

**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council members:**  
**Lead official:**

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**SC(18)JAN05 - Seriousness**  
**Maura McGowan, Julian Roberts**  
**Ruth Pope**  
**0207 071 5781**

## **1 ISSUE**

1.1 At the November 2017 meeting the Council agreed a draft guideline including expanded explanation of factors for use where there is no offence specific guideline.

1.2 At this meeting the Council will be asked to consider expanded explanations to be made available for factors in the digital version of offence specific guidelines. The original plan was to cover all offence specific guidelines at this meeting, but that has proved impossible. The guidelines for consideration this month are assault, burglary, sex, robbery, drugs, fraud, environmental offences, possession of offensive weapon/ bladed article and theft.

1.3 At the March meeting we plan to cover health and safety, dangerous dogs, intimidatory offences, arson and criminal damage and child cruelty.

1.4 We still hope to consult on the draft guideline from April 2018.

## **2 RECOMMENDATION**

2.1 That the Council considers the draft factors at Annex A and agrees:

- Which factors in each guideline would benefit from expanded explanations and
- The content of those explanations

## **3 CONSIDERATION**

3.1 When all of the Sentencing Council guidelines are digitised, it will be possible to provide additional 'pop up' information within offence specific guidelines to provide expanded explanations for factors. The proposals in this paper (with the exception of paragraphs 3.37 and 3.38 below) are not to change any of the factors in existing guidelines, but to provide additional information for those users who wish to access it.

### *Evidence for the need for expanded explanations*

3.2 The analysis and research team at the Office of the Sentencing Council has used the results of road testing, the Crown Court Sentencing Survey (CCSS) and guideline evaluations to highlight those factors which have raised issues of ambiguity, inconsistency and/or an

impact on sentencing severity in guidelines. This is a major piece of work and is extremely useful but there are gaps in the evidence. In general, where there is good evidence of how often factors are applied and what effect they have on sentence levels, it appears that sentencers are giving appropriate weight to factors.

3.3 The expanded explanations will not be able to address structural issues such as the lack of medium culpability or harm in the assault and burglary guidelines; that will be addressed when the Council reviews those guidelines in due course. What the expanded explanations can do is ensure that the factors that appear across most of the guidelines are properly understood and applied. It is also hoped to address a few factors in specific guidelines that are known to cause difficulties for sentencers.

#### *Standard aggravating factors*

3.4 All guidelines contain the statutory aggravating factor relating to previous convictions. The Council has previously agreed explanatory wording for the generic 'Seriousness' guideline (see page 1 of Annex A). It could be possible to tailor the explanation to individual offences, but it is not clear that it would be helpful to do so. It is therefore proposed that the standard explanation be made available for all offence specific guidelines.

3.5 Most of the offences in the Sex Offences guideline (the exceptions are the 'non-contact' offences) and all of the offences in the Robbery, Assault, Burglary and Bladed Article & Offensive Weapons guidelines contain the aggravating factor 'commission of the offence whilst under the influence of alcohol or drugs'. Again, it is proposed that the explanation for this factor (see page 2 of Annex A) can usefully be provided wherever it appears in these guidelines.

3.6 There are other aggravating factors which apply in all or most guidelines:

- Offence committed whilst on bail
- Offence committed on licence or post sentence supervision
- Failure to comply with current court orders
- Offences taken into consideration

3.7 Explanations for these factors are provided at Annex A (page 2). The explanations are taken from those previously agreed for the generic guideline, but there was no separate factor for failure to comply with current court orders, so that wording will need to be considered (in particular the second bullet point).

#### *Assaults on public servants*

3.8 This is a high profile issue and concern has been expressed that sentences are not adequately protecting public servants. The Assault guideline (S18, S20, ABH and Common

Assault) and Bladed Article guideline (threats offence) contain an aggravating factor of 'Offence committed against those working in the public sector or providing a service to the public'. It is proposed to provide the explanation agreed for the generic guideline (see page 3 of Annex A).

**Question 1: Does the Council agree to provide these generic explanations for the standard aggravating factors and assaults on public workers?**

*Standard mitigating factors*

3.9 All guidelines have the mitigating factor for no previous convictions. The wording previously agreed for this factor is reproduced on page 3 of Annex A.

3.10 All guidelines contain the 'good character and/or exemplary conduct' factor. It is proposed that standard explanatory wording is used for all<sup>1</sup> except the Sex Offences guideline which already contains offence specific explanations which limit the application of the factor.

3.11 'Serious medical condition requiring urgent, intensive or long-term treatment' and 'Sole or primary carer for dependent relatives' appear in all except the Sex Offences guideline. The proposed wording of the explanations (on pages 3 and 4 of Annex A) is that agreed for the generic guideline.

**Question 2: Does the Council agree to provide standard explanations for these four mitigating factors?**

*Other mitigating factors: Mental disorder or learning disability*

3.12 Mental disorder or learning disability is treated differently by different guidelines as shown below:

Guideline	Factor
Sex - mitigating	Mental disorder or learning disability particularly where linked to the commission of the offence
Theft (except shop), Drugs, Fraud, Bladed article - mitigating	Mental disorder or learning disability
Robbery, Shop theft, Assault, Burglary - lesser culpability Environmental - mitigating	Mental disorder or learning disability where linked to the commission of the offence
Robbery, Shop theft, Assault, Burglary - mitigating	Mental disorder or learning disability (where not linked to the commission of the offence)

<sup>1</sup> 'All' meaning all of the guidelines under consideration at this meeting.

3.13 The proposed wording of the explanations (at pages 4 and 5 of Annex A) reflects the different wording and position of the factors.

**Question 3: Does the Council agree with the proposed explanations for the mental disorder/ learning disability factors?**

*Other mitigating factors: Age/ lack of maturity*

3.14 The Council has agreed an explanation for a mitigating factor relating to age and lack of maturity in the generic guideline. The wording of this factor in all offence specific guidelines is: Age and/or lack of maturity *where it affects the responsibility of the offender* (emphasis added). The wording on page 5 of Annex A reflects the relevance of the factor to culpability only. The fuller explanation agreed for the generic guideline also relates to the impact of the sentence on an immature offender:

Age and/or lack of maturity can affect:

- the offender's responsibility for the offence and
- the effect of the sentence on the offender.

Either or both of these considerations may justify a reduction in the sentence.

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults may still be developing neurologically and consequently be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Environment plays a role in neurological development and factors such as childhood deprivation or abuse will affect development.

An immature offender may find it more difficult to cope with custody or to complete a community order.

There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.

When considering a custodial or community sentence for a young adult the National Probation Service should address these issues in a PSR.

3.15 Mitigating factors are non-exhaustive and so there would be no bar on the explanation including elements not strictly covered by the factor, especially as the explanation would be subject to consultation.

**Question 4: Does the Council wish to include the fuller explanation for the age/ lack of maturity factor?**

*Lesser culpability/mitigating factors: Coercion*

3.16 Factors relating to coercion and exploitation appear in different forms across the guidelines. The Council agreed the following wording for the factor ‘involved through coercion, intimidation or exploitation’ in the generic guideline:

- Where this applies it will reduce the culpability of the offender.
- This factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.
- Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.
- This factor **may** indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.

3.17 In the Robbery, Theft and Fraud guidelines there is a lesser culpability factor of ‘Involved through coercion, intimidation or exploitation’ and it is proposed that the above explanation could be used in those guidelines. In the Burglary guideline there is a lesser culpability factor of ‘Offender exploited by others’ to which the same explanation could arguably apply.

3.18 In the Drugs guideline the following factors are used:

Importation, Supply, Production (lesser role)	Engaged by pressure, coercion, intimidation
Importation, Supply, Production, Permitting (mitigating)	Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step 1
Importation, Supply, Production, Permitting (mitigating)	Offender’s vulnerability was exploited

3.19 In the context of drug offences some of the same considerations may apply, but there is also likely to be an additional element of exploiting addiction and indebtedness which may not be fully captured by the standard wording.

**Question 5: Does the Council agree to provide the generic explanation for the Robbery, Theft, Fraud and Burglary guidelines?**

**Question 6: Does the Council wish to develop tailored explanations for the factors relating to exploitation and coercion in the Drugs guideline?**

### *Vulnerability of victim*

3.20 There is evidence from road testing of some inconsistency in the interpretation of victim vulnerability and some uncertainty around the distinction between vulnerability as a harm factor and targeting vulnerability as a culpability factor. The way these factors are used varies slightly across guidelines.

3.21 In the Sex Offences guideline for offences such as rape and sexual assault and in the Assault guideline for s18, s20 and ABH there is a harm factor 'Victim is particularly vulnerable due to personal circumstances'. A suggested expanded explanation is provided on page 6 of Annex A. (The wording of the factor for rape or sexual assault of a child under 13 is slightly different; the explanation can be adapted).

3.22 In the Fraud guideline there is a high impact harm factor (part of the two stage assessment of harm in that guideline) of 'Victim particularly vulnerable (due to factors including but not limited to their age, financial circumstances, mental capacity)'. Similarly in the Theft from Shop guideline there is a factor indicating additional harm of 'A particularly vulnerable victim'. Views are invited on whether it would be helpful to expand on either or both of these factors.

3.23 In the Sex Offences guideline there is an aggravating factor 'Specific targeting of a particularly vulnerable victim'. A suggested expanded explanation is provided for the rape guideline; slight changes would be required for other offences. In the Assault guideline there is a greater culpability factor of 'Deliberate targeting of a vulnerable victim', suggested wording for this factor is also on page 6. In the Robbery guideline there is an aggravating factor of 'Victim is targeted due to a vulnerability or perceived vulnerability'; a similar explanation could be provided.

3.24 In the Burglary guideline there is a high culpability factor 'Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation)'; a suggested explanation is provided on page 6 of Annex A.

3.25 In the Drugs (supply/ possession with intent to supply) guideline there is an aggravating factor 'Targeting of any premises intended to locate vulnerable individuals or to supply to such individuals and/or to supply to those under 18'. This factor appears to be self-explanatory, but there could be some merit in considering an explanation that specifically addresses the issue of 'cuckooing'.

**Question 7: Does the Council agree with the proposed explanations for vulnerability; should any further explanations be added?**

### *Abuse of trust*

3.26 In the Sex Offences Guideline 'Abuse of trust' is a high culpability factor in most of the guidelines (the exceptions being those offences where abuse of trust is an element of the offence and the indecent images offences). Suggested explanatory wording (based on that agreed for the generic guideline) is provided at page 7 of Annex A. Slight changes to examples provided in the explanation might be useful for offences specifically against children. The same factor is used as an aggravating factor in the Indecent Images guideline. Guidance is sought from the Council as to whether the same considerations apply to this factor.

3.27 In the Assault guideline there is an aggravating factor of 'Abuse of power and/or position of trust' in the S18, S20, ABH and Common Assault guidelines. It is suggested that a similar explanation could apply to this factor.

3.28 In other guidelines abuse of trust is used slightly differently (see table below). The situations addressed by these factors are likely be things such as theft by an employee and so the wording suggested for the sex offences would not apply.

Drugs: Importation, Production (leading role)	Abuses a position of trust or responsibility.
Drugs: Supply (leading role)	Abuses a position of trust or responsibility, for example prison employee, medical professional
Aggravated Burglary (aggravating)	Abuse of power and/or position of trust
Non-Domestic Burglary (aggravating)	Abuse of a position of trust
Commercial Robbery, Dwelling Robbery (high culpability)	Abuse of position
General Theft (high culpability)	Breach of a high degree of trust or responsibility
General Theft (high culpability)	Breach of some degree of trust or responsibility
Handling Stolen Goods, Abstracting Electricity (high culpability)	Abuse of position of power or trust or responsibility
Fraud, Articles for use in Fraud, Revenue Fraud, Benefit Fraud, Money Laundering, Bribery (high culpability)	Abuse of position of power or trust or responsibility

**Question 8: Does the Council agree with the proposed explanation for abuse of trust for sex offences; should further explanations be added for other offences?**

### *Location and Timing*

3.29 The Council has expressed concern that factors relating to location and timing can be applied to any factual situation and that guidance would be useful. Aggravating factors 'Location of offence' and Timing of offence' are found in the following guidelines:

- Sex Offences: 25 offences including Rape, Sexual Assault, and Exposure.
- Assault: all offences

3.30 Suggested wording for 'Location of offence' is provided at page 7 of Annex A; the examples given within the explanation relate to the Rape guideline and could be tailored to other offences. The Street Robbery guideline has an aggravating factor 'Location of the offence (including cases where the location of the offence is the victim's residence)'. Suggested wording for this is also at page 7.

3.31 Explanatory wording for 'Timing of offence' is at page 8 of Annex A.

### **Question 9: Does the Council agree with the proposed explanations for location and timing?**

#### *Psychological harm*

3.32 There are references to psychological harm in many of the guidelines, variously described as severe, serious or significant and in other guidelines there are references to distress and trauma. There is some evidence that sentencers find these descriptors ambiguous or would welcome guidance as to how the level of psychological harm should be evidenced. However, there is no evidence of sentencers regularly miscategorising cases based on psychological harm.

3.33 An attempt to provide some explanation for the harm factor 'severe psychological harm' in the Rape guideline is at page 8 of Annex A. Views are sought as to whether this is helpful and should be adapted for other instances of psychological harm or whether attempts at explanation are likely to cause more problems than they solve.

### **Question 10: Does the Council wish to provide expanded explanations for factors referring to 'psychological harm'?**

#### *Serious in the context of the offence*

3.34 There have been frequent complaints from sentencers (at all levels) that references in the assault guideline to injuries that are 'serious in the context of the offence' are difficult to interpret. A revision of the assault guideline is on the Council's work plan, but in the meantime the 'Seriousness' project provides an opportunity to provide some guidance. Suggested wording is provided on pages 8 and 9 of Annex A.

### **Question 11: Does the Council agree with the proposed explanations for the Assault guideline?**



### *Weapon and bladed article*

3.35 Various guidelines refer to the use of a weapon, knife or bladed article. In most cases the factor is either phrased in very general terms (for example in the Sex Offences guideline 'use of weapon or other item to frighten or injure') or the factor provides examples (such as in the Assault guideline 'use of a weapon or weapon equivalent (for example shod foot, head butting, use of acid, use of animal)') and therefore no further explanation is needed. There is some evidence from road testing that judges would welcome clarification as to what amounts to a 'weapon' or 'bladed article' for the purposes of the robbery guideline. Proposed explanations are provided at page 9 of Annex A.

### **Question 12: Does the Council agree with the proposed explanations for weapons in the Robbery guideline?**

### *Membership of group or gang*

3.36 In most guidelines where group offending is referenced it is in the context of the role of the offender within that group (for example in the Assault guideline 'Leading role in group or gang' is a higher culpability factor). The exception is the Burglary guideline which has a higher culpability factor of 'member of a group or gang'. It is proposed to provide an explanation to make it clear that the membership of a group must be linked to the offending to be relevant. Proposed wording is at page 9.

### **Question 13: Does the Council agree with the proposed explanation for membership of a group or gang for the Burglary guideline?**

### *Medium harm and Culpability*

3.37 Robbery, Fraud and Theft all include medium culpability and or harm factors which are defined by the lack of characteristics for high and low. Typically they are worded as 'Other cases where characteristics for A or C are not present.' Feedback from road testing has consistently been that sentencers find this concept difficult or are reluctant to make a finding of harm or culpability based on a lack of factors. This is despite the fact that guidelines include wording instructing sentencers to balance factors.

3.38 It is therefore proposed to amend the medium culpability factors to read 'Other cases that fall between categories A and C' and to provide expanded explanations as shown on page 10 of Annex A.

### **Question 14: Does the Council agree to consult on changing the wording of the 'medium' factors and providing the proposed explanation?**

#### **4 IMPACT AND RISKS**

4.1 The aim of providing expanded explanations is to encourage best practice and therefore no significant impact on sentence levels is anticipated. However, as the project is wide in scope there is the potential for a significant impact. Road testing and the consultation process will highlight any issues that are likely to have unintended consequences.

## Proposed additional information on factors for existing guidelines

### Statutory aggravating factor

Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

### Expanded explanation

#### **Guidance on the Use of Previous Convictions**

The following guidance should be considered when seeking to determine the degree to which previous convictions should aggravate sentence:

Section 143 of the Criminal Justice Act states that:

*In considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—*

*(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and*

*(b) the time that has elapsed since the conviction.*

1. Previous convictions are considered at step two in the Council’s offence-specific guidelines.
2. The primary significance of previous convictions is the extent to which they indicate trends in offending behaviour and possibly the offender’s response to earlier sentences;
3. Previous convictions are normally **relevant** to the current offence when they are of a similar type;
4. Previous convictions of a type different from the current offence **may** be relevant where they are an indication of persistent offending or escalation and/or a failure to comply with previous court orders;
5. Numerous and frequent previous convictions might indicate an underlying problem (for example, an addiction) that could be addressed more effectively in the community and will not necessarily indicate that a custodial sentence is necessary;
6. If the offender received a non-custodial disposal for the previous offence, a court should not necessarily move to a custodial sentence for the fresh offence;
7. In cases involving significant persistent offending, the community and custody thresholds may be crossed even though the current offence normally warrants a lesser sentence. Any custodial sentence imposed to reflect persistent offending rather than the current offence should be kept to the necessary minimum.
8. The aggravating effect of relevant previous convictions reduces with the passage of time; **older convictions are less relevant** to the offender’s culpability for the current offence and less likely to be predictive of future offending.
9. Where the previous offence is particularly old it will normally have little relevance for the current sentencing exercise;
10. The court should consider the time gap since the previous conviction and the reason for it. Where there has been a significant gap between previous and current convictions or a reduction in the frequency of offending this may indicate that the offender has made attempts to desist from offending in which case the aggravating effect of the previous offending will diminish.
11. Where the current offence is significantly less serious than the previous conviction (suggesting a decline in the gravity of offending), the previous conviction may carry less weight.
12. When considering the totality of previous offending a court should take a rounded view of the previous crimes and not simply aggregate the individual offences.
13. Where information is available on the context of previous offending this may assist the court in assessing the relevance of that prior offending to the current offence

Aggravating factor

Commission of offence whilst under the influence of alcohol or drugs

Expanded explanation

- The fact that an offender is **voluntarily** intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has **contributed to the offending**.
- In the case of a person addicted to drugs or alcohol the intoxication may not be considered to be voluntary, but the court should have regard to the extent to which the offender may have failed to engage with any assistance in dealing with the addiction in making that assessment.
- An offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character.

Statutory aggravating factor

Offence committed whilst on bail

Expanded explanation

S143 (3) Criminal Justice Act 2003 states: In considering the seriousness of any offence committed while the offender was on bail, the court must treat the fact that it was committed in those circumstances as an aggravating factor.

Aggravating factor

Offence committed on licence or post sentence supervision

Expanded explanation

- An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending.
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

Aggravating factor

Failure to comply with current court orders

Expanded explanation

- Commission of an offence while subject to a **relevant** court order makes the offence more serious (where not dealt with separately as a breach of that order).
- Failure to comply with current court orders may indicate a disregard for the authority of the court which may be relevant to the likelihood of the offender complying with future orders
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

Aggravating factor

Offences taken into consideration

Expanded explanation

*Taken from the Offences taken into consideration definitive guideline: [Not reproduced here]*

Aggravating factor

Offence committed against those working in the public sector or providing a service to the public

Expanded explanation

This reflects:

- the fact that people in public facing roles are more exposed to the possibility of harm and consequently more vulnerable and /or
- the fact that someone is working for the public good merits the additional protection of the courts

Mitigating factor

No previous convictions or no relevant/recent convictions

Expanded explanation

- First time offenders generally represent a lower risk of re-offending. Re-offending rates for first offenders are significantly lower than rates for repeat offenders. In addition, first offenders are normally regarded as less blameworthy than offenders who have committed the same crime several times already. For these reasons first offenders attract a mitigated sentence (unless the crime is particularly serious).
- Where there are previous offences but these are old and /or are for offending of a different nature, the sentence will normally be reduced to reflect that the new offence is not part of a pattern of offending and there is therefore a lower likelihood of reoffending.
- When assessing whether a previous conviction is 'recent' the court should consider the time gap since the previous conviction and the reason for it.
- Previous convictions are likely to be 'relevant' when they share characteristics with the current offence (examples of such characteristics include – but are not limited to – dishonesty, violence, abuse of position or trust, use or possession of weapons, disobedience of court orders). In general the more serious the previous offending the longer it will retain relevance.

Mitigating factor

Good character and/or exemplary conduct

Expanded explanation

This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character through, for example, charitable works may reduce the sentence.

**However**, this factor is less likely to be relevant where the offending is very serious. Where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor.

Mitigating factor

Serious medical condition requiring urgent, intensive or long-term treatment

Expanded explanation

Such conditions as may affect the impact of a sentence on the offender may justify a reduction in sentence.

Mitigating factor

Sole or primary carer for dependent relatives

Expanded explanation

This factor is particularly relevant where an offender is on the cusp of custody or where the suitability of a community order is being considered. For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing. For more serious offences where a substantial period of custody is appropriate, this factor will carry less weight.

Mitigating factor

Mental disorder or learning disability particularly where linked to the commission of the offence/

Mental disorder or learning disability

Expanded explanation

A mental disorder or learning disability can affect both:

- the offender's responsibility for the offence and
- the impact of the sentence on the offender.

Where appropriate the court will be assisted by a PSR and/or medical reports in assessing:

- the degree to which a mental disorder or learning disability has reduced the offender's responsibility for the offence
  - a relevant factor will be the degree to which a mental disorder has been exacerbated by the actions of the offender (for example by the **voluntary** abuse of drugs or alcohol or by **voluntarily** failing to follow medical advice);
  - the extent to which a mental disorder has an impact on the offender's ability to exercise self-control or to engage with medical services will be a relevant consideration.
- any effect of the mental disorder or learning disability on the impact of the sentence on the offender (for example making it more difficult for the offender to cope with custody or comply with a community order)

Culpability/ Mitigating factor

Mental disorder or learning disability where linked to the commission of the offence

Expanded explanation

Where appropriate the court will be assisted by a PSR and/or medical reports in assessing the degree to which a mental disorder or learning disability has reduced the offender's responsibility for the offence.

- a relevant factor will be the degree to which a mental disorder has been exacerbated by the actions of the offender (for example by the **voluntary** abuse of drugs or alcohol or by **voluntarily** failing to follow medical advice);
- the extent to which a mental disorder has an impact on the offender's ability to exercise self-control or to engage with medical services will be a relevant consideration.

Mitigating factor

Mental disorder or learning disability (where not linked to the commission of the offence)

Expanded explanation

A mental disorder or learning disability can affect both:

- the offender’s responsibility for the offence and
- the impact of the sentence on the offender.

Where this factor has been taken into account at step one as reducing culpability, it should not be counted again for that purpose but may still be taken into account as a factor that may reduce the sentence where the mental disorder or learning disability will make it more difficult for the offender to cope with custody or comply with a community order.

Where appropriate the court will be assisted by a PSR and/or medical reports in making this assessment.

Mitigating factor

Age and/or lack of maturity where it affects the responsibility of the offender

Expanded explanation

The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).

In particular young adults may still be developing neurologically and consequently be less able to:

- evaluate the consequences of their actions
- limit impulsivity
- limit risk taking

Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.

Environment plays a role in neurological development and factors such as childhood deprivation or abuse will affect development.

Culpability factor

Involved through coercion, intimidation or exploitation

Expanded explanation

- This factor may be of particular relevance where the offender has been the victim of domestic abuse, trafficking or modern slavery, but may also apply in other contexts.
- Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.
- This factor **may** indicate that the offender is vulnerable and would find it more difficult to cope with custody or to complete a community order.

### Harm factor

Victim is particularly vulnerable due to personal circumstances

#### Expanded explanation

There is no automatic assumption that any specific 'class' of victim is covered and sentencers need to consider the language used – 'particularly vulnerable', 'personal circumstances'. 'Personal circumstances' refers to matters such as (but not limited to) age, illness or disability. For this factor to be engaged it does not matter if the offender knew about the vulnerability – the relevance is to the harm caused to the victim.

### Aggravating factor (sex offences)

Specific targeting of a particularly vulnerable victim

#### Expanded explanation

[In all cases of rape] the victim will be vulnerable to some extent and it is likely that the offender will have taken advantage of that vulnerability. For this factor to be engaged the offender will have **targeted** a victim because of an actual or perceived particular vulnerability. Examples of vulnerability for this purpose **may** include personal circumstances such as age, illness or disability, or other factors such as the victim being isolated or incapacitated through drink or drugs.

Care should be taken to avoid double counting any vulnerability or perceived vulnerability already taken into account at step one.

### Culpability factor (assault offences)

Deliberate targeting of a vulnerable victim

#### Expanded explanation

For this factor to be engaged the offender will have **targeted** a victim because of an actual or perceived particular vulnerability. Examples of vulnerability for this purpose **may** include personal circumstances such as age, illness or disability, or other factors such as the victim being isolated or incapacitated through drink or drugs.

Care should be taken to avoid double counting any vulnerability taken into account in assessing harm or in the culpability factors relating to hostility.

### Culpability factor (burglary)

Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation)

#### Expanded explanation

In most cases of burglary the offender is likely to have taken advantage of a vulnerability of the victim or premises to commit the offence.

For this factor to be engaged the offender will have **deliberately targeted** a victim or premises for example

- because of an actual or perceived particular vulnerability (such as but not limited to isolation, age, illness or disability) and/or
- because of hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.



Culpability factor (sex)

Abuse of trust

Expanded explanation

- In order for an abuse of trust to make an offence more serious the relationship between the offender and victim must be one that would give rise to the offender having a significant level of responsibility towards the victim on which the victim would be entitled to rely.
- Abuse of trust may occur in many factual situations. Examples **may** include relationships such as teacher and pupil, or carer (whether paid or unpaid) and dependant. It **may** also include ad hoc situations such as a late-night taxi driver and a lone passenger. It would **not** generally include a familial relationship without a significant level of responsibility.
- Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply.
- A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.

Aggravating factor

Location of offence

Expanded explanation

- In general, an offence is not made more serious by the location of the offence except in ways taken into account by other factors in this guideline (such as forced entry into victim's home, planning, vulnerable victim, offence committed in presence of children). Care should be taken to avoid double counting.
- However, there may be cases where the location of the offence increases the harm caused to the victim or the culpability of the offender in ways not already taken into account.

Aggravating factor

Location of the offence (including cases where the location of the offence is the victim's residence)

Expanded explanation

- In general, a robbery is not likely to be made more serious by the location of the offence but there may be cases where the location increases the harm caused to the victim or the culpability of the offender in ways not already taken into account.
- For example where the robbery is committed on premises that are also the victim's residence this may increase the harm caused. Care should be taken to avoid double counting the harm taken into account at step one.

Aggravating factor

Timing of offence

Expanded explanation

- Courts should be cautious about aggravating an offence by reason of it being committed for example at night, or in broad daylight, unless it also indicates increased harm or culpability not already accounted for.

Harm factor (rape)

Severe psychological harm

Expanded explanation

In all cases of rape the victim will suffer significant and often long lasting psychological harm. A finding that the psychological harm is **severe** may be based on a clinical diagnosis but the court may make such a finding based on other evidence from or on behalf of the victim that an exceptionally severe impact exists. It is important to be clear that the absence of such a finding does **not** imply that the psychological harm suffered by the victim is minor or trivial.

Greater harm factor (S18, S20, ABH)

Injury (which includes disease transmission and/or psychological harm) which is serious in the context of the offence (must normally be present)

Expanded explanation

It is not sufficient for the victim to have an injury which meets the criteria of the offence; it must be serious in the context of the range of injuries which can occur for that offence. This will require the sentencer to assess the nature of the injury, including psychological harm where relevant, and decide where on the scale of injuries for the offence any particular injury falls.

Lesser harm factor (S18, S20, ABH)

Injury which is less serious in the context of the offence

Expanded explanation

This will involve an assessment by the sentencer as to where on the scale of injuries for the offence a particular injury falls.

Greater harm factor (Common Assault)

Injury or fear of injury which is serious in the context of the offence

Expanded explanation

Common assault does not necessarily result in injury to the victim. Any significant injury is likely to be serious in the context of this offence. Where there is no/ minimal injury but the victim suffers real fear of significant injury a finding of greater harm may still be made.

Lesser harm factor (Common Assault)

Injury which is less serious in the context of the offence

Expanded explanation

Where there is no/minimal injury to the victim this is likely to result in a finding of lesser harm.

Culpability factor (robbery)

Use of a weapon to inflict violence

[plus 2 references to weapon in culpability B]

Expanded explanation

A 'weapon' can take many forms and can include a shod foot.

Culpability factor (robbery)

Production of a bladed article or firearm or imitation firearm to threaten violence

Expanded explanation

A 'bladed article' is any article which has a blade or is sharply pointed (it would not normally include items such as a screwdriver unless sharpened to a blade or point).

Culpability factor (burglary)

Member of a group or gang

Expanded explanation

The mere membership of a group (two or more persons) or gang should not be used to increase the culpability, but where the **offence was committed as part** of a group or gang this may indicate that the **culpability** of the offender may be higher (the role of the offender within the group will be a relevant consideration).

When sentencing young adult offenders, consideration should also be given to the guidance on age and immaturity when considering the significance of group offending.

Culpability factor

Other cases where characteristics for categories A or C are not present

**Change to:**

**Other cases that fall between categories A and C**

Expanded explanation

A case may fall between categories A and C because:

- Factors are present in A and C which balance each other out (see the instruction regarding balancing characteristics above) **and/or**
- The offender's culpability falls between the factors described in A and C

Harm factor

Other cases where characteristics for categories 1 or 3 are not present

**Change to:**

**Other cases that fall between categories 1 and 2**

Expanded explanation

A case may fall between categories 1 and 3 because:

- Factors are present in 1 and 3 which balance each other out **and/or**
- The level of harm falls between the factors described in 1 and 3