

Sentencing Council meeting:
Paper number:

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SC(18)JUN07 – Expanded factors in
offence specific guidelines

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1 ISSUE

1.1 At the May 2018 meeting the Council agreed to go ahead with the second phase of the project to replace the SGC Seriousness guideline by making expanded explanations available in the digital version of offence specific guidelines. The Council decided that the explanations should be standard across all of the guidelines, suitably worded to cater for the differences that exist between offences and guidelines.

1.2 In January the Council had considered how the factors in the General guideline could be applied to the assault, burglary, sex, robbery, drugs, fraud, environmental offences, possession of offensive weapon/ bladed article and theft guidelines. Following the decisions made in May, rather than look at each guideline the approach for this meeting will be to consider each factor in the round.

1.3 At this meeting aggravating factors will be considered, mitigating factors will be considered in October.

1.4 The first phase of the project, the draft General guideline, is due to be launched for consultation on Tuesday 19 June 2018. Feedback from that consultation will inform the wording of the factors to be consulted on for the second phase to be finalised at the October 2018 meeting.

2 RECOMMENDATION

2.1 That the Council considers and agrees:

- A title for this phase of the project.
- Which aggravating factors can be used without modification across offence specific guidelines.
- Wording to modify other aggravating factors.
- How the Council can examine the detail of this phase of the project before consultation.

3 CONSIDERATION

3.1 At the May meeting it was agreed that this project should not be referred to as 'seriousness'. The suggestion is to call it 'Expanded factors in offence specific guidelines'.

Question 1: What should this project be called?

3.2 In the light of the decisions made at the May meeting, factors across all guidelines¹ have been reviewed to assess whether and where the proposed factors in the General guideline appear in each guideline and if so whether the expanded explanations apply and are helpful. The factors referred to in this paper have been numbered for ease of reference, these numbers will not appear in the guidelines. The General guideline is at **Annex A**.

3.3 All decisions as to the wording of factors taken at this meeting will be subject to review in the light of responses to the General guideline consultation.

3.4 The statutory aggravating factors are set out in the table below:

Factor	Notes
SA1: 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	This factor appears at step 2 in every offence specific guideline. The explanation proposed for the General guideline is applicable to individual offenders, it is less relevant to organisations.
SA2: Offence committed whilst on bail	Appears at step 2 of every individual guideline. The explanation applies in all cases.
SA3: Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.	Factor is not consistently used across guidelines (for good reason). In some guidelines the protected characteristics are split across steps 1 & 2. The explanation can be used in all cases where the statutory aggravating characteristics apply.

3.5 There are two issues relating to SA3. Firstly how to treat occurrences of SA3 that also refer to characteristics or elements which are not statutory aggravating factors as in the Burglary guideline:

¹ This exercise has not yet been carried out for summary offences that appear only in the MCSG

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

3.6 Secondly, where there is a racially or religiously aggravated version of an offence (assault, public order, criminal damage etc) other considerations apply. It is proposed that the following additional wording could be added at the beginning of the explanation at Annex A:

- Where an offence is motivated by, or demonstrates hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity the court **must** treat this as an aggravating factor.
- Hostility based on other characteristics **may** be treated as an aggravating factor.
- Where an aggravated form of an offence is charged that factor will be inherent in the offence and the court should follow the steps in the relevant guideline.
- Where a religiously or racially aggravated form of the offence is available but the offender is convicted of the simple offence it is not permissible to increase the sentence based solely on the presence of religious or racial aggravation.

Question 2: Does the Council agree to include the explanations for SA1 & SA2 in all guidelines in which they appear without amendment?

Question 3: Does the Council agree to the additional wording for SA3?

3.7

Factor	Notes
A1: Commission of offence whilst under the influence of alcohol or drugs	Always at step 2 – explanation can be added wherever it appears
A2: Offence was committed as part of a group or gang	Mixed step 1 and 2. Only burglary contains factor without qualification
A3: Offence involved use or threat of use of a weapon	References to weapons are often used at step 1.

3.8 The explanation for A1 applies across all offences where it appears. Factors relating to group offending (A2) are more varied. In Burglary there is a higher culpability factor of ‘member of a group or gang’, in other guidelines where group offending is referenced at step one it is always in relation to role. In other guidelines such as Bladed Articles there is a step two factor ‘offence was committed as part of a group or gang’. It is proposed that with the

exception of burglary, the explanation should only be attached to the factor when it appears at step 2.

3.9 At the January meeting the Council agreed to add the explanation at A3 relating to weapons at step 1 of the to the Robbery guideline. It is proposed that in all other guidelines it should only be used if reference to weapons is made without explanation at step 2.

Question 4: Does the Council agree to include the explanation for A1 in all guidelines in which it appears without amendment?

Question 5: Does the Council agree to include the explanations for A2 and A3 only in the limited circumstances outlined above?

3.10

Factor	Notes
A4: Planning of an offence	Mainly used at step 1 – query whether the explanation is useful
A5: Commission of the offence for financial gain	Rarely applies – where it does (H&S, Environmental) guideline already contains relevant information
A6: High level of profit from the offence	Does not appear as a factor in offence specific guidelines.

3.11 The above three factors only appear rarely in guidelines and where they do the explanation would not add anything useful to the content already in the guideline.

Question 6: Does the Council agree not to include these explanations in offence specific guidelines?

3.12

Factor	Notes
A7: Abuse of trust or dominant position	Steps 1 & 2. May need to add wording for situation where there is no identifiable victim e.g. benefit/ revenue fraud

3.13 The explanation agreed for the General guideline for A7 was based on a judgment relation to sex offences. The explanation works well for all offences where there is an individual

identifiable victim, but it would not apply for example in Revenue fraud to the high culpability factor 'Abuse of position of power or trust or responsibility'.

3.14 Suggested additional wording is provided below:

Abuse of position may make an offence more serious where an offender has used their position or status to facilitate the commission of an offence. The greater the level of trust or responsibility which is vested in the offender (for example where the offender holds a relevant professional qualification) the greater the culpability attached.

3.15 Views are sought as to whether the explanation should be expanded to cover such situations or whether the explanation should be reserved only to those cases to which the current explanation applies.

Question 7: Does the Council wish to expand the explanation at A7 to cover situations where there is no individual victim?

3.16

Factor	Notes
A8: Gratuitous degradation of victim / maximising distress to victim	Step 2 factor – may need to expand examples to give wider applicability
A9: Vulnerable victim	Appears at steps 1 and 2. May need to revise wording to take account of step one.

3.17 The explanation for the factor at A8, gives an example of such behaviour relating to posting images on social media. This factor appears in some guidelines in a slightly different form, for example, in Robbery: 'Restraint, detention or additional degradation of the victim' is a step 2 factor.

3.18 It is proposed that further examples could be included to make it clear that the factor is of wider application. Suggested wording is:

Where an offender deliberately causes **additional** harm to a victim over and above that which is an essential element of the offence - this will increase seriousness. Examples may include, but are not limited to:

- posts of images on social media designed to cause additional distress to the victim (where not separately charged);
- restraining or detaining the victim (where not separately charged)

3.19 At the January meeting tailored explanations were proposed for vulnerability across different guidelines. Following the decision to have a standard definition to cover all offences additional wording is proposed before the explanation for A9 at page 7 of Annex A:

The following guidance is of general application to issues of vulnerability; courts should have regard to the precise wording of the factor and its position in an offence specific guideline in applying this guidance and should avoid double counting.

Question 8: Does the Council agree to add further examples to the explanation for A8?

Question 9: Does the Council agree to the additional wording proposed for A9?

3.20

Factor	Notes
A10: Victim was providing a public service or performing a public duty at the time of the offence	Step 2 factor – ok where it appears
A11: Other(s) put at risk of harm by the offending	Rarely appears in existing guidelines
A12: Offence committed in the presence of other(s) (especially children)	Step 2 wording of factor varies so caution needed

3.21 At the January meeting the Council agreed that the explanation for A10 should be provided wherever the factor appears.

3.22 Wording similar to the factor at A11 appears at step 1 of the Theft and Health and Safety guidelines, but the explanation would not provide any useful additional guidance in that context. The factor will be at step 2 of the forthcoming Manslaughter guidelines and the explanation would apply without amendment there.

3.23 Wording similar to the factor at A12 appears at step 2 of several guidelines. The explanation would apply without amendment where the wording of the factor is sufficiently close to that at A12.

Question 10: Does the Council agree to provide the standard explanations where the factors A10, A11 and A12 appear at step 2 of offence specific guidelines?

3.24

Factor	Notes
A13: Actions after the event including but not limited to attempts to cover up/ conceal	Step 2 – some g/l have a factor: Steps taken to prevent the victim

evidence	reporting or obtaining assistance and/or from assisting or supporting the prosecution. (robbery) Obstruction of justice (H&S) Explanation would work for both
A14: Blame wrongly placed on other(s)	Step 2 (mainly fraud) explanation is ok
A15: Failure to respond to warnings or concerns expressed by others about the offender's behaviour	Mainly step 2. Exception is Dogs step 1. Suggest use only at step 2

3.25 The short explanation for the factor at A13 will also apply to other aggravating factors in guidelines that apply to the offender's actions after the offence, such as attempt to prevent victims reporting the offence.

3.26 The explanation for A14 would apply without amendment where it occurs in guidelines.

3.27 The factor at A15 appears in several guidelines. It is proposed that the explanation should be provided wherever it appears at step 2.

Question 11: Does the Council agree to provide the standard explanations for factors A13, A14 and A15 where they appear at step 2 of guidelines?

3.28

Factor	Notes
A16: Offence committed on licence or post sentence supervision or while subject to court order(s)	This is split across 2 factors at step 2 in almost all g/l. Could split the explanation
A17: Offence committed in custody	Only appears in Terrorism step 2
A18: Offences taken into consideration	Appears in most g/l's
A19: Offence committed in a domestic context	Not mentioned except in intimidatory Consider how best to add?
A20: Offence committed in a terrorist context	Not mentioned Consider how best to add for relevant offences?

3.29 The factor at A16 is in fact two separate factors at step 2 of almost all guidelines. It is proposed to provide explanations as follows:

Offence committed on licence or post sentence supervision

- 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.

Failure to comply with current court orders

- 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).
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

Question 12: Does the Council agree to the proposed wording relating to A16?

3.30 The link to the Offences Taken into Consideration information can be provided in all guidelines where the factor at A18 appears.

3.31 A17 'Offence committed in custody' appears only in the Terrorism guideline. However, the explanation is of possible relevance to other offences. The Council has received representations from Kent Police about the need for guidance on sentencing offences committed in custody. Some of these will be offences specifically relating to prisons (such as conveying prohibited articles into prisons) which in the medium term will be catered for by the General guideline, but others may be offences for which there are existing offence specific guidelines. Views are sought on whether it would be helpful to provide a link to this guidance from existing guidelines and, if so, which ones.

3.32 The Council may also wish to consider providing links to the Domestic Abuse guideline from other offence specific guidelines (currently it is only referred to in the forthcoming Intimidatory offences guideline). Again views are sought as to which guidelines should have this link.

3.33 A similar issue arises with regard to linking to the Terrorism guideline for offences in a terrorist context, though as such cases are rarer and will be dealt with by experienced judges, it may be safe to assume that the court would refer to the Terrorism guideline in any event.

Question 13: Where and how does the Council wish to provide links to the information on domestic abuse, terrorism and offences committed in custody?

3.34

Factor	Notes
A21: Location and/or timing of offence	Location step 2 dogs, robbery (except dwelling), assault, sex Timing step 2 robbery, assault, sex

3.35 At the January meeting the Council agreed tailored wording for the explanation for the factors of 'Timing' and 'Location' in different guidelines. Following the decision to provide standard wording for all offence specific guidelines the following wording is suggested:

Location

- In general, an offence is not made more serious by the location of the offence except in ways already taken into account by other factors in this guideline. Care should be taken to avoid double counting.
- Courts should be cautious about aggravating an offence by reason of it being committed for example, in a crowded place or in an isolated place unless it also indicates increased harm or culpability not already accounted for.
- An offence may be more serious when it is committed in places in which there is a particular need for discipline or safety such as prisons, courts, schools or hospitals

Timing

- In general, an offence is not made more serious by the timing of the offence except in ways already taken into account by other factors in this guideline. Care should be taken to avoid double counting.
- 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.

Question 14: Does the Council agree to the proposed wording for timing and location above?

3.36

Factor	Notes
A22: Established evidence of community/ wider impact	Step 2: eg Theft, burglary, assault Explanation ok
A23: Prevalence	Only appears in Theft where explanation is given in guideline

3.37 The explanation for the factor at A22 applies in all cases where the factor appears. Prevalence is only referred to in the Theft guideline where an explanation is already provided as follows:

Prevalence

There may be exceptional local circumstances that arise which may lead a court to decide that prevalence should influence sentencing levels. The pivotal issue in such cases will be the harm caused to the community.

It is essential that the court before taking account of prevalence:

- has supporting evidence from an external source, for example, Community Impact Statements, to justify claims that a particular crime is prevalent in their area, and is causing particular harm in that community, and
- is satisfied that there is a compelling need to treat the offence more seriously than elsewhere.

3.38 In order that information on prevalence is available for other relevant guidelines it is suggested that the explanation for A23 could be added to the second bullet point for A22 either as an integral part of that explanation or as a link from it:

Established evidence of community/ wider impact

- This factor should increase the sentence only where there is clear evidence of wider harm not already taken into account elsewhere. A community impact statement will assist the court in assessing the level of impact.
- For issues of prevalence see the separate guidance below:

Prevalence

- Sentencing levels in offence-specific guidelines take account of collective social harm. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributed to a harmful social effect upon a neighbourhood or community.
- It is not open to a sentencer to increase a sentence for prevalence in ordinary circumstances or in response to a personal view that there is 'too much of this sort of thing going on in this area'.
- First, there must be evidence provided to the court by a responsible body or by a senior police officer.
- Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material can be made.
- Even if such material is provided, a sentencer will only be entitled to treat prevalence as an aggravating factor if satisfied
 - that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);
 - that the circumstances can properly be described as exceptional; **and**
 - that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced.

Question 15: Does the Council agree with the proposed treatment of factor A22 and A23?

Medium harm and Culpability

3.39 At the January meeting the Council agreed to consult on changing the wording of the medium culpability and harm factors in Robbery, Fraud and Theft which are all 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.

3.40 It was therefore agreed 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 below.

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

Question 16: Does the Council still wish to consult on changing the wording of the ‘medium’ factors and providing the proposed explanations?

4 NEXT STEPS

4.1 Working through the factors and their application to offence specific guidelines is time consuming and it will not be possible for the Council to consider the application of every factor to every guideline. Over the next three months officials can look in detail at each guideline and, using the newly created digital guidelines, create a version with proposed explanations for consultation.

4.2 It may be helpful to set up a 'virtual' working group of Council members to review the proposed changes before the next Council meeting in October, so that only the contentious issues need be considered in detail by the full Council.

Question 17: Does the Council agree to set up a working group for this project?

5 IMPACT AND RISKS

5.1 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.

Statutory aggravating factors

SA1:

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

More information:

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. If a custodial sentence is it should be proportionate and 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.

SA2:

Offence committed whilst on bail

More information:

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.

SA3:

Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.

More information:

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been aggravated by the relevant hostility.**
- **Where the element of hostility is core to the offending, the aggravation will be higher than where it plays a lesser role.**

Increase in sentences for racial or religious aggravation

s145(2) of the Criminal Justice Act 2003 states:

If the offence was racially or religiously aggravated, the court—

- (a) must treat that fact as an aggravating factor, and*
- (b) must state in open court that the offence was so aggravated.*

An offence is racially or religiously aggravated for these purposes if—

at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence, hostility based on the victim's membership (or presumed membership) of a racial or religious group; **or**

the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

“membership”, in relation to a racial or religious group, includes association with members of that group;

“presumed” means presumed by the offender.

It is immaterial whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned above.

“racial group” means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

“religious group” means a group of persons defined by reference to religious belief or lack of religious belief.

Increase in sentences for aggravation related to disability, sexual orientation or transgender identity

s146 of the Criminal Justice Act 2003 states:

(1) This section applies where the court is considering the seriousness of an offence committed in any of the circumstances mentioned in subsection (2).

(2) Those circumstances are—

(a) that, at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on—

- (i) the sexual orientation (or presumed sexual orientation) of the victim,
- (ii) a disability (or presumed disability) of the victim, or
- (iii) the victim being (or being presumed to be) transgender, or

(b) that the offence is motivated (wholly or partly)—

- (i) by hostility towards persons who are of a particular sexual orientation,
- (ii) by hostility towards persons who have a disability or a particular disability or
- (iii) by hostility towards persons who are transgender.

(3) The court—

(a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and

(b) must state in open court that the offence was committed in such circumstances.

(4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.

(5) In this section “disability” means any physical or mental impairment.

(6) In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

A1:

Commission of offence whilst under the influence of alcohol or drugs

More information:

- 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 be considered not to be voluntary, but the court should have regard to the extent to which the offender has engaged 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.
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A2:

Offence was committed as part of a group or gang

More information:

The mere membership of a group (two or more persons) or gang should not be used to increase the sentence, but where the **offence was committed as part** of a group or gang this will normally make it more serious because:

- the **harm** caused (both physical or psychological) or the potential for harm may be greater and/or
- 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 the mitigating factor relating to age and immaturity when considering the significance of group offending.

A3:

Offence involved use or threat of use of a weapon

More information:

- A 'weapon' can take many forms and may include a shod foot
- The use or production of a weapon has relevance
 - to the **culpability** of the offender where it indicates planning or intention to cause harm; and
 - to the **harm** caused (both physical or psychological) or the potential for harm.
- Relevant considerations will include:
 - the dangerousness of the weapon;
 - whether the offender brought the weapon to the scene, or just used what was available on impulse;

- the context in which the weapon was threatened, used or produced.

A4:

Planning of an offence

More information:

- Evidence of planning normally indicates a higher level of intention and pre-meditation which increases the level of culpability.
- The greater the degree of planning the greater the culpability

A5:

Commission of the offence for financial gain

More information:

- Where an offence (which is not one which by its nature is an acquisitive offence) has been committed wholly or in part for financial gain or the avoidance of cost, this will increase the seriousness.
- Where the offending is committed in a commercial context for financial gain or the avoidance of costs, this will normally indicate a higher level of culpability.
 - examples would include, but are not limited to, dealing in unlawful goods, failing to comply with a regulation or failing to obtain the necessary licence or permission in order to avoid costs.
 - offending of this type can undermine legitimate businesses.
- Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived through the commission of the offence including:
 - avoided costs;
 - operating savings;
 - any gain made as a direct result of the offence.
- Where the offender is fined, the amount of economic benefit derived from the offence should normally be added to the fine. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.
- Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.
- When sentencing **organisations** the fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law.**

A6:

High level of profit from the offence

More information:

- A high level of profit is likely to indicate:
 - high culpability in terms of planning and
 - a high level of harm in terms of loss caused to victims or the undermining of legitimate businesses

- In most situations a high level of gain will be a factor taken in to account at step one – care should be taken to avoid double counting.
 - Where possible if a financial penalty is imposed it should remove any economic benefit the offender has derived through the commission of the offence including:
 - avoided costs;
 - operating savings;
 - any gain made as a direct result of the offence.
 - Where the offender is fined, the amount of economic benefit derived from the offence should normally be added to the fine. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.
 - Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.
 - When sentencing **organisations** the fine must be **sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law.**
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A7:

Abuse of trust or dominant position

More information:

- In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.
 - Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, professional adviser and client, 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.
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A8:

Gratuitous degradation of victim / maximising distress to victim

More information:

Where an offender deliberately causes **additional** harm to a victim over and above that which is an essential element of the offence - this will increase seriousness. Examples may include, but are not limited to, posts of images on social media designed to cause additional distress to the victim (where not separately charged).

A9:

Vulnerable victim

More information:

- An offence is more serious if the victim is vulnerable because of personal circumstances such as (but not limited to) age, illness or disability (unless the vulnerability of the victim is an element of the offence).
 - Other factors such as the victim being isolated, incapacitated through drink or being in an unfamiliar situation **may** lead to a court considering that the offence is more serious.
 - The extent to which any vulnerability may impact on the sentence is a matter for the court to weigh up in each case.
 - Culpability will be increased if the offender **targeted** a victim because of an actual or perceived vulnerability.
 - Culpability will be increased if the victim is made vulnerable by the actions of the offender (such as a victim who has been intimidated or isolated by the offender).
 - Culpability is increased if an offender persisted in the offending once it was obvious that the victim was vulnerable (for example continuing to attack an injured victim).
 - The level of harm (physical, psychological or financial) is likely to be increased if the victim is vulnerable.
-

A10:

Victim was providing a public service or performing a public duty at the time of the offence

More information:

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.
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A11:

Other(s) put at risk of harm by the offending

More information:

- Where there is risk of harm to other(s) not taken in account at step one and not subject to a separate charge, this makes the offence more serious.
 - Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.
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A12:

Offence committed in the presence of other(s) (especially children)

More information:

- This reflects the psychological harm that may be caused to those who witnessed the offence.

- The presence of one or more children may in some situations make the primary victim more vulnerable – for example an adult may be less able to resist the offender if concerned about the safety or welfare of children present.
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A13:

Actions after the event including but not limited to attempts to cover up/ conceal evidence

More information:

Unless this conduct is the subject of separate charges, it should be taken into account to make the offence more serious.

A14:

Blame wrongly placed on other(s)

More information:

- Where the investigation has been hindered and/or other(s) have suffered as a result of being wrongly blamed by the offender, this will make the offence more serious.
 - This factor will **not** be engaged where an offender has simply exercised his or her right not to assist the investigation or accept responsibility for the offending.
-

A15:

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

More information:

Where an offender has had the benefit of warnings or advice about their conduct but has failed to heed it, this would make the offender more blameworthy.

This may particularly be the case when:

- such warning(s) or advice were of an official nature or from a professional source and/or
 - the warning(s) were made at the time of or shortly before the commission of the offence.
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A16:

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

More information:

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

A17:

Offence committed in custody

More information:

- Offences committed in custody are more serious because they undermine the fundamental need for control and order which is necessary for the running of prisons and maintaining safety.
 - Generally the sentence for the new offence will be consecutive to the sentence being served as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender's criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Refer to the [Totality guideline](#) for detailed guidance.
 - Care should be taken to avoid double counting matters taken into account when considering previous convictions.
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A18:

Offences taken into consideration

More information:

Taken from the [Offences Taken into Consideration Definitive Guideline](#):

General principles

When sentencing an offender who requests offences to be taken into consideration (TICs), courts should pass a total sentence which reflects all the offending behaviour. The sentence must be just and proportionate and must not exceed the statutory maximum for the conviction offence.

Offences to be Taken into Consideration

The court has discretion as to whether or not to take TICs into account. In exercising its discretion the court should take into account that TICs are capable of reflecting the offender's overall criminality. The court is likely to consider that the fact that the offender has assisted the police (particularly if the offences would not otherwise have been detected) and avoided the need for further proceedings demonstrates a genuine determination by the offender to 'wipe the slate clean'.

It is generally **undesirable** for TICs to be accepted in the following circumstances:

- where the TIC is likely to attract a greater sentence than the conviction offence;
- where it is in the public interest that the TIC should be the subject of a separate charge;
- where the offender would avoid a prohibition, ancillary order or similar consequence which it would have been desirable to impose on conviction. For example:
 - where the TIC attracts mandatory disqualification or endorsement and the offence(s) for which the defendant is to be sentenced do not;
- where the TIC constitutes a breach of an earlier sentence;
- where the TIC is a specified offence for the purposes of section 224 of the Criminal Justice Act 2003, but the conviction offence is non-specified; or

- where the TIC is not founded on the same facts or evidence or part of a series of offences of the same or similar character (unless the court is satisfied that it is in the interests of justice to do so).

Jurisdiction

The magistrates' court cannot take into consideration an indictable only offence.

The Crown Court can take into account summary only offences provided the TICs are founded on the same facts or evidence as the indictable charge, or are part of a series of offences of the same or similar character as the indictable conviction offence

Procedural safeguards

A court should generally only take offences into consideration if the following procedural provisions have been satisfied:

- the police or prosecuting authorities have prepared a schedule of offences (TIC schedule) that they consider suitable to be taken into consideration. The TIC schedule should set out the nature of each offence, the date of the offence(s), relevant detail about the offence(s) (including, for example, monetary values of items) and any other brief details that the court should be aware of;
- a copy of the TIC schedule must be provided to the defendant and his representative (if he has one) before the sentence hearing. The defendant should sign the TIC schedule to provisionally admit the offences;
- at the sentence hearing, the court should ask the defendant in open court whether he admits each of the offences on the TIC schedule and whether he wishes to have them taken into consideration;
- if there is any doubt about the admission of a particular offence, it should not be accepted as a TIC. Special care should be taken with vulnerable and/or unrepresented defendants;
- if the defendant is committed to the Crown Court for sentence, this procedure must take place again at the Crown Court even if the defendant has agreed to the schedule in the magistrates' court.

Application

The sentence imposed on an offender should, in most circumstances, be increased to reflect the fact that other offences have been taken into consideration. The court should:

1. Determine the sentencing starting point for the conviction offence, referring to the relevant definitive sentencing guidelines. No regard should be had to the presence of TICs at this stage.
2. Consider whether there are any aggravating or mitigating factors that justify an upward or downward adjustment from the starting point.

The presence of TICs should generally be treated as an aggravating feature that justifies an adjustment from the starting point. Where there is a large number of TICs, it may be appropriate to move outside the category range, although this must be considered in the context of the case and subject to the principle of totality. The court is limited to the statutory maximum for the conviction offence.

3. Continue through the sentencing process including:
 - consider whether the frank admission of a number of offences is an indication of a defendant's remorse or determination and/ or demonstration of steps taken to address addiction or offending behaviour;

- any reduction for a guilty plea should be applied to the overall sentence;
- the principle of totality;
- when considering ancillary orders these can be considered in relation to any or all of the TICs, specifically:
 - compensation orders;
 - restitution orders

A19:

Offence committed in a domestic context

More information:

Refer to the [Overarching Principles: Domestic Abuse Definitive Guideline](#)

A20:

Offence committed in a terrorist context

More information:

Where there is a terrorist element to the offence, refer also to the [Terrorism Offences Definitive Guideline](#)

A21:

Location and/or timing of offence

More information:

- In general, an offence is not made more serious by the location and/or timing of the offence except in ways taken into account by other factors in this guideline (such as planning, vulnerable victim, offence committed in a domestic context, maximising distress to victim, others put at risk of harm by the offending, offence committed in the presence of others). Care should be taken to avoid double counting.
- Courts should be cautious about aggravating an offence by reason of it being committed for example at night, or in broad daylight, in a crowded place or in an isolated place unless it also indicates increased harm or culpability not already accounted for.
- An offence may be more serious when it is committed in places in which there is a particular need for discipline or safety such as prisons, courts, schools or hospitals.

A22:

Established evidence of community/ wider impact

More information:

- This factor should increase the sentence only where there is clear evidence of wider harm not already taken into account elsewhere. A community impact statement will assist the court in assessing the level of impact.
- For issues of prevalence see the separate guidance.

A23:

Prevalence

More information:

- Sentencing levels in offence-specific guidelines take account of collective social harm. Accordingly offenders should normally be sentenced by straightforward application of the guidelines without aggravation for the fact that their activity contributed to a harmful social effect upon a neighbourhood or community.
 - It is not open to a sentencer to increase a sentence for prevalence in ordinary circumstances or in response to a personal view that there is 'too much of this sort of thing going on in this area'.
 - First, there must be evidence provided to the court by a responsible body or by a senior police officer.
 - Secondly, that evidence must be before the court in the specific case being considered with the relevant statements or reports having been made available to the Crown and defence in good time so that meaningful representations about that material can be made.
 - Even if such material is provided, a sentencer will only be entitled to treat prevalence as an aggravating factor if satisfied
 - that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);
 - that the circumstances can properly be described as exceptional; **and**
 - that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced.
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