

Generic sentencing guideline for use where there is no offence-specific guideline

Consultation

June 2018

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Guideline for use where
there is no offence-specific
guideline**
Consultation

Published on XX June 2018

The consultation will end on XX September 2018

About this consultation

- To:** This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.
- Duration:** From XX June 2018 to
- Enquiries (including requests for the paper in an alternative format) to:** Office of the Sentencing Council
Royal Courts of Justice
(full address as below)
Tel: 020 7071 5793
Email: info@sentencingcouncil.gov.uk
- How to respond:** Please send your response by [date] to:
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Email: consultation@sentencingcouncil.gov.uk
- Additional ways to feed in your views:** This consultation exercise is accompanied by a resource assessment, and an online questionnaire which can be found at:
www.sentencingcouncil.org.uk
A series of consultation meetings is also taking place. For more information, please use the “Enquiries” contact details above.
- Response paper:** Following the conclusion of this consultation exercise, a response will be published at:
www.sentencingcouncil.org.uk
- Freedom of information:** We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents’ names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – We will disregard automatic confidentiality statements generated by an IT system.
In addition, responses may be shared with the Justice Committee of the House of Commons.

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Introduction

What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines for the courts to use when passing a sentence. The Council's remit extends to allow consultation on the sentencing of offenders following conviction.

Background

The Sentencing Council's predecessor body, the Sentencing Guidelines Council, published its Overarching Principles: Seriousness guideline in 2004.¹ It remains in force although parts of it have been superseded.

The SGC Seriousness guideline sets out the statutory provisions governing the five purposes of sentencing and the assessment of culpability and harm as set out in the Criminal Justice Act 2003. The SGC guideline then goes on to give guidance on the assessment of harm and culpability and to list factors that indicate an increase or decrease the harm or culpability.

It then gives guidance on reductions for a guilty plea (which has been superseded by the *Reduction in Sentence for a Guilty Plea* definitive guideline), the custody and community sentence thresholds (superseded by the *Imposition of Community and Custodial Sentences* definitive guideline) and prevalence (which is still current).

Why is the Council producing a generic guideline?

The Council aims to replace all SGC guidelines by 2020, so that all guidelines are in the Sentencing Council format and are up-to-date. In 2018 the Council will be moving to digital guidelines for use in the Crown Court (magistrates' courts already use digital guidelines) and this presents an opportunity to embed additional information into guidelines.

The Council has produced offence-specific guidelines for most of the high volume criminal offences sentenced by the courts in England and Wales and is currently developing guidelines for the remaining high volume offences. There remain, however, many offences which are not yet covered by definitive or draft offence-specific guidelines. These include but are not limited to:

Blackmail	Kidnap and false imprisonment
Child abduction	Landlord, HMO offences
Cybercrime - hacking	Modern slavery
Data protection offences	Offences against vulnerable adults
Female genital mutilation	Offences committed in custody
Fire regulation offences	Perverting the course of justice / perjury
Forgery / counterfeiting	Planning offences
Immigration offences	Wildlife offences

¹ https://www.sentencingcouncil.org.uk/wp-content/uploads/web_seriousness_guideline.pdf

In addition the Council has produced overarching guidance on many of the key issues of sentencing (including totality, sentencing children and young people, domestic abuse, reductions in sentence of a guilty plea and imposition of custodial and community sentences) and the Council has commenced work on developing overarching guidance on mental health and learning disabilities in sentencing. There are other overarching issues about which the Council has been asked to provide guidance, such as youth and immaturity and the significance of previous convictions.

The Council has therefore taken this opportunity to:

1. replace the SGC Seriousness guideline;
2. provide a guideline for the sentencing of offences not covered by an offence specific guideline;
3. embed in that guideline, overarching guidance on sentencing issues.

Guidance for factors in offence-specific guidelines

The introduction of digital guidelines will also allow the Council to provide additional guidance on the factors in existing and new offence-specific guidelines. The Council will consult separately on this in late 2019/early 2020.

What is the Council consulting about?

The Council has produced this consultation paper in order to seek the views of people interested in criminal sentencing.

Through this consultation process, the Council is seeking views on:

- the principal factors that make offences more or less serious;
- additional factors which should influence the sentence;
- the applicability of the guideline to a wide range of offences;
- the clarity and accessibility of the guideline; and
- anything else that you think should be considered.

The Council recognises that when all the additional information is taken into account this generic guideline is longer than most offence-specific guidelines and that not all aspects of the guideline will be of interest to all respondents. The Council welcomes responses to all or part of this consultation.

A list of the consultation questions can be found at Annex A.

What else is happening as part of the consultation process?

This is a 12 week public consultation. During the consultation period, the Council will host a number of consultation meetings to seek views from interested organisations as well as with sentencers. Once the consultation exercise is over and the results considered, a final guideline will be published and used by all adult courts.

The Council has also produced a resource assessment and a statistical bulletin detailing current sentencing practice. These documents can be found on the Sentencing Council's website: www.sentencingcouncil.org.uk

Q1: *What is your name?*

Q2: *What is your email address?*

Q3: *What is your organisation?*

Q4: *Which (if any) criminal offences are of particular interest to you in the context of this guideline?*

Developing the guideline

General considerations

This generic guideline is for use when sentencing offences for which there is no offence-specific guideline. As such it is designed to provide guidance for sentencing a very wide range of offences with very different characteristics and very different maximum sentences. Of necessity, therefore, the guideline cannot specify sentence levels.

The Council is aware of the difficulty faced by courts when sentencing offenders for offences that are only rarely seen, and this is particularly the case for offences most commonly sentenced in magistrates' courts where there are no judgments of the Court of Appeal (Criminal Division) to assist.

The guideline aims to provide a framework for sentencing cases and to provide additional context to factors to assist courts in arriving at a just and proportional sentence.

The guideline inevitably leaves very wide discretion to the sentencer but aims to ensure that all relevant factors are considered and given appropriate weight in arriving at the final sentence.

In developing the guideline the Council has had regard to:

- submissions from parties seeking guidelines for specific offences;
- decisions of the Court of Appeal (Criminal Division) on the application of sentencing factors;
- the SGC Seriousness guideline;
- research with sentencers on offence-specific and overarching guidelines;
- the report on how the Sentencing Council can best exercise its functions by Professor Sir Anthony Bottoms (the Review);²

Digital guidelines

The basic structure of the generic guideline is very similar to all Sentencing Council offence guidelines, but this guideline will take advantage of the digital format by providing additional information about the factors to be accessed from within the guideline.

A text version of the draft guideline is available here [\[link\]](#) but in order to see how the guideline will operate in practice it is recommended that you open the digital draft guideline in a separate window [\[link\]](#)

If you have any difficulty accessing the draft guideline please contact us [\[link\]](#).

Q5: Have you been able to access the digital guideline to respond to this consultation?

² THE SENTENCING COUNCIL IN 2017, A Report on Research to Advise on how the Sentencing Council can best Exercise its Statutory Functions [\[link\]](#)

The proposals in detail

Applicability of guideline

The guideline applies to sentencing adults and organisations only. For sentencing children and young people refer to the definitive guideline: *Overarching Principles – Sentencing Children and Young People*.

Step one

The first step is to arrive at a provisional sentence. The guideline sets out the three main sources of information which may assist a sentencer to identify an appropriate sentence (and reminds sentencers not to have regard to draft sentencing guidelines). Sentencers are then directed to assess the seriousness of the offence by considering culpability and harm, which is in accordance with section 143(1) of the Criminal Justice Act 2003 which provides:

‘In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.’

The guideline provides additional information on the assessment of culpability and of harm which is accessed by clicking on the relevant words in the digital version (see further below).

The guideline also refers to sentencing offences for which a fixed penalty notice was available and provides additional information on the approach to be taken in such cases.

Finally, at step one the guideline directs sentencers to have regard to the five purposes of sentencing which are taken from section 142(1) of the Criminal Justice Act 2003 which provides:

‘Any court dealing with an offender in respect of his offence must have regard to the following purposes of sentencing-

- (a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.’

Additional information at step one

By clicking on ‘harm’, ‘culpability’ or ‘penalty notices’ the user will access further information on these topics. Views are sought on the clarity, relevance and helpfulness of the information.

Q6: What are your views on the general guidance given at step one?

Q7: What are your views on the additional information on harm and culpability?

Q8: What are your views on the additional information on fixed penalty notices (if relevant to you)?

Step two

In offence-specific guidelines, step two would include a sentence table with starting points and category ranges. In this generic guideline no such table can be provided. However, in most other respects the generic guideline follows the same format as offence-specific guidelines at step two. The sentencer is required to consider a non-exhaustive list of aggravating and mitigating factors and determine whether the sentence arrived at thus far should be adjusted.

The digital guideline will provide links to information on community and custodial sentences (taken from the *Imposition of community and custodial sentences* definitive guideline) and on fine bands.

Importantly the sentencer is reminded not to double count when applying the factors at step two.

Statutory aggravating factors

These factors are set out in statute and sentencers are obliged to apply them in relevant cases. The generic guideline provides additional information for each factor including reference to the statutory provisions. In the case of previous convictions, evidence shows that this factor can be very influential in sentencing and the Council wants to ensure that sentencers take all relevant matters into consideration in determining the effect of previous convictions on sentences.

Q9: What are your views on the additional information provided for the statutory aggravating factors?

Other aggravating factors

The Council has listed all of the factors that seem likely to be relevant to a range of different offending, but the list is not exhaustive and many of the factors will not be relevant to any particular case. The digital guideline will provide additional information on each factor to assist sentencers in applying the factor consistently and fairly.

The first two factors in the list:

- Commission of offence whilst under the influence of alcohol or drugs
- Offence was committed as part of a group or gang

are commonly used in guidelines and may be applicable to a wide range of offences. The information is designed to ensure these factors are only used to increase the sentence when they are relevant to the offending and indicate increased harm and/or culpability. Importantly, sentencers are referred to the guidance on the mitigating factor relating to age and immaturity when considering the significance of group offending in young adults. This is because immature offenders are more likely to take risks and behave in an impulsive manner when in company with their peers. The Council considers that it is important that sentencers take account of all the relevant information to ensure fair treatment of offenders.

The next factor ‘offence involved the use or threat of a weapon’ is relevant to many offences of violence.

Responses to consultations on offence-specific guidelines have highlighted that sentencers would welcome guidance on how these factors should be applied.

‘Planning of an offence’ can be a relevant factor in many types of offending and may have already been taken into account at step one; the warning against double counting will be relevant to this factor.

Q10: What are your views on the above four factors and the additional information provided in the guideline?

Other aggravating factors (continued)

- Commission of the offence for financial gain
- High level of profit from the offence

These factors are related and the offences to which they may be relevant will include (but are not limited to) regulatory offences and some wildlife offences. They may apply to offences committed by individuals or by organisations. Stakeholders have made representations to the Council about the need for guidance in this area to ensure that financial penalties in particular are commensurate with the seriousness of the offending and represent an effective deterrent against future offending. The information provided aims to give courts the framework to ensure that any financial sanction imposed is appropriate to the offending.

Q11: What are your views on the above two factors relating to financial gain and the additional information provided in the guideline?

Other aggravating factors (continued)

- Abuse of trust or dominant position
- Gratuitous degradation of victim / maximising distress to victim
- Vulnerable victim
- Victim was providing a public service or performing a public duty at the time of the offence
- Other(s) put at risk of harm by the offending
- Offence committed in the presence of other(s) (especially children)

The above aggravating factors all relate to victims and the harm caused by the offending and/or the culpability of the offender.

The issue of when it is appropriate to aggravate an offence for abuse of trust in the context of sexual offending has been considered by the Court of Appeal (Criminal Division).³ The additional information is designed to provide some more general guidance on this issue.

Evidence from responses to previous consultations and from research with sentencers suggests that information about how vulnerability should be interpreted would be useful.

The factor relating to those working in the public sector may need to be amended if legislation is passed relating specifically to emergency workers as victims, but the Council

³ Case reference

intends to continue to recognise the need for additional protection for all those whose public facing roles expose them to the possibility of harm.

Q12: What are your views on the above six factors relating to victims and the additional information provided in the guideline?

Other aggravating factors (continued)

The following two factors relate to the behaviour of the offender after the offence has been committed:

- Actions after the event including but not limited to attempts to cover up/ conceal evidence
- Blame wrongly placed on other(s)

The additional information in relation to the 'blame' factor makes it clear that it does not apply where an offender simply fails to accept responsibility for the offence. The factor should not be interpreted in any way that undermines the presumption of innocence.

Q13: What are your views on the above two factors relating to behaviour after the offence and the additional information provided in the guideline?

Other aggravating factors (continued)

- Failure to respond to warnings or concerns expressed by others about the offender's behaviour

This factor has been included to reflect the fact that the culpability of the offender may be increased where warnings have been received but ignored. There are many factual scenarios to which this factor could apply. One is where an offender ignores warnings that his acts or omissions may give rise to an offence in a regulatory context, for example a warning that premises are not compliant with fire regulations. Another is where an offender is warned shortly before committing an offence that it is dangerous and/or unlawful, for example a member of a jury warned not to research a defendant on the internet. Rather than give examples the guideline provides guidance of general application.

- Offence committed on licence or post sentence supervision or while subject to court order(s)
- Offence committed in custody

The additional information for these factors sets out the way in which they can make an offence more serious but also reminds sentencers not to double count matters already taken into account in considering previous convictions. The 'offence committed in custody' factor includes a link to the Totality guideline.

- Offences taken into consideration

The additional information for this factor is an extract from the *Offences taken into consideration definitive guideline*.

Q14: What are your views on the above four factors and the additional information provided in the guideline?

Other aggravating factors (continued)

- Offence committed in a domestic context
- Offence committed in a terrorist context
- Location and/or timing of offence

The first two factors above, simply refer users to other relevant guidelines which they will be able to access digitally. The third factor is one that is used in several offence-specific guidelines. The Council considers that there is a danger that without further explanation 'location' and 'timing' may be applied too widely, but that there are situations to which factor would legitimately apply; the additional information aims to clarify where it is appropriate to apply the factor.

Q15: What are your views on the above three factors and in particular the additional information on timing and location provided in the guideline?

Other aggravating factors (continued)

- Established evidence of community/ wider impact
- Prevalence

These two factors may be linked and the additional information seeks to clarify when they may properly be applied.

Q16: What are your views on the above two factors and the additional information provided in the guideline?

Q17: Are there any other aggravating factors that you think should be included in the generic guideline?

Factors reducing seriousness or reflecting personal mitigation

As with the aggravating factors, the Council has listed all of the mitigating factors that seem likely to be relevant to a range of different offending, but the list is not exhaustive and many of the factors will not be relevant to any particular case. The digital guideline will provide additional information on each factor to assist sentencers in applying the factor consistently and fairly.

The Council did consider a recommendation in the Review by Professor Bottoms to separate out personal mitigation from offence mitigation. The Council concluded there was not always a clear distinction between the two types of mitigation and that some mitigating factors will apply to both.

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct

The first two factors are common to all sentencing guidelines. Although the term 'good character' is often used to mean no previous convictions, in the context of sentencing guidelines the factors are different and the additional information sets out the relevance of each to sentencing. The additional information on good character contains the caveat that good character does not always mitigate.

Q18: What are your views on the additional information on the mitigating factors relating to no previous convictions and good character?

- Remorse
- Self-reporting
- Co-operation with the investigation/ early admissions

Remorse is a factor common to all Sentencing Council guidelines and is frequently referenced in transcripts of sentencing remarks. The other two factors above are different but related (and may be evidence of genuine remorse). The additional information makes it clear that these are to be considered separately from the reduction in sentence for any guilty plea.

Q19: What are your views on the additional information on the three mitigating factors above?

To be continued.....