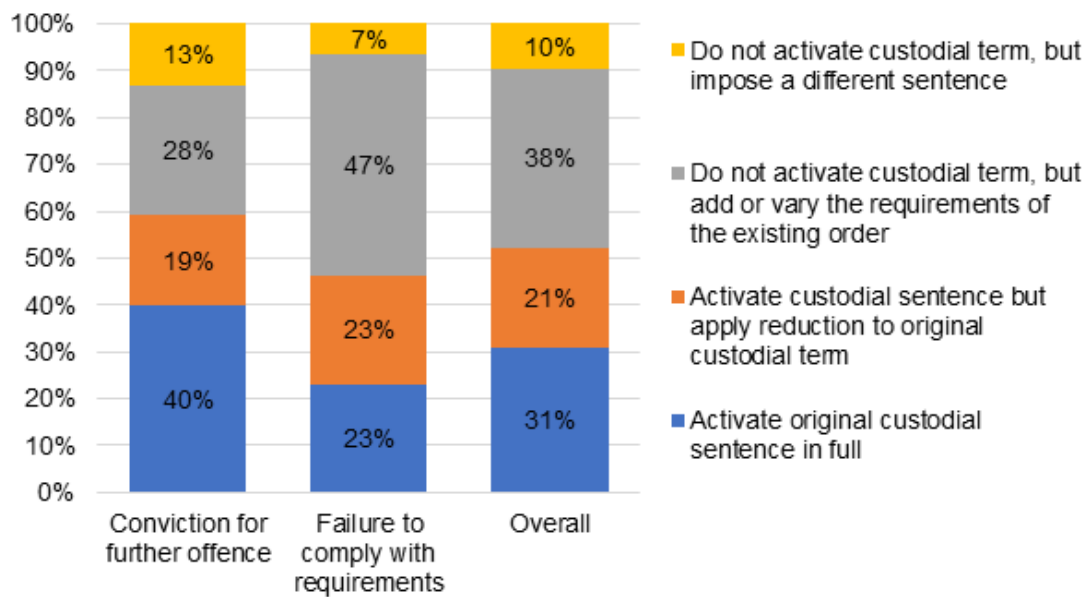
### Breach of a suspended sentence order – current sentencing practice

3.19 For this assessment, 174 completed data collection forms were analysed, including 83 forms for conviction for a further offence during the operational period of the order, and 91 for failure to comply with the community requirements of the order.

3.20 Overall, 52% of offenders had their sentences activated following the breach (31% in full, and 21% with a reduction to the sentence length). The rest either had their existing order modified (38%) or had a different sentence<sup>3</sup> imposed (10%).

3.21 The breakdown of these figures differed depending on whether the breach was for a further offence or for failure to comply with requirements, with custodial sentences more likely to be activated if the offender was being sentenced for a further offence during the operational period of the order, as the chart below shows.

#### **Sentencing outcomes for breach of a SSO, from an early extract of data from the magistrates' court data collection**



3.22 When looking at the activation rate<sup>4</sup> by the level of compliance (for conviction for a further offence and failure to comply with requirements, combined), the data shows that the lower the level of compliance with the order, the more likely the sentencers were to activate the order, as would be expected. The vast majority (93%) of offenders who were deemed not to have complied with the order at all had their sentences activated, while only 9% of offenders with a high level of compliance

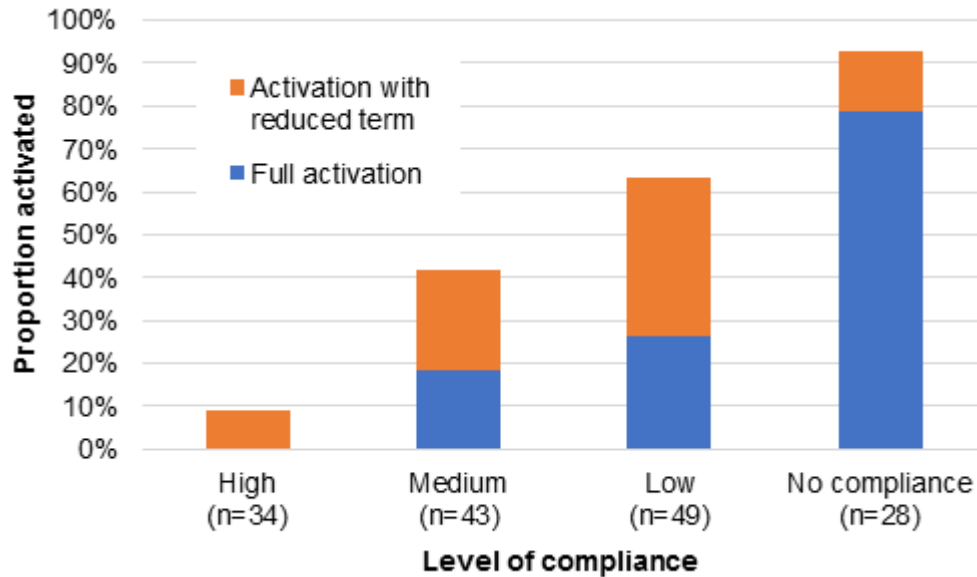
<sup>3</sup> Most of the different sentences imposed were fines, although one offender was given a conditional discharge and for one it was not clear what sentence was imposed.

<sup>4</sup> The activation rate is defined here as the proportion of forms that included activation out of all forms analysed.



went on to have their sentence activated. This is thought to be broadly in line with sentences following the Breach guideline.

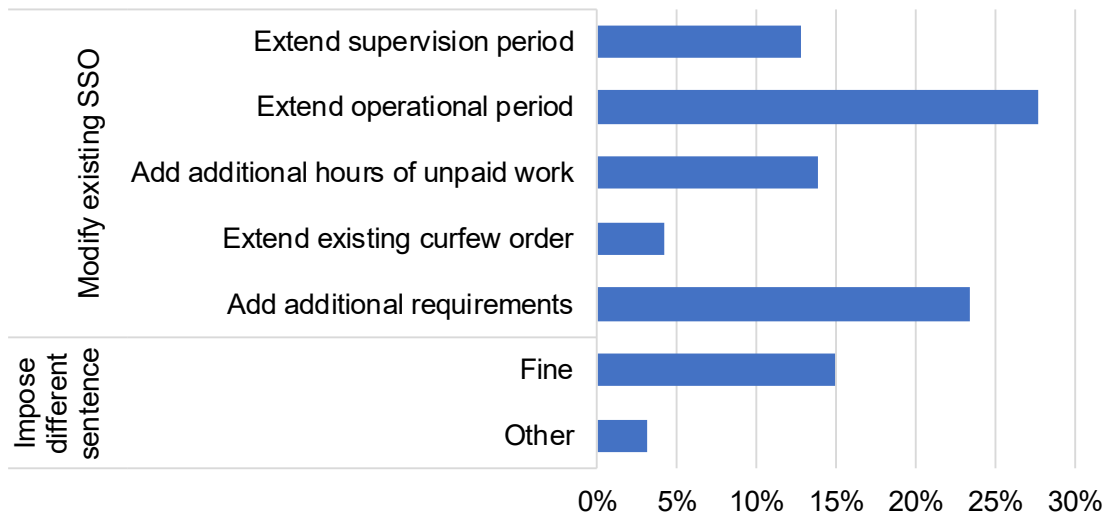
**Proportion of offenders who had their sentence activated, split by level of compliance, from an early extract of data from the magistrates' court data collection**



3.23 Where a sentencer indicated that they did not activate the custodial sentence at all, and instead either modified the existing order or imposed a different sentence, the most common choice was to extend the operational period of the existing order (representing around 28% of offenders for whom the custodial sentence wasn't activated).<sup>5</sup>

<sup>5</sup> Note that the majority of sentencers only chose one of the five options listed, but 14% chose two or three of the options (for example, by extending the supervision period *and* adding additional requirements).

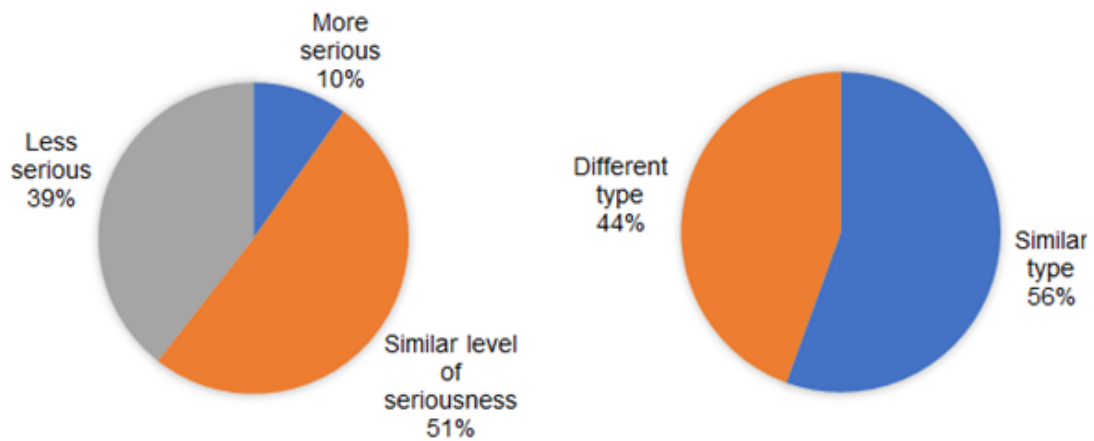
**Penalties imposed for breach of a SSO, for offenders whose custodial sentence was not activated, from an early extract of data from the magistrates' court data collection**



3.24 The second most common was adding additional requirements (23%). Of the additional requirements imposed, the most commonly chosen was a Rehabilitation Activity Requirement (RAR).

3.25 The guideline for sentencing offenders convicted for a further offence during the operational period of the order says that “The facts/nature of the new offence is the primary consideration in assessing the action to be taken on the breach.” Where the new offence is more serious or where there are multiple new offences, the guideline tells sentencers that they should be activating the custodial sentence in full. Around 14% of offenders were being dealt with for multiple new offences. The relative seriousness and type of new offence is shown below.

**The relative seriousness and type of the new offence compared to the original offence for which the order was imposed, from an early extract of data from the magistrates' court data collection**



3.26 Overall, around 20% (17 offenders) had been convicted either for multiple new offences, or for a new offence that was more serious than the original offence. The majority of these had their custodial sentence activated, either in full (71%, 12 offenders) or with a reduction (18%, 3 offenders). The remaining 2 offenders had their existing orders modified. Under the new guideline, all of these offenders would have their sentence activated in full.

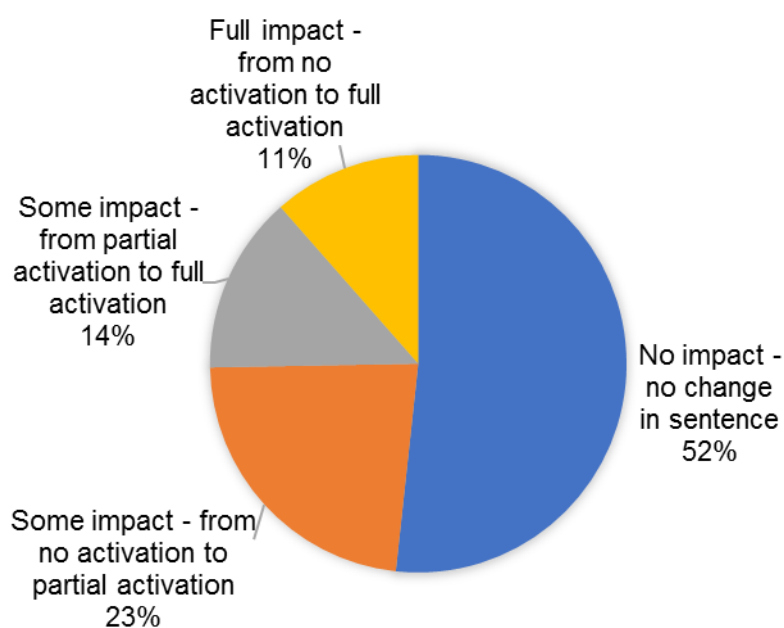
3.27 For most of the rest of this guideline, the sentencer is told to weigh up the seriousness and type of the new offence against the overall level of compliance of the offender with the order, in order to decide the appropriate sentence. For breach of a SSO by failing to comply with requirements, the compliance is the only factor to be considered by the sentencer in the new guideline.

Breach of a suspended sentence order - estimated changes to sentencing practice

3.28 Analysis was conducted to compare the sentence given within the magistrates' court data collection with the sentence the offender would be expected to receive under the new guideline, if sentencers use the sentencing tables only, without considering the provision for when it would be 'unjust in all of the circumstances' to activate. For example, if an offender was convicted for a further offence that was more serious than the original offence for which the order was imposed, then, under the new guideline, they would have their sentence activated in full. If the data collection indicated that an offender of this type was currently not having their sentence activated, and instead had their SSO modified in some way, then this would be recorded as "Full impact", because it is anticipated under this scenario that the offender would go from no activation to full activation and so the new guideline would have the fullest impact on this offender.

3.29 So if we assume that sentencers only consider the sentencing tables in the guideline, and do not apply the provisions for when activating the sentence would be 'unjust in all of the circumstances' then this would be expected to lead to the following changes in sentence as a result of the guideline.

**Expected changes to sentence outcomes for breach of a SSO, if the sentencing tables are applied strictly, with no exceptions**



3.30 Just over half (52%) of sentences would be expected to stay the same under the new guideline in this scenario, while the rest (48%) would be expected to change, either by activating in full under the new guideline where previously the sentence was not activated or partially activated (activated with a reduction in the custodial term), or by partially activating now where previously the sentence was not activated at all.

3.31 However, there are several key reasons why it is expected that the actual proportion of offenders who will receive different sentences under the new guideline will be lower than the 48% mentioned above:

- As explained, the 48% does not take into account the guideline's provision for when activation would be 'unjust in all of the circumstances'. As part of the data collection, when sentencers indicated that they did not activate the custodial sentence, they were asked to provide a reason. The words 'unjust' or 'not in the interests of justice' were spontaneously mentioned on numerous forms where the custodial sentence was not activated. If these types of cases continue to be assessed in this way under the new guideline, then these

offenders will continue not to have their sentences activated, and the impact will be lower.

- In the data collection, many offenders had a characteristic or circumstance taken into account, where the sentencer indicated that it had impeded the offender's compliance with the order.<sup>6</sup> There were also specific reasons given for why the sentencer chose not to activate. These included mental health issues, disabilities, learning difficulties, drug and alcohol dependency, family problems including childcare responsibilities and illnesses, housing issues including homelessness, a change in circumstance of the offender, the sentencer wanting to give the offender the opportunity to complete a programme, and the sentencer stating that a programme seemed to be working. For many of the forms, multiple reasons were given for not activating; for example, one sentencer stated: "Dissimilar offence, less serious offence, compliance with probation, proximity to end of SSO, imminent arrival of first child". If these were sufficient reasons not to activate, and for these cases it is considered 'unjust' to activate under the new guideline, then sentencers will continue not to activate and the impact of the guideline will be lower.
- When sentencers indicated that they activated the custodial sentence but applied a reduction to the length, almost all sentencers stated that this was because of the offender's compliance in some way; either that the offender had completed some of the requirements and/ or because the offender had complied for the majority of the length of the order. If sentencers continue to consider compliance as a reason for it to be 'unjust in all of the circumstances' to activate in full, then they will continue to apply reductions as they are currently, as the guideline specifically provides for this in relation to any completed unpaid work or curfew in the penalty levels in appropriate cases.
- For breaches where the offender has committed a further offence during the operational period of the order, it is possible that some sentencers will state that the custodial sentence should be served concurrently with a custodial sentence imposed for the new offence. This would mean that if offenders were given different sentences under the new guideline, the impact would be

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<sup>6</sup> Note that some of these cases are the same as those mentioned in the previous point.

lower than if the sentences were to be served consecutively. We have no data however on how many such sentences are served concurrently.

3.32 The analysis suggests that current sentencing practice is not too different to the penalties recommended in the guideline, as the guideline allows for reductions to sentence lengths when there has been some compliance with the order, and for sentencers to use the 'unjust' provision if there are appropriate circumstances not to activate the order. Therefore, the impact may be lower than was previously anticipated (at the point of guideline development and consultation).

3.33 Together, these reasons demonstrate that the guideline is likely to change the penalties imposed for a lower proportion of cases than the 48% mentioned above. However, even if these assumptions are correct, there is likely to be an increase in the proportion of sentences activated as a result of the guideline, and this may have a large cumulative impact on the prisons, with many more offenders being sent to custody than at present.

3.34 However, there is evidence to suggest that the sentences served by these offenders may be low. As part of the data collection, information on the custodial sentence lengths of the original orders and the lengths of reductions given (when applicable) was collected. If offenders only serve around half of their sentence in custody (and are released from prison at the half-way point), then the data suggests that offenders with full activation of their sentence would serve an average of 8 weeks in custody, offenders with full activation but who would previously have had a reduction in their sentence would serve an average of 3 additional weeks, and offenders with partial activation would serve an average of 5 weeks. It should be noted that this represents magistrates' court sentences only. Around 60% of offenders sentenced to SSOs in 2016 were sentenced at magistrates' courts (although it should be noted that sentences served by offenders sentenced at the Crown Court are likely to be considerably higher).

3.35 In addition, if the work to embed the use of the Imposition guideline has the intended effect, and the number of SSOs imposed decreases, then the guideline will apply to fewer offenders and so any impact will be smaller than it would be under current sentencing practice.

### Breach of a suspended sentence order - estimating the cost of any impact

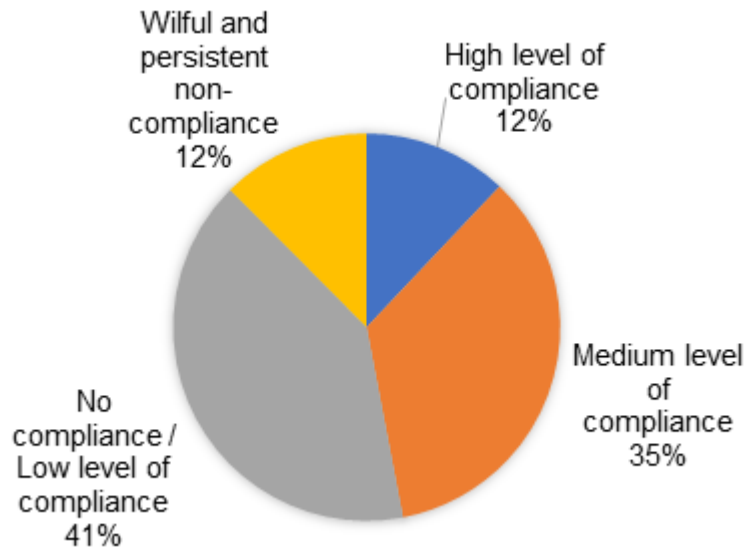
3.36 There are no reliable data sources available to report the number of offenders sentenced each year for breaches of SSOs. Several data sources have some data on breaches, but these either capture something not directly related to what is needed (such as probation data on terminations of orders) or are not considered to be reliable enough to trust and have therefore never been published (such as the MoJ CPD data on breaches). This means that no one source, or combination of sources, is able to fully provide the data needed. While it is possible to try to estimate the number based on these sources, depending on the set of assumptions used and the method for counting breaches, any estimate of the impact of the guideline would vary widely and result in a number that is potentially both meaningless and very likely misleading. It is therefore not possible, or advisable, to calculate any informative or realistic estimate of the guideline on sentencing practice, or the subsequent impact on prison and probation services.

### Breach of a community order

3.37 In total, 747 completed forms were analysed to assess current sentencing practice for breaches of COs, and to estimate the impact of the guideline.

3.38 The new guideline for breach of a CO (by failing to comply with requirements) states that where the non-compliance is wilful and persistent, the sentencer should revoke the order and impose a custodial sentence. Analysis of the data collected from magistrates' courts shows that around 12% of breaches of COs were considered to be 'wilful and persistent non-compliance'.

**Levels of compliance with COs, from an early extract of data from the magistrates' court data collection**



3.39 For all other types, the sentencer is told either to revoke the order and re-sentence the original offence, add curfew requirements, add additional hours of unpaid work, extend the length of the order, add additional requirements or impose a fine. These options are too varied for it to be feasible to estimate the impact of the guideline for high, medium, low or no compliance, because it would not be possible to determine with any certainty how the penalty may be different under the new guideline.

3.40 Of those offenders whose non-compliance was deemed to be 'wilful and persistent', 59% already received a custodial sentence. The other 41%, who are not currently receiving a custodial sentence, would receive a custodial sentence under the new guideline.

3.41 Out of those offenders already receiving a custodial sentence, 53% were sentenced to immediate custody and the remaining 47% had their sentence suspended.

3.42 If we assume these proportions from the data collection apply to all offenders sentenced for breach of a CO, then overall, just under 3% of offenders will be sentenced to immediate custody when they wouldn't have been under current sentencing practice (i.e. were deemed to be wilfully and persistently non-compliant, and will receive an immediate custodial sentence under the new guideline where they had previously received a non-custodial sentence).



3.43 In a similar way as for breaches of SSOs, the number of offenders dealt with for breach of a CO at court per year was not known, so it has not been possible to estimate the likely impact of the guideline.

#### Summary of impact

3.44 Overall, there is a huge amount of uncertainty regarding the impact of the new guideline on sentencing for breaches of SSOs and COs. With no reliable information about volumes, no up-to-date information on the impact of the Imposition guideline, very little idea of sentencing practice at the Crown Court and only limited information on sentencing at the magistrates' courts, it has not been possible to quantify the impact of the guideline on the prison or probation services.

3.45 Any changes in sentencing practice could have a large cumulative impact on the prisons, with many more offenders being sent to custody than at present. However, the work currently being undertaken to embed the use of the Imposition guideline in court should help to reduce any possible impact, and if SSOs are only imposed as intended, then the impact of the guideline may not be substantial. An option to further mitigate the risk of an increased level of activations could be to publish the guideline as planned at the end of May, but to have a greater length of time than usual for it to come into force, with October proposed as a suitable time by a number of stakeholders we have engaged with to provide for training and events focused on providing information on the guideline.

3.46 Resource assessments covering all breaches included in the guideline will be cascaded to Council in due course, following the decisions made at this meeting.

**Question 1: Does the Council agree to go ahead with publishing the definitive Breach Offences guideline in May?**

**Question 2: Does the Council agree that the guideline should have a longer than usual lead time before coming into force, and become effective from October?**

**Question 3: Is the Council content with the interpretation of the latest data on breach, as detailed above, and for this to form the basis of the resource assessments on breach of a SSO and CO?**

## **4 RISKS**

4.1 As explained throughout, there is a risk that the guideline could have an impact on average sentencing practice, particularly if the guideline leads sentencers to more frequently activate the custodial sentences of SSOs when breached. This could have a potentially large cumulative impact on the prisons, with many more offenders being sent to custody than at present. However, the work to embed the use of the Imposition guideline should help to counteract this by ensuring that SSOs are only imposed when it is intended that the offender would serve a custodial sentence if they breached their order. Additionally, there is no evidence to suggest that sentencers do not currently have good reasons not to activate, and they may continue to consider it to be 'unjust in all of the circumstances' to activate under the new guideline.

# **Breach of a Community Order**

## **Criminal Justice Act 2003 (Schedule 8)**

## Breach of Community Order by Failing to Comply with Requirements

The court must take into account the extent to which the offender has complied with the requirements of the community order when imposing a sentence.

In assessing the level of compliance with the order the court should consider:

- i) the overall attitude and engagement with the order as well as the proportion of elements completed;
- ii) the impact of any completed or partially completed requirements on the offender's behaviour;
- iii) the proximity of breach to imposition of order; and
- iv) evidence of circumstances or offender characteristics, such as disability, mental health issues or learning difficulties which have impeded offender's compliance with the order.

Overall compliance with order	Penalty
Wilful and persistent non-compliance	Revoke the order and re-sentence imposing custodial sentence (even where the offence seriousness did not originally merit custody)
Low level of compliance	Revoke the order and re-sentence original offence <b>OR</b> Add curfew requirement 20 - 30 days* <b>OR</b> 30 - 50 hours additional unpaid work/extend length of order/add additional requirements <b>OR</b> Band C fine
Medium level of compliance	Revoke the order and resentence original offence <b>OR</b> Add curfew requirement 10 - 20 days* <b>OR</b> 20 - 30 hours additional unpaid work/extend length of order/add additional requirements <b>OR</b> Band B fine
High level of compliance	Add curfew requirement 6 - 10 days* <b>OR</b> 10 - 20 hours additional unpaid work/extend length of order/add additional requirements <b>OR</b> Band A fine

\* curfew days do not have to be consecutive and may be distributed over particular periods, for example at weekends, as the court deems appropriate. The period of the curfew should not exceed the duration of the community order and cannot be for longer than 12 months.

## Technical guidance

- a) If imposing more onerous requirements the length of the order may be extended up to 3 years or six months longer than the previous length, whichever is longer (but only once).
- b) If imposing unpaid work as a more onerous requirement and an unpaid work requirement was not previously included, the minimum number of hours that can be imposed is 20.
- c) The maximum fine that can be imposed is £2,500.
- d) If re-sentencing, a suspended sentence **MUST NOT** be imposed as a more severe alternative to a community order. A suspended sentence may only be imposed if it is fully intended that the offender serve a custodial sentence in accordance with the *Imposition of Community and Custodial sentences* guideline.
- e) Where the order was imposed by Crown Court, magistrates should consider their sentencing powers in dealing with a breach. Where the judge imposing the order reserved any breach proceedings commit the breach for sentence.

### Powers of the court following a subsequent conviction

A conviction for a further offence does not constitute a breach of a community order. However, in such a situation, the court should consider the following guidance from the *Offences Taken into Consideration and Totality* guideline:<sup>1</sup>

#### **Offender convicted of an offence while serving a community order**

*The power to deal with the offender depends on his being convicted whilst the order is still in force; it does not arise where the order has expired, even if the additional offence was committed whilst it was still current.*

*If an offender, in respect of whom a community order made by a magistrates' court is in force, is convicted by a magistrates' court of an additional offence, the magistrates' court should ordinarily revoke the previous community order and sentence afresh for both the original and the additional offence.*

*Where an offender, in respect of whom a community order made by a Crown Court is in force, is convicted by a magistrates' court, the magistrates' court may, and ordinarily should, commit the offender to the Crown Court, in order to allow the Crown Court to re-sentence for the original offence and the additional offence.*

*The sentencing court should consider the overall seriousness of the offending behaviour taking into account the additional offence and the original offence. The court should consider whether the combination of associated offences is sufficiently serious to justify a custodial sentence.*

*If the court does not consider that custody is necessary, it should impose a single community order that reflects the overall totality of criminality. The court must take into account the extent to which the offender complied with the requirements of the previous order.*

<sup>1</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive\\_guideline\\_TICs\\_\\_totality\\_Final\\_web.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive_guideline_TICs__totality_Final_web.pdf) p.14

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# **Breach of a Suspended Sentence Order**

**Criminal Justice Act 2003 (Schedule 12)**

## Breach of a Suspended Sentence Order

### 1) Conviction for further offence committed during operational period of order

The court **must activate the custodial sentence** unless it would be unjust in all the circumstances to do so. The predominant factor in determining whether activation is unjust relates to the level of compliance with the suspended sentence order and the facts/nature of any new offence. **These factors are already provided for in the penalties.**

The facts/nature of the new offence is the primary consideration in assessing the action to be taken on the breach.

Where the breach is in the second or third category below, the prior level of compliance is also relevant. In assessing the level of compliance with the order the court should consider:

- i) the overall attitude and engagement with the order as well as the proportion of elements completed;
- ii) the impact of any completed requirements on the offender's behaviour;
- iii) the proximity of breach to imposition of order; and
- iv) evidence of circumstances or offender characteristics, such as disability, mental health issues or learning difficulties which have impeded offender's compliance with the order.

Breach involves	Penalty
Multiple and/or more serious new offences committed	Full activation of original custodial term
New offence similar in type and gravity to offence for which Suspended Sentence Order imposed and:  a) No/Low level of compliance with Suspended Sentence Order <b>OR</b> b) Medium or High level of compliance with Suspended Sentence Order	Full activation of original custodial term  Activate sentence but apply appropriate reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed
New offence less serious than original offence but requires a custodial sentence and:  a) No/Low level of compliance with Suspended Sentence Order <b>OR</b> b) Medium or High level of compliance with Suspended Sentence Order	Full activation of original custodial term  Activate sentence but apply appropriate reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed
New offence does not require custodial sentence	Activate sentence but apply reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed <b>OR</b> Impose more onerous requirements and/or extend supervision period and/or extend operational period and/or impose fine

\* It is for the court dealing with the breach to identify the appropriate proportionate reduction depending on the length and duration of any compliance with the requirements specified



## Unjust in all the circumstances

**The court dealing with the breach should remember that the court imposing the original sentence determined that a custodial sentence was appropriate in the original case.**

In determining if there are other factors which would cause activation to be unjust, the court may consider all factors including:

- any strong personal mitigation;
- whether there is a realistic prospect of rehabilitation;
- whether immediate custody will result in significant impact on others.

**Only new and exceptional factors/circumstances not present at the time the sentence was imposed should be taken into account.**

In cases where the court considers that it would be unjust to order the custodial sentence to take effect, it must state its reasons and it **must** deal with the offender in one of the following ways:

- (a) impose a fine not exceeding £2,500; **OR**
- (b) extend the operational period (to a maximum of two years from date of original sentence); **OR**
- (c) if the SSO imposes community requirements, do one or more of:
  - (i) impose more onerous community requirements;
  - (ii) extend the supervision period (to a maximum of two years from date of original sentence);
  - (iii) extend the operational period (to a maximum of two years from date of original sentence).

See page **xx**.

## 2) Failure to comply with a community requirement during the supervision period of the order

The court **must activate the custodial sentence** unless it would be unjust in all the circumstances to do so. The predominant factor in determining whether activation is unjust relates to the level of compliance with the suspended sentence order. **This factor is already provided for in the penalties.**

The court must take into account the extent to which the offender has complied with the suspended sentence order when imposing a sentence.

In assessing the level of compliance with the order the court should consider:

- i) the overall attitude and engagement with the order as well as the proportion of elements completed;
- ii) the impact of any completed or partially completed requirements on the offender's behaviour; and
- iii) the proximity of breach to imposition of order; and
- iv) evidence of circumstances or offender characteristics, such as disability, mental health issues or learning difficulties which have impeded offender's compliance with the order.

Breach involves	Penalty
No/Low level of compliance	Full activation of original custodial term
Medium level of compliance	Activate sentence but apply reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed
High level of compliance	Activate sentence but apply reduction* to original custodial term taking into consideration any unpaid work or curfew requirements completed <b>OR</b> Impose more onerous requirements and/or extend supervision period and/or extend operational period and/or impose fine

\*It is for the court dealing with the breach to identify the appropriate proportionate reduction depending on the length and duration of any compliance with the requirements specified

See page **xx**.

## Unjust in all the circumstances

**The court dealing with the breach should remember that the court imposing the original sentence determined that a custodial sentence was appropriate in the original case.**

In determining if there are other factors which would cause activation to be unjust, the court may consider all factors including:

- any strong personal mitigation;
- whether there is a realistic prospect of rehabilitation;
- whether immediate custody will result in significant impact on others.

**Only new and exceptional factors/circumstances not present at the time the sentence was imposed should be taken into account.**

In cases where the court considers that it would be unjust to order the custodial sentence to take effect, it must state its reasons and it **must** deal with the offender in one of the following ways:

- (a) impose a fine not exceeding £2,500; **OR**
- (b) extend the operational period (to a maximum of two years from date of original sentence); **OR**
- (c) if the SSO imposes community requirements, do one or more of:
  - (i) impose more onerous community requirements;
  - (ii) extend the supervision period (to a maximum of two years from date of original sentence);
  - (iii) extend the operational period (to a maximum of two years from date of original sentence).

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Dear Judge

I am writing to all sentencers and magistrates' legal advisers regarding the definitive guideline on the Imposition of Community and Custodial Sentences came into force in February 2017. This guideline was issued in anticipation of a guideline for Breach offences which will be issued shortly. When we began work on the breach guideline, our research identified a trend. Over a ten year period between 2005-2015, we observed a substantial decline in the number of community orders imposed (from almost 203,000 in 2005 to 188,000 in 2010 to less than 108,000 in 2015) whilst the number of suspended sentence orders (SSOs) increased substantially (from less than 4,000 in 2005, to 46,000 in 2010 to over 52,000 in 2015).

Evidence suggested that part of the reason for this could be the development of a culture to impose suspended sentences as a more severe form of community order in cases where the custody threshold may not have been crossed. In such cases, if the suspended sentence order is then breached, there are two possible outcomes - neither of which is satisfactory. Either the courts must activate the custodial sentence and the offender then serve time in custody even when it may never have been intended that they do so for the original offence. Or the court could choose not to enforce the suspended sentence, thereby diminishing the deterrent power of such orders.

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

guideline, can custody be imposed. At that point the court may then undertake a weighted assessment of the various factors which may lead the court to consider that it is possible to suspend the sentence.

Although the Imposition guideline has been in effect since 1st February 2017, the Council has some concerns that behaviour in respect of imposing these sentences has not changed. For the guideline to be effective, and to mitigate the risk of a high volume of activated suspended sentences upon the publication of the Breach guideline shortly, it is important that all members of the Judiciary and magistrates' courts' Legal Advisers are aware of it and ensure it is properly applied when sentencing appropriate cases.

To support effective application of the Imposition guideline, I have agreed with the Director of the National Probation Service that Probation Officers will refrain from recommending SSOs in pre sentence reports. This is because SSOs are not a standalone sentence; they are a custodial sentence and the court should only impose them having followed the structured sentencing exercise in the Imposition guideline. This does not mean the court should never suspend a custodial sentence, but this can only ever occur where the Court genuinely deems that a custodial sentence is entirely necessary and then conducts the weighted assessment as to whether suspension is possible. This in no way impacts upon judicial discretion to suspend custodial sentences: it merely seeks to reinforce good sentencing practice.

You will therefore notice that PSR reports will change in respect of the recommendations made by Probation staff and will refer only to custodial sentences or community orders, which are the only sentences available to the court. Guidance will be issued to Probation staff shortly, and will ensure sentencers are furnished with all relevant information to enable the appropriate sentence to be passed.

I would be grateful if you could share this letter with all circuit judges and recorders who sit at the Crown Court centres for which you act as Resident Judge and ensure full compliance with the Imposition guideline.

Yours faithfully,

A handwritten signature in black ink that reads "Colman Treacy". The signature is written in a cursive style and is positioned above a horizontal line that extends to the right.

**LORD JUSTICE TREACY**  
**CHAIRMAN OF THE SENTENCING COUNCIL**