

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

**19 October 2018**  
**SC(18)OCT06 – General guideline**  
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## **1 ISSUE**

1.1 This is the first consideration of the General guideline post-consultation. Any changes made to the explanations will also apply to those in offence specific guidelines.

1.2 The consultation on providing explanations for factors in offence specific guidelines was scheduled to start in December, but will be put back due mainly to delays in development of the digital Crown Court digital guidelines. A revised timetable for these projects will be produced once we have a clear idea of when the digital platform will be ready.

## **2 RECOMMENDATION**

2.1 That the Council considers the suggestions made in consultation responses and agrees revisions to the draft guideline at Annex A. Suggested additions are shown underlined. The question numbers in bold in the draft guideline relate to the questions in this paper.

2.2 It may not be possible to cover all of the questions in the paper at this meeting, there will be a further opportunity to consider these and any other issues arising from the road testing and consultation at a later meeting.

## **3 CONSIDERATION**

### *The consultation and research*

3.1 There were 27 responses to the consultation including from key stakeholders such as the Magistrates' Association, the Law Society and the CPS. There were a number of responses from groups with an interest in particular offence types that are not covered by offence-specific guidelines such as wildlife/rural crime, housing offences, insolvency offences and tobacco related offences.

3.2 The consultation responses were broadly supportive of the guideline but there were suggestions for changes which will be considered in detail below.

3.3 Research interviews were conducted with 22 magistrates and District Judges. Of those about half found the guideline helpful. Those who did not consider it helpful found the guideline difficult to navigate, the text dense, and wanted more direction on sentence levels.

*The format of the guideline*

3.4 Some consultation respondents were provided with the text version of the draft guideline to assist with group responses. However, all of those who responded to the consultation said that they had been able to use the digital version (which can be accessed at:

<https://www.sentencingcouncil.org.uk/offences/item/general-guideline-sentencing-offences-for-which-there-is-no-definitive-guideline-for-consultation-only/> )

3.5 Most respondents to the consultation reported that they found the mechanism for accessing the additional information straightforward, though in road testing most participants needed help in doing so. There were some specific criticisms or comments on the digital format that have been fed back to the website developers. The consultation on the offence specific explanations will provide an opportunity to test changes.

3.6 Most of the difficulties experienced by users were due to the unfamiliarity of the format, the density of the information and the fact that in any given case much of the information would be irrelevant. The problem of unfamiliarity will naturally resolve itself when the digitisation project is completed and the format is used across all guidelines. The problem of the density and irrelevance of the information is more difficult to address. Suggestions for change in this paper all involve adding rather than subtracting information. Consideration will be given to making the presentation of the information as clear as possible and this issue will be returned to at a future meeting.

3.7 An issue raised by some respondents was the accessibility of the guideline to those without internet access, particularly offenders in custody. A printable version of all guidelines will be available from the website and the office will continue to send hard copies of guidelines to those prisoners or other users who are unable to access the digital guidelines and who request them.

*The applicability of the guideline*

3.8 The text and online versions of the draft guideline consulted on had different wording on applicability. The online version says:

Following consultation, when a definitive guideline is produced it will apply to all offenders aged 18 and older, and to organisations who are sentenced on or after the effective date of this guideline, regardless of the date of the offence. [ ]

General principles to be considered in the sentencing of youths are in the Sentencing Council's definitive guideline: [Overarching Principles – Sentencing Children and Young People](#)

3.9 Whereas the version at Annex A says:

Following consultation, when a definitive guideline is produced it will apply to all individuals, and to organisations who are sentenced on or after [date to be confirmed], regardless of the date of the offence. [ ]

When sentencing offenders aged under 18 courts should also refer to the Sentencing Council's definitive guideline, *Overarching Principles – Sentencing Children and Young People*.

3.10 It is difficult to see how the General guideline would be of much, if any, practical assistance in sentencing under 18s, especially as it would have to be read in conjunction with the Children and Young People guideline. The proposal is for the guideline to be applicable to adults and organisations only.

**Question 1: Does the Council agree that the General guideline should not be applicable to under 18s?**

*Step one*

3.11 Several respondents suggested that further guidance on identifying and applying analogous guidelines would be helpful. The underlined text at a) and b) are suggested additions.

**Question 2: Should the suggested text be added regarding analogous guidelines?**

3.12 Birmingham Law Society made the following comment:

We agree with the prohibition on taking into account draft sentencing guidelines. We disagree with the prohibition on taking into account sentencing guidelines that are not yet in force. Although this reflects recent Court of Appeal authority, it is our experience that courts were often assisted by referral to such guidelines, prior to the Court of Appeal guidance. Our preference is that courts ought to be able to have regard to published Guidelines prior to their implementation date, without them being binding.

**Question 3: Should courts be able to take into account definitive guidelines not yet in force?**

3.13 The Howard League suggested that the guideline should provide information of the effectiveness of sentencing:

While it is accepted that the Sentencing Council has no power to change the statutory purposes of sentencing, it does have a duty to provide sentencers with relevant information that will assist sentencers in applying them. We note that with

regard to “the reduction of crime (including its reduction by deterrence)” the courts should be provided with information about the effectiveness of different sentences in reducing crime, namely that there is no such evidence.

Research has shown that community sentences can be more effective than short prison sentences at reducing crime. Recent research on short sentences published by the Ministry of Justice showed that custodial sentences of under 12 months were associated with higher levels of reoffending than sentences served in the community and that reductions in reoffending associated with community orders were greater for people with larger numbers of previous offences.

3.14 The CPS stated:

We suggest that explanations should also be provided for the five purposes of sentence at section 142 Criminal Justice Act 2003 to explain how they relate to Section 143(1) of the Criminal Justice Act 2003 which states that: ‘In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused’. That explanation will therefore focus on seriousness, aggravating and mitigating factors and how these considerations may result in a purpose of sentencing being preferred to another purpose.

**Question 4: Should the guideline seek to give guidance on the effectiveness of sentences or any further information on the purposes of sentencing?**

3.15 T2A (Transition to Adulthood) and the Howard League suggest that age/lack of maturity linked to the commission of the offence should be included at step one and a link made between reckless behaviour and immaturity. The MA note that some of the aggravating and mitigating factors that follow would more usually be considered at step one. WWF suggest that factors relating to role, planning, organisation etc should be considered in relation to culpability.

3.16 While it is clearly the case that many of the factors (and their expanded explanations) in step two in this guideline are likely to be relevant at step one, the unspecific nature of the guideline makes it impossible to choose which to ‘promote’ to step one. The suggested additional text (underlined) could clarify that courts can take into account offender characteristics in the assessment of culpability.

3.17 Wording could be added to refer sentencers to the aggravating and mitigating factors to assist in the assessment of culpability (and harm).

**Question 5: Should the suggested text be added? Should any further guidance be added to culpability?**

3.18 The guideline refers to Harm – Caused, risked or intended. The CPS point out that the statutory language is ‘any harm which the offence caused, was intended to cause or might foreseeably have caused’.

**Question 6: Would it be preferable to use the statutory wording for harm?**

3.19 The Association of Tenancy Relations Officers suggests that loss of the home or being in fear in the home should be examples of harm. Link (who represent wildlife and conservation charities) suggest adding an aggravating factor relating to cruelty to animals. if it was felt that it was not clear that suffering caused to animals was covered in the assessment of harm (the term psychological harm is not readily applicable to animals) additional wording could assist.

3.20 Several respondents suggested making reference to other impact statements at step one to ensure that harm is properly assessed for those offences where there is not an identifiable individual victim. Suggested additional text is shown underlined.

**Question 7: Should the explanation of harm include a wider range of examples of harm and/or should reference be made at step one to impact statements other than VPS?**

3.21 Birmingham Law Society note that there is no instruction to balance considerations of harm as there is with culpability. The Department of Health and Social Care suggests that examples of the range of levels harm should be provided (as has been done with culpability). This was also a strong finding from the road testing. A suggested table with additional text has been added.

**Question 8: Should the suggested text and table relating to harm be added?**

*Step two*

3.22 The Chief Magistrate and the Justices' Clerks' Society (JCS) suggested the inclusion of a statement that sometimes a fine resulting from a sentencing process may be lower than the fixed penalty. Suggested additional text is shown underlined.

**Question 9: Should the suggested text relating to fixed penalties be added?**

3.23 The Howard League and MA suggested that the additional information relating to community orders could contain more of the information in the Imposition guideline. The suggested items are:

- Community orders can fulfil all of the purposes of sentencing.
- A community order must not be imposed unless the offence is 'serious enough to warrant such a sentence'.
- Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty.
- The court must ensure that the restriction on the offender's liberty is commensurate with the seriousness of the offence and that the requirements imposed are the most suitable for the offender.
- Sentences should not necessarily escalate from one community order range to the next on each sentencing occasion.

- whenever the court reaches the provisional view that a community order may be appropriate, it should request a pre-sentence report (whether written or verbal) unless the court is of the opinion that a report is unnecessary in all the circumstances of the case

3.24 The content of the 'drop down box' on community orders is that used in all MCSG offences for which a community order is a possible sentence. It is an extract from the Imposition guideline (and includes a link to the Imposition guideline) and is designed to be of practical use to the sentencer. The difficulty is that the more additional information we include the less likely users are to look at anything but the table.

**Question 10: Should more information on community orders be included?**

*Aggravating factors*

3.25 The JCS suggest adding a statement that relevant previous convictions include offences committed in another member state and may include offences committed anywhere.

**Question 11: Should the additional point relating to convictions in another jurisdiction be made as suggested?**

3.26 The Assaults on Emergency Worker (Offences) Act 2018 will come into effect on 13 November 2018. This creates a statutory aggravating factor of 'Offence was committed against an emergency worker acting in the exercise of functions of such a worker' for the following offences:

1. Threats to kill;
2. Wounding with intent to cause grievous bodily harm;
3. Malicious wounding;
4. Administering poison etc;
5. Causing bodily injury by gunpowder etc;
6. Using explosive substances etc with intent to cause grievous bodily harm;
7. Assault occasioning actual bodily harm;
8. Sexual assault;
9. Manslaughter;
10. Kidnapping.

3.27 There are offence specific guidelines for most of these offences, so for the purposes of the General guideline this factor is only likely to apply to kidnap or offences relating to explosives or poison (4, 5, 6 and 10 in the list above). The proposal is to add the factor and explanation to the General guideline as set out at Annex A.

3.28 In addition, when the provision comes into force in November, the factor will be added to the digital version of the relevant offence specific guidelines. The explanation will be consulted on as part of the offence specific phase of this project.

**Question 12: Should the additional statutory aggravating factor and explanation be added as set out in Annex A?**

3.29 Several respondents raised an issue of the danger of double counting. There is a general caution against double counting at the top of the aggravating factors and at the top of the mitigating factors as well as specific notes for the following factors:

A6 'high level of profit',  
A11 'others put at risk of harm by the offending',  
A16 'offence committed on licence or post sentence supervision etc',  
A17 'offence committed in custody',  
A21 'Location and/or timing',  
A22 'Established evidence of community/ wider impact',  
A23 'Prevalence'.

3.30 It is also proposed to add a caution about double counting to factor A10 ('Victim was providing a public service' etc). Three suggestions to guard against double counting are:

1. The existing general warning against double counting could be formatted to make it more prominent.
2. The standard wording on double counting could be included in every expanded explanation.
3. Tailored wording on double counting could be added to individual factors as appropriate.

**Question 13: How should the issue of double counting be dealt with?**

3.31 The Chief Magistrate states:

I note that although the guideline refers to acting as part of a gang as an aggravating feature, it does not specify whether having a leading role in the gang is a factor to be taken into account, although it does list "acting under direction" in the mitigating factors.

3.32 In fact the wording does say 'the role of the offender will be a relevant consideration'. It may be helpful to give more guidance on role within the group. It has also been suggested that a reference to organised crime could be relevant. Suggested additional text is shown underlined.

**Question 14: Should any of the suggested additional text relating to offending as part of a group be added?**

3.33 Link suggest that where dogs are used in the commission of wildlife crime (such as poaching and badger persecution) they should be considered to be weapons. While the use of dogs in such situations could clearly be seen to be an aggravating factor (unless an

element of the offence) it may not be helpful to characterise this as 'use of a weapon'. It is therefore not proposed to include any other examples of weapons.

3.34 The CLSA suggest including consideration of 'whether or not a weapon has been made or adapted for use as a weapon as a factor. For example a bottle that has been smashed specifically for use as a weapon or a bottle filled with ammonia. Use of such items suggests planning and preparation for violence which would make an offence more serious'. Suggested additional text is shown underlined.

**Question 15: Should any further examples of weapons be added; should the suggested additional text be added?**

3.35 WWF suggested that factors relevant to planning in the context of wildlife crime include: 'a sophisticated and/or large-scale operation; offending in course of business/ defendant is professional dealer; evidence of prolonged activity; conspiracy to defraud buyers (by them unwittingly purchasing illegal goods); defendant shown to have knowledge of specific risks involved i.e. knows the species is endangered'. While some of the suggestions from WWF are too specific to wildlife crime to be of general relevance, it might be helpful to adopt others. Suggested additional text is shown underlined.

**Question 16: Should the suggested additional text relating to planning be added?**

3.36 There were suggestions for additional examples of offending for financial gain or the avoidance of costs. Link suggested that where offending is masked by legal trade (for example, where a pet shop trades, for the most part legally, but in part illegally by selling endangered species) or where financial gain accrues by not following lawful process (for instance, property developers who fail to follow lawful licensing procedures and whose activities impact on protected species and habitats). These suggestions from Link appear to be already covered by the concept of offending in a commercial context and failing to comply with regulations. (See also Question 32 in relation to the mitigating factor 'activity originally legitimate' below.) The Insolvency Service suggested 'failing to declare property to the Official Receiver or to a liquidator' as an example. While such a specific example would not be helpful, suggested additional text of a more general nature is shown underlined.

**Question 17: Should the suggested additional text relating to offending for financial gain be added?**

3.37 The CLSA suggested that a reminder about compensation would be helpful. The Residential Landlords Association (RLA) were concerned that 'the guideline should make in clear (in line with case law relating to confiscation) that only the economic benefit derived from unlawful activity should be added to the fine. Where the offender has breached a

regulatory requirement but the underlying activity remains lawful, care should be taken to identify what sum of money represents the benefit derived from the offence. Priority should be given to compensating the victims of an offence, whether this is achieved through a compensation order or making allowance for an anticipated Rent Repayment Order’.

3.38 To a degree the points raised by the RLA are covered by the wording ‘fair and proportionate’. Suggested additional text is shown underlined.

**Question 18: Should the suggested additional text relating to economic benefit be added?**

3.39 A magistrate suggested that reference should be made to obtaining financial information about the offender. Suggested additional text taken from the Environmental guideline is shown underlined.

**Question 19: Should the suggested additional text on obtaining information be added?**

3.40 Many of the points raised in relation to factor A5 also apply to factor A6.

**Question 20: Should the changes also be made to A6?**

3.41 The CLSA suggested adding a reference to different levels of trust as in the Theft guideline which has a high culpability factor of ‘breach of a high degree of trust or responsibility’ and a medium culpability factor of ‘breach of some degree of trust or responsibility’. Suggested additional text is shown underlined.

**Question 21: Should the suggested additional text regarding the level of trust be added?**

3.42 Link asked for clarification of what is meant by ‘victim’ in this factor and ask if it could include an animal. WWF suggested additional aggravating factors relating to victims:

1. endangered or critically endangered species;
2. specimens taken from particularly sensitive stock/areas;
3. human, animal or flora health adversely affected (e.g. animals injured or killed during shipment, flora destroyed, etc.);
4. evidence of cruelty or deliberate cruelty towards the animals involved

3.43 The assessment of harm at step one includes reference to the environment and animals and it is not clear that it would be helpful to add these factors to a general guideline.

**Question 22: Should any additional factors be added relating to vulnerability of animals or the environment?**

3.44 WWF suggested providing guidance relating to factor A13 that the more deliberate and sophisticated the conduct to conceal, the more weight should be attached to this factor. Birmingham Law Society suggested balancing this factor against the immaturity of the offender in appropriate cases. Baker J queried the reference to separate charges, noting that even if the offending was charged separately it would still be permissible to take it into account when assessing the totality of offending.

3.45 Suggested additional text to address these points is shown underlined

**Question 23: Should any of the suggested additional text relating to actions after the event be added?**

3.46 Similarly for factor A14 Birmingham Law Society suggested balancing this factor against the immaturity of the offender in appropriate cases. Suggested additional text is shown underlined

**Question 24: Should the suggested additional text relating to blame wrongly placed on others be added?**

3.47 The CPS noted that there was no reference to whether extensive compliance with a licence/order would mitigate the aggravating effect of an offence committed on licence etc. Suggested additional text is shown underlined. As with factor A14 above, the reference to being dealt with separately has been changed.

**Question 25: Should the suggested changes to the information on offence committed on licence etc be made?**

3.48 The CPS commented:

The explanation within the Overarching Principles guidance is clearer and we suggest that the first paragraph from that guidance succinctly outlines the limitations of this aggravating factor. That paragraph states

“The seriousness of an individual case should be judged on its own dimensions of harm and culpability rather than as part of a collective social harm. It is legitimate for the overall approach to sentencing levels for particular offences to be guided by their cumulative effect. However, it would be wrong to further penalise individual offenders by increasing sentence length for committing an individual offence of that type”.

3.49 Other respondents were broadly supportive of the explanation.

**Question 26: Should any change be made to the explanation of prevalence?**

*Mitigating factors*

3.50 The MA and the CLSA queried why the mitigation for a first offence / good character would not apply if the crime is particularly serious.

**Question 27: Should the qualification relating to the seriousness of the offence be removed?**

3.51 The Law Society suggested adding ‘separate from any guilty plea reduction at step four’ to the explanation on remorse as used in the next two mitigating factors. The guilty plea guideline states:

- The purpose of reducing the sentence for a guilty plea is to yield the benefits described above. The guilty plea should be considered by the court to be independent of the offender’s personal mitigation.
- Factors such as admissions at interview, co-operation with the investigation and demonstrations of remorse should **not** be taken into account in determining the level of reduction. Rather, they should be considered separately and prior to any guilty plea reduction, as potential mitigating factors.

**Question 28: Should the suggested wording in the explanation for remorse be added?**

3.52 The MA suggested that ‘limited awareness or understanding’ could relate to a lack of capacity on the part of the offender and that the court would require specialist advice to assess this. Other respondents were concerned that offenders could rely on this factor when they had chosen not to inform themselves of the law. Suggested additional wording to clarify this factor is shown underlined.

**Question 29: Should the suggested wording regarding limited awareness of the offence be added?**

3.53 There was some misunderstanding of the explanation regarding little or no financial gain, with one respondent suggesting that it might be relied on where gain was intended but did not materialise. It is therefore proposed to put the words ‘did not seek to gain financially’ in bold.

**Question 30: Should the suggested emphasis regarding financial gain be added?**

3.54 Several respondents who are involved in the prosecution of offences that typically take a long time to come to court were concerned about this factor and suggested additional wording such as ‘unless inherent in the investigation of the offence in question’. The Chief Magistrate suggested that a reduction that was unreasonable but short should not result in a reduction in sentence. Suggested additional wording is shown underlined.

**Question 31: Should the suggested wording regarding delay be added?**

3.55 Suggested wording is shown underlined to qualify the factor ‘activity originally legitimate’.

**Question 32: Should the suggested wording relating to activity that was originally legitimate be added?**

3.56 The information relating to the 'Age and/or lack of maturity' factor was welcomed by many respondents. The Howard League and T2A have produced a report 'Sentencing Young Adults'<sup>1</sup> in which they make the case for sentencing principles for young adults. A meeting with the Howard League clarified some of their comments and the suggested additional text shown underlined is in response to the points raised by them and T2A.

3.57 The suggested reference to the age range 18-25 has been added to references to this factor elsewhere in the guideline.

**Question 33: Should the suggested wording relating to age and immaturity be added?**

3.58 One respondent (who has also made the same point in response to the Arson and Criminal damage consultation) suggested that pregnancy should be a factor considered in mitigation. The suggestion is that pregnancy could have an effect on the suitability of a community order or the impact of custody and should therefore be considered at sentencing. She states that 'should a custodial sentence be considered for a pregnant defendant it should be compulsory that the defendant is provided a place at a Mother and Baby Unit'. Such a recommendation is beyond the remit of a sentencing guideline. Views are sought on whether the factor 'sole or primary carer for dependent relatives' would be applied to a pregnant offender and whether there is any need to explicitly deal with pregnant offenders in guidelines.

**Question 34: Should a separate factor or explanatory wording be added in relation to pregnant offenders?**

3.59 The MA and Magistrates' Leadership Executive raised issues relating to obtaining information about an offender where mental health issues are raised. More detailed information on this factor will be provided in due course by the separate overarching guideline. Some limited suggested additional wording is shown underlined.

**Question 35: Should the additional wording relating to obtaining reports form the Liaison and Diversion Team be added?**

**4 RISKS/IMPACT**

4.1 There was some criticism of the Council for the lack of a detailed impact assessment for this guideline. Some research has been done with sentencers during consultation to try to assess the likely impact of the guideline, but it remains impossible to quantify.

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<sup>1</sup> <https://howardleague.org/publications/sentencing-young-adults-making-the-case-for-sentencing-principles-for-young-adults/>

# General guideline

## For sentencing offences for which there is no offence specific sentencing guideline

### Applicability of guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this draft guideline. Following consultation, when a definitive guideline is produced it will apply to all individuals, and to organisations who are sentenced on or after [date to be confirmed], regardless of the date of the offence.

Section 125(1) Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court -

(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function, unless the court is satisfied that it would be contrary to the interests of justice to do so.”

When sentencing offenders aged under 18 courts should also refer to the Sentencing Council’s definitive guideline, *Overarching Principles – Sentencing Children and Young People*.<sup>1</sup>

#### Question 1

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<sup>1</sup> <https://www.sentencingcouncil.org.uk/publications/item/sentencing-children-and-young-people-definitive-guideline/>

**STEP ONE – reaching a provisional sentence**

- a) Where there is no definitive sentencing guideline for the offence, to arrive at a provisional sentence the court should take account of all of the following (if they apply):
- the statutory maximum sentence (and if appropriate minimum sentence) for the offence;
  - sentencing judgments of the Court of Appeal (Criminal Division) for the offence; and
  - definitive sentencing guidelines for analogous offences

The court will be assisted by the parties in identifying the above. **Question 2**

For the avoidance of doubt the court should **not** take account of any draft sentencing guidelines or definitive guidelines that are not yet in force. **Question 3**

- b) When considering definitive guidelines for analogous offences the court must apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetic exercise. **Question 2**
- c) Where possible the court should follow the stepped approach of sentencing guidelines to arrive at the sentence.
- The seriousness of the offence is assessed by considering:
- the **culpability** of the offender and
  - the **harm** caused by the offending.
- d) The initial assessment of harm and culpability should take no account of plea or previous convictions.

The court should consider which of the five purposes of sentencing (below) it is seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence. **Question 4**

- the punishment of offenders
- the reduction of crime (including its reduction by deterrence)
- the reform and rehabilitation of offenders
- the protection of the public
- the making of reparation by offenders to persons affected by their offences

More information:

**Culpability** is assessed with reference to the offender's role, level of intention and/or premeditation and the extent and sophistication of planning. **Question 5**

- The court should balance these characteristics to reach a fair assessment of the offender's overall culpability in the context of the circumstances of the offence and offender characteristics.

- The relevance of factors will vary depending on the type of offending. Where a characteristic is inherent in the offence, the mere presence of that characteristic will not be determinative of the level of culpability.
- Deliberate or gratuitous violence, or damage to property, over and above what is needed to carry out the offence will normally indicate a higher level of culpability
- For offences where there is no requirement for the offender to have any level of intention, recklessness, negligence, dishonesty, knowledge, understanding or foresight for the offence to be made out, the range of culpability **may** be inferred from the circumstances of the offence as follows:

Highest level  Lowest level	Deliberate - intentional act or omission
	Reckless - acted or failed to act regardless of the foreseeable risk
	Negligent - failed to take steps to guard against the act or omission
	Low/no culpability - act or omission with none of the above features

- For offences that require some level of culpability (eg intention, recklessness or knowledge) to be made out, the range of culpability will be narrower. Relevant factors **may** typically include but are not limited to:

Highest level  Lowest level	High level of planning/ sophistication/ leading role
	Some planning/ significant role
	Little or no planning/ minor role

- These models of assessing culpability will not be applicable to all offences

**Harm – *caused, risked and/or intended***

**Question 6**

- There may be primary and secondary victims of an offence and, depending on the offence, victims may include one or more individuals, a community, the general public, the state, the environment and/or animal(s). In some cases there may not be an identifiable victim.
- An assessment of harm should generally reflect the overall impact of the offence upon the victim(s) and may include direct harm (including physical injury, psychological harm and financial loss) and consequential harm.
- When considering the value of property lost or damaged the court should also take account of any sentimental value to the victim(s) and any disruption caused to a victim's life, activities or business.
- Where harm was intended but no harm or a lower level of harm resulted – the sentence will normally be assessed with reference to the level of harm intended.
- Where the harm caused is greater than that intended - the sentence will normally be assessed with reference to the level of harm suffered by the victim.
- Dealing with a risk of harm involves consideration of both the likelihood of harm occurring and the extent of it if it does.
- Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or less) actual harm the normal approach is to move down to the next category of harm. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.
- A Victim Personal Statement (VPS) or other impact statement may assist the court in assessing harm, but the absence of a VPS should not be taken to indicate the absence of harm.

**Question 7**

- The court should balance these characteristics to reach a fair assessment of harm in the context of the circumstances of the offence

**Question 8**

Highest level  Lowest level	Very serious harm caused to individual victim(s) or to wider public/ environment etc
	Serious harm caused OR high risk of very serious harm
	Significant harm caused OR high risk of serious harm
	Low/ no harm caused OR high risk significant harm

The table should be used in conjunction with the notes above and may not be applicable to all offences.

**STEP TWO**

Once a provisional sentence is arrived at the court should take into account factors that may make the offence more serious and factors which may reduce seriousness or reflect personal mitigation.

- Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far.
- It is for the sentencing court to determine how much weight should be assigned to the aggravating and mitigating factors taking into account all of the circumstances of the offence and the offender. Not all factors that apply will necessarily influence the sentence.
- When sentencing an offence for which a **fixed penalty notice [link to information below]** was available the reason why the offender did not take advantage of the fixed penalty will be a relevant consideration.
- **If considering a community or custodial sentence refer also to the *Imposition of community and custodial sentences* definitive guideline. [link to information below]**
- **If considering a fine – see information on fine bands [link to information below]**

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More information:

**Penalty notices** may be issued as an alternative to prosecution in respect of a range of offences. An admission of guilt is not a prerequisite to issuing a penalty notice. An offender who is issued with a penalty notice may nevertheless be prosecuted for the offence if he or she:

- asks to be tried for the offence; or
- fails to pay the penalty within the period stipulated in the notice and the prosecutor decides to proceed with charges.

In some cases of non-payment, the penalty is automatically registered and enforceable as a fine without need for recourse to the courts. This procedure applies to penalty notices for disorder and fixed penalty notices issued in respect of certain road traffic offences but not to fixed penalty notices issued for most other criminal offences

When sentencing in cases in which a penalty notice was available:

- the fact that the offender did not take advantage of the penalty (whether that was by requesting a hearing or failing to pay within the specified timeframe) does not increase the seriousness of the offence and must not be regarded as an aggravating factor. The appropriate sentence must be determined in accordance with the sentencing principles set out in this guideline (including the amount of any fine, which must take an offender’s financial circumstances into account), disregarding the availability of the penalty. In some cases this may result in a fine that is lower than the fixed penalty. Question 9
- where a penalty notice could not be offered or taken up for reasons unconnected with the offence itself, such as administrative difficulties outside the control of the offender, the starting point should be a fine equivalent to the amount of the penalty and no order of costs should be imposed. The offender should not be disadvantaged by the unavailability of the penalty notice in these circumstances.

Where an offender has had previous penalty notice(s), the fact that an offender has previously been issued with a penalty notice does not increase the seriousness of the current offence and must not be regarded as an aggravating factor. It may, however, properly influence the court’s assessment of the offender’s suitability for a particular sentence, so long as it remains within the limits established by the seriousness of the current offence.

More information - fines

	<u>Starting point</u>	<u>Range</u>
<b><u>Fine Band A</u></b>	<u>50% of relevant weekly income</u>	<u>25 – 75% of relevant weekly income</u>
<b><u>Fine Band B</u></b>	<u>100% of relevant weekly income</u>	<u>75 – 125% of relevant weekly income</u>
<b><u>Fine Band C</u></b>	<u>150% of relevant weekly income</u>	<u>125 – 175% of relevant weekly income</u>
<b><u>Fine Band D</u></b>	<u>250% of relevant weekly income</u>	<u>200 – 300% of relevant weekly income</u>
<b><u>Fine Band E</u></b>	<u>400% of relevant weekly income</u>	<u>300 – 500% of relevant weekly income</u>
<b><u>Fine Band F</u></b>	<u>600% of relevant weekly income</u>	<u>500 – 700% of relevant weekly income</u>

More information – community orders

Question 10

- The seriousness of the offence should be the **initial** factor in determining which requirements to include in a community order. Offence specific guidelines refer to three sentencing levels within the community order band based on offence seriousness (low, medium and high). See below for **non-exhaustive** examples of requirements that might be appropriate in each.
- At least one requirement **MUST** be imposed for the purpose of punishment and/or a fine imposed in addition to the community order unless there are exceptional circumstances which relate to the offence or the offender that would make it unjust in all the circumstances to do so. For further information see the [Imposition guideline](#).

- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence.

<b>Low</b>	<b>Medium</b>	<b>High</b>
<ul style="list-style-type: none"> <li>• Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender’s record means that a discharge or fine is inappropriate</li> <li>• In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary</li> </ul>	<ul style="list-style-type: none"> <li>• Offences that obviously fall within the community order band</li> </ul>	<ul style="list-style-type: none"> <li>• Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances</li> <li>• More intensive sentences which combine two or more requirements may be appropriate</li> </ul>
<ul style="list-style-type: none"> <li>• Suitable requirements might include:</li> <li>• Any appropriate rehabilitative requirement(s)</li> <li>• 40 – 80 hours of unpaid work</li> <li>• Curfew requirement for example up to 16 hours per day for a few weeks</li> <li>• Exclusion requirement, for a few months</li> <li>• Prohibited activity requirement</li> <li>• Attendance centre requirement (where available)</li> </ul>	<ul style="list-style-type: none"> <li>• Suitable requirements might include:</li> <li>• Any appropriate rehabilitative requirement(s)</li> <li>• 80 – 150 hours of unpaid work</li> <li>• Curfew requirement for example up to 16 hours for 2 – 3 months</li> <li>• Exclusion requirement lasting in the region of 6 months</li> <li>• Prohibited activity requirement</li> </ul>	<ul style="list-style-type: none"> <li>• Suitable requirements might include:</li> <li>• Any appropriate rehabilitative requirement(s)</li> <li>• 150 – 300 hours of unpaid work</li> <li>• Curfew requirement for example up to 16 hours per day for 4 – 12 months</li> <li>• Exclusion requirement lasting in the region of 12 months</li> </ul>

If order does not contain a punitive requirement, suggested fine levels are indicated below:

**BAND A FINE**

**BAND B FINE**

**BAND C FINE**

More information – custodial sentences

The approach to the imposition of a custodial sentence should be as follows:

**1) Has the custody threshold been passed?**

- A custodial sentence must not be imposed unless the offence or the combination of the offence and one or more offences associated with it was so serious that neither a fine alone nor a community sentence can be justified for the offence.
- There is no general definition of where the custody threshold lies. The circumstances of the individual offence and the factors assessed by offence-specific guidelines will determine whether an offence is so serious that neither a fine alone nor a community sentence can be justified. Where no offence specific guideline is available to determine seriousness, the harm caused by the offence, the culpability of the offender and any previous convictions will be relevant to the assessment.
- The clear intention of the threshold test is to reserve prison as a punishment for the most serious offences.

**2) Is it unavoidable that a sentence of imprisonment be imposed?**

- Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender’s liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.
- 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.

**3) What is the shortest term commensurate with the seriousness of the offence?**

- In considering this the court must NOT consider any licence or post sentence supervision requirements which may subsequently be imposed upon the offender’s release.

**4) Can the sentence be suspended?**

- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence. **Sentencers should be clear that they would impose an immediate custodial sentence if the power to suspend were not available.** If not, a non-custodial sentence should be imposed.
- The following factors should be weighed in considering whether it is possible to suspend the sentence:

**Factors indicating that it would not be appropriate to suspend a custodial sentence**

- Offender presents a risk/danger to the public
- Appropriate punishment can only be achieved by immediate custody

**Factors indicating that it may be appropriate to suspend a custodial sentence**

- Realistic prospect of rehabilitation
- Strong personal mitigation

- History of poor compliance with court orders
- Immediate custody will result in significant harmful impact upon others

The imposition of a custodial sentence is both punishment and a deterrent. To ensure that the overall terms of the suspended sentence are commensurate with offence seriousness, care must be taken to ensure requirements imposed are not excessive. A court wishing to impose onerous or intensive requirements should reconsider whether a community sentence might be more appropriate.

### Pre-sentence report

Whenever the court reaches the provisional view that:

- the custody threshold has been passed; and, if so
- the length of imprisonment which represents the shortest term commensurate with the seriousness of the offence;

the court should obtain a pre-sentence report, whether verbal or written, **unless** the court considers a report to be unnecessary. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case.

**Magistrates:** Consult your legal adviser before deciding to sentence to custody without a pre-sentence report.

For further information and sentencing flowcharts see the guideline on [Imposition of Community and Custodial Sentences](#).

### Statutory aggravating factors

**Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence**

#### Short description:

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:

**Question 11**

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.

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Short description:

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.

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Short description:

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.

Short description:

Offence was committed against an emergency worker acting in the exercise of functions of such a worker.

**Question 12**

More information:

See below for the statutory provisions.

- **Note the requirement for the court to state that the offence has been so aggravated.**
- **Note this statutory factor only applies to certain violent or sexual offences as listed below which were committed on or after 13 November 2018.**
- **For other offences the factor 'Victim was providing a public service or performing a public duty at the time of the offence' can be applied where relevant.**

The Assaults on Emergency Worker (Offences) Act 2018 states:

**2 Aggravating factor**

(1) This section applies where—

(a) the court is considering for the purposes of sentencing the seriousness of an offence listed in subsection (3), and

(b) the offence was committed against an emergency worker acting in the exercise of functions as such a worker.

- (2) The court—
- (a) must treat the fact mentioned in subsection (1)(b) as an aggravating factor (that is to say, a factor that increases the seriousness of the offence), and
  - (b) must state in open court that the offence is so aggravated.
- (3) The offences referred to in subsection (1)(a) are—
- (a) an offence under any of the following provisions of the Offences against the Person Act 1861—
    - (i) section 16 (threats to kill);
    - (ii) section 18 (wounding with intent to cause grievous bodily harm);
    - (iii) section 20 (malicious wounding);
    - (iv) section 23 (administering poison etc);
    - (v) section 28 (causing bodily injury by gunpowder etc);
    - (vi) section 29 (using explosive substances etc with intent to cause grievous bodily harm);
    - (vii) section 47 (assault occasioning actual bodily harm);
  - (b) an offence under section 3 of the Sexual Offences Act 2003 (sexual assault);
  - (c) manslaughter;
  - (d) kidnapping;
  - (e) an ancillary offence in relation to any of the preceding offences.

(4) For the purposes of subsection (1)(b), the circumstances in which an offence is to be taken as committed against a person acting in the exercise of functions as an emergency worker include circumstances where the offence takes place at a time when the person is not at work but is carrying out functions which, if done in work time, would have been in the exercise of functions as an emergency worker.

- (5) In this section—
- “ancillary offence”, in relation to an offence, means any of the following—
    - (a) aiding, abetting, counselling or procuring the commission of the offence;
    - (b) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to the offence;
    - (c) attempting or conspiring to commit the offence;
  - “emergency worker” has the meaning given by section 3.

(6) Nothing in this section prevents a court from treating the fact mentioned in subsection (1)(b) as an aggravating factor in relation to offences not listed in subsection (3).

(7) This section applies only in relation to offences committed on or after the day it comes into force.

### **3 Meaning of “emergency worker”**

- (1) In sections 1 and 2, “emergency worker” means—
- (a) a constable;
  - (b) a person (other than a constable) who has the powers of a constable or is otherwise employed for police purposes or is engaged to provide services for police purposes;
  - (c) a National Crime Agency officer;
  - (d) a prison officer;
  - (e) a person (other than a prison officer) employed or engaged to carry out functions in a custodial institution of a corresponding kind to those carried out by a prison officer;
  - (f) a prisoner custody officer, so far as relating to the exercise of escort functions;
  - (g) a custody officer, so far as relating to the exercise of escort functions;

- (h) a person employed for the purposes of providing, or engaged to provide, fire services or fire and rescue services;
- (i) a person employed for the purposes of providing, or engaged to provide, search services or rescue services (or both);
- (j) a person employed for the purposes of providing, or engaged to provide—
  - (i) NHS health services, or
  - (ii) services in the support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public.

(2) It is immaterial for the purposes of subsection (1) whether the employment or engagement is paid or unpaid.

(3) In this section—

“custodial institution” means any of the following—

- (a) a prison;
- (b) a young offender institution, secure training centre, secure college or remand centre;
- (c) a removal centre, a short-term holding facility or pre-departure accommodation, as defined by section 147 of the Immigration and Asylum Act 1999;
- (d) services custody premises, as defined by section 300(7) of the Armed Forces Act 2006;

“custody officer” has the meaning given by section 12(3) of the Criminal Justice and Public Order Act 1994;

“escort functions”—

- (a) in the case of a prisoner custody officer, means the functions specified in section 80(1) of the Criminal Justice Act 1991;
- (b) in the case of a custody officer, means the functions specified in paragraph 1 of Schedule 1 to the Criminal Justice and Public Order Act 1994;

“NHS health services” means any kind of health services provided as part of the health service continued under section 1(1) of the National Health Service Act 2006 and under section 1(1) of the National Health Service (Wales) Act 2006;

“prisoner custody officer” has the meaning given by section 89(1) of the Criminal Justice Act 1991.

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**Other aggravating factors:** (factors are not listed in any particular order and are **not** exhaustive)

**Question 13**

**Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence**

Short description:

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.

Short description:

A2. Offence was committed as part of a group or gang.

Question 14

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).

Culpability based on role in group offending could range from:

Higher culpability indicated by a leading role in the group and/or involvement of others through coercion, intimidation or exploitation, to

Lower culpability indicated by a lesser or subordinate role under direction and/or involvement through coercion, intimidation or exploitation.

Where the offending is part of an organised criminal network, this will make it more serious, and the role of the offender in the organisation will also be relevant.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and immaturity when considering the significance of group offending. **(See Question 33 below)**

Short description:

A3. Offence involved use or threat of use of a weapon

Question 15

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;
  - whether the offender made or adapted something for use as a weapon;
  - the context in which the weapon was threatened, used or produced.

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Short description:

A4. Planning of an offence

**Question 16**More information:

- Evidence of planning normally indicates a higher level of intention and pre-meditation which increases the level of culpability.
  - Planning may be indicated by the scale and sophistication of the offending
  - The greater the degree of planning the greater the culpability
- 

Short description:

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 disclose relevant matters to an authority or regulator, 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. **Question 17**
- 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.
- In considering economic benefit, the court should avoid double recovery. Where the means of the offender are limited, priority should be given to compensation (where applicable) over payment of any other financial penalty (see further step seven below)

**Question 18**
- 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.**
- Obtaining financial information: In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied financial information to the contrary. It is for the offender to disclose to the court such data relevant to their financial position as will enable it to assess what they can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial

circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

### Question 19

#### Short description:

A6. High level of profit from the offence

### Question 20

#### 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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#### Short description:

A7. Abuse of trust or dominant position

### Question 21

#### 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.
- The level of trust or responsibility that the offender has, will be a significant factor in assessing the degree to which any abuse of that trust or responsibility makes an offence more serious.

- 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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Short description:

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).

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Short description:

**Question 22**

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.

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Short description:

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.

Care should be taken to avoid double counting where the statutory aggravating factor relating to emergency workers applies

**Question 13**

Short description:

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.

Short description:

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.

Short description:

A13. Actions after the event including but not limited to attempts to cover up/ conceal evidence

**Question 23**

More information:

The more sophisticated the conduct, the more likely it is to increase the seriousness of the offence.

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and immaturity when considering the significance of such conduct.

Where any such ~~Unless this~~ conduct is the subject of separate charges, it should be taken into account when assessing totality at step six ~~to make the offence more serious.~~

Short description:

A14. Blame wrongly placed on other(s)

**Question 24**

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.
- When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and immaturity when considering the significance of such conduct.

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Short description:

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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Short description:

A16. Offence committed on licence or post sentence supervision or while subject to court order(s)

Question 25

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).~~
- The extent to which the offender has complied with the conditions of a licence or order will be a relevant consideration.
- Where the offender is dealt with separately for a breach of a licence or order regard should be had to totality (see step six)
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

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Short description:

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.
-

Short description:

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

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### Short description:

A19. Offence committed in a domestic context

### More information:

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

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Short description:

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](#)

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Short description:

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.
- 

Short description:

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.
- 

Short description:

A23. Prevalence **Question 26**

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.
- 

**Factors reducing seriousness or reflecting personal mitigation** (factors are not listed in any particular order and are not exhaustive)

**Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm**

Short description:

M1. No previous convictions or no relevant/recent convictions

More information:

- 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).

**Question 27**

- 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.
-

Short description:

M2. Good character and/or exemplary conduct

More information:

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.

**Question 27**

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Short description:

M3. Remorse

**Question 28**

More information:

The court will need to be satisfied that the offender is genuinely remorseful for the offending behaviour in order to reduce the sentence (separate from any guilty plea reduction at step four).

Lack of remorse should never be treated as an aggravating factor.

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Short description:

M4. Self-reporting

More information:

Where an offender has self-reported to the authorities, particularly in circumstances where the offence may otherwise have gone undetected, this should reduce the sentence (separate from any guilty plea reduction at step four).

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Short description:

M5. Cooperation with the investigation/ early admissions

More information:

Assisting or cooperating with the investigation and /or making pre-court admissions may ease the effect on victims and witnesses and save valuable police time justifying a reduction in sentence (separate from any guilty plea reduction at step four).

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Short description:

M6. Little or no planning

More information:

Where an offender has committed the offence with little or no prior thought, this is likely to indicate a lower level of culpability and therefore justify a reduction in sentence.

**However**, impulsive acts of unprovoked violence or other types of offending may indicate a propensity to behave in a manner that would not normally justify a reduction in sentence.

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Short description:

M7. The offender was in a lesser or subordinate role if acting with others / performed limited role under direction

More information:

Whereas acting as part of a group or gang may make an offence more serious, if the offender's role was minor this may indicate lower culpability and justify a reduction in sentence.

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Short description:

M8. Involved through coercion, intimidation or exploitation

More information:

- 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.
- 

Short description:

M9. Limited awareness or understanding of the offence

Question 29

More information:

The factor may apply to reduce the culpability of an offender

- acting alone who has not appreciated the significance of the offence **or**
- where an offender is acting with others and does not appreciate the extent of the overall offending.

In such cases the sentence may be reduced from that which would have applied if the offender had understood the full extent of the offence and the likely harm that would be caused.

This factor will not apply where an offender has wilfully avoided taking steps to understand the offence.

Where an offender lacks capacity to understand the full extent of the offending see the guidance under 'Mental disorder or learning disability' below.

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Short description:

M10. Little or no financial gain **Question 30**

More information:

Where an offence (which is not one which by its nature is an acquisitive offence) is committed in a context where financial gain could arise, the culpability of the offender may be reduced where it can be shown that the offender **did not seek to gain financially** from the conduct and did not in fact do so.

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Short description:

M11. Delay since apprehension

More information: **Question 31**

Where there has been an **unreasonable** delay in proceedings since apprehension **that is not the fault of the offender**, and which has had a detrimental effect on the offender, the court may take this into account by reducing the sentence.

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Short description:

M12. Activity originally legitimate

More information: **Question 32**

Where the offending arose from an activity which was originally legitimate, but became unlawful (for example because of a change in the offender's circumstances or a change in regulations), this **may** indicate lower culpability and thereby a reduction in sentence.

This factor will not apply where the offender has used a legitimate activity to mask a criminal activity.

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Short description:

M13. Age and/or lack of maturity **Question 33**

More information:

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 (typically aged 18-25) 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.

Where the offender is a care leaver regard should be had to the effect of any sentence on the duties that the local authority has towards the offender.

Where an offender has turned 18 between the commission of the offence and conviction the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed, but taking into account the purposes of sentencing adult offenders. See also the Sentencing Children and Young People Guideline (paragraphs 6.1 to 6.3).

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

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Short description:

M14. Sole or primary carer for dependent relatives

**Question 34**

More information:

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. Where custody is unavoidable consideration of the impact on dependants may be relevant to the length of the sentence imposed. For more serious offences where a substantial period of custody is appropriate, this factor will carry less weight.

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Short description:

M15. Physical disability or serious medical conditions requiring urgent, intensive or long-term treatment

More information:

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

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Short description:

M16. Mental disorder or learning disability

## Question 35

More information:

Mental disorders and learning disabilities are different things, although an individual may suffer from both. A **learning disability** is a permanent condition developing in childhood, whereas **mental illness** (or a mental health problem) can develop at any time, and is not necessarily permanent; people can get better and resolve mental health problems with help and treatment.

In the context of sentencing a broad interpretation of the terms ‘mental disorder’ and learning disabilities’ should be adopted to include:

- Offenders with an intellectual impairment (low IQ);
- Offenders with a cognitive impairment such as (but not limited to) dyslexia, attention deficit hyperactivity disorder (ADHD);
- Offenders with an autistic spectrum disorder (ASD) including Asperger’s syndrome;
- Offenders with a personality disorder;
- Offenders with a mental illness.

Offenders may have a combination of the above conditions.

Sentencers should be alert to the fact that not all mental disorders or learning disabilities are visible or obvious.

A mental disorder or learning disability can affect both:

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

The court will be assisted by a PSR and, where appropriate, medical reports (including from the Liaison and Diversion Team) in assessing:

1. the degree to which a mental disorder or learning disability has reduced the offender’s responsibility for the offence. This may be because the condition had an impact on the offender’s ability to understand the consequences of their actions, to limit impulsivity and/or to exercise self-control.
    - a relevant factor will be the degree to which a mental disorder or learning disability 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);
    - in considering the extent to which the offender’s actions were voluntary, the extent to which a mental disorder or learning disability has an impact on the offender’s ability to exercise self-control or to engage with medical services will be a relevant consideration.
  2. any effect of the mental disorder or learning disability on the impact of the sentence on the offender; a mental disorder or learning disability may make it more difficult for the offender to cope with custody or comply with a community order.
-

Short description:

M17. Determination and /or demonstration of steps having been taken to address addiction or offending behaviour

More information:

Where offending is driven by or closely associated with drug or alcohol abuse (for example stealing to feed a habit, or committing acts of disorder or violence whilst drunk) a commitment to address the underlying issue may justify a reduction in sentence. This will be particularly relevant where the court is considering whether to impose a sentence that focuses on rehabilitation.

Similarly, a commitment to address other underlying issues that may influence the offender's behaviour may justify the imposition of a sentence that focusses on rehabilitation.

The court will be assisted by a PSR in making this assessment.

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**STEP THREE**

**Consider any factors which indicate a reduction for assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

**STEP FOUR**

**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

**STEP FIVE**

**Dangerousness**

**Where the offence is listed in Schedule 15 and/or Schedule 15B of the Criminal Justice Act 2003**

The court should consider whether having regard to the criteria contained in Chapter 5 of Part 12 of the Criminal Justice Act 2003 it would be appropriate to impose a life sentence (section 224A or section 225) or an extended sentence (section 226A). When sentencing offenders to a life sentence under these provisions, the notional determinate sentence should be used as the basis for the setting of a minimum term.

**STEP SIX**

**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with the *Offences Taken into Consideration and Totality guideline*.

**STEP SEVEN**

**Compensation and ancillary orders**

In all cases the court should consider whether to make compensation and/or other ancillary orders. The court will be assisted by the parties in identifying relevant ancillary orders.

Where the offence involves a firearm, an imitation firearm or an offensive weapon the court may consider the criteria in section 19 of the Serious Crime Act 2007 for the imposition of a Serious Crime Prevention Order.

**STEP EIGHT**

**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

**STEP NINE**

**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.