Sentencing Council

Sentencing Council meeting:	**14 June 2019**
Paper number:	**SC(19)JUN03 – General Guidelines and Expanded Explanations (paper 1)**
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1 ISSUE

1.1 To recap on the history of this project: The Sentencing Council's predecessor body, the Sentencing Guidelines Council (SGC), published its *Overarching Principles: Seriousness* guideline in 2004.[1] It remains in force although parts of it have been superseded.

1.2 The SGC *Seriousness* guideline sets out the statutory provisions governing the five purposes of sentencing and the assessment of culpability and harm as set out in the Criminal Justice Act 2003. It gives guidance on the assessment of harm and culpability and lists factors that indicate an increase or decrease in harm or culpability.

1.3 It also gives guidance on reductions for a guilty plea (superseded by the *Reduction in Sentence for a Guilty Plea Definitive Guideline*), the custody and community sentence thresholds (superseded by the *Imposition of Community and Custodial Sentences Definitive Guideline)* and prevalence (which is still current).

1.4 The SGC Seriousness guideline is still relevant in two ways:

1. Providing information when sentencing offences for which there is no offence specific guideline; and
2. Providing context for factors used in sentencing whether or not a guideline is available.

1.5 As outlined above, the *Seriousness* guideline is now out of date in many respects and in June 2017 the Council took the decision to replace it and in the process address some of the issues raised in Professor Bottoms' review of the work of the Council, in particular to provide more guidance on aggravation and mitigation to help sentencers' understanding of the guidelines and to increase transparency.

1.6 In order to make the project manageable the replacement of the *Seriousness* guideline was undertaken in two stages:

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

1. From June to September 2018 the Council consulted on a *General* guideline for use where there is no offence specific guideline. That guideline included expanded explanations for factors that are commonly found in guidelines.
2. From February to May 2019 the Council consulted on providing expanded explanations in all existing Sentencing Council offence specific guidelines

1.7 The consultation on the expanded explanations closed on 23 May 2019. The aim is to consider all the responses at this meeting to enable publication of the explanations on 24 July, alongside the General guideline, and for both to come into force on 1 October.

1.8 At the same time the SGC Seriousness guideline will be withdrawn.

1.9 This is an ambitious timetable, but there are several other definitive guidelines and consultations scheduled for publication in the autumn, so it is desirable to publish next month. This will enable training to be carried out in conjunction with the Judicial College in September and October when training days are already scheduled.

1.10 This is the first of two papers to consider the responses – it is hoped to consider all of the substantive changes to the expanded explanations in the morning session and for the remaining issues and final sign off to be considered at the afternoon session.

2 RECOMMENDATION

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

3 CONSULTATION RESPONSES

3.1 There were 36 responses to the consultation representing a wide range of guideline users and other interested parties.

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

General comments

3.3 Most respondents welcomed the concept of the expanded explanations. Some expressed concern that it would slow down the process of sentencing, but most felt that having all the information readily available would be useful:

> Keep this excellent additional material as training and out-of-court guidance, and do not add yet more verbiage to the guidelines used in open court on the bench. Pressure of case turnover will mean that it does not get read in any case, during the course of a hearing. *Magistrate*

> I am very much in favour of the development of expanded explanations, along the lines that the Council describes in this consultation document. The concept of providing this additional information strikes me as right in principle, insofar as it

contributes to consistency of approach and to transparency, as well as taking advantage of the online format of the guidelines to improve ease of access. *Andrew Ashworth*

I am supportive of the objectives of this consultation to improve consistency and clarity of sentencing decisions and to improve transparency for victims. *Victims' Commissioner*

We welcome the opportunity to provide input to the Sentencing Council proposal to embed additional information into offence-specific sentencing guidelines to make it easier for users to access relevant information. *West London Bench*

As to the concept, we are supportive of the overall aim of this project, which is to *"provide easy access to relevant information without interfering with the ability of the court to sentence appropriately on the facts of the case before it."* While the existing sentencing guidelines already provide a considerable degree of clarity, any increase in the ability of court users and the general public to understand the basis upon which those convicted are sentenced is to be welcomed. The sentencing tribunal will retain an important degree of discretion as to how the guidelines are applied in each individual case - by apportioning weight to relevant aggravating and mitigating factors, after first identifying what they consider to be the appropriate starting point within the applicable range of sentences of the offence under consideration, and thereafter considering any credit resulting from a plea of Guilty. The use of expanded explanations is likely to benefit public understanding of the sentences handed down by the courts following the careful process set out above. *Bar Council*

We support the proposal to embed additional information into offence specific sentencing guidelines, and agree that this will make it easier for sentencers and practitioners alike to access the relevant information. *Law Society*

The extended explanations listed are helpful and will assist sentencers at reaching the appropriate tariff. *Chief Magistrate*

I would like to express my support for the approach suggested, to embed additional information into offence specific guidelines. I agree that the digitisation of the proposed new wording will increase access to the material and will improve transparency related to the factors considered as part of sentencing decisions. *Robert Buckland, Minister of State for Justice.*

The Howard League welcomes the notion of expanded explanations and the encouragement they will be able provide to judges and magistrates to turn their minds to the detail of people's lives and experiences as part of the sentencing process. *Howard League*

3.4 Notable exceptions to the general approval were the Council of HM Circuit Judges and the Criminal Law Solicitors Association (CLSA):

Inevitably our responses reflect our position as professional sentencers in the Crown Court. We appreciate the proposed expanded explanations are for wider professional and public consumption. There may be tension between those perspectives which is not necessarily easy to reconcile. Nonetheless we take the view that guidelines hitherto have largely succeeded in achieving that. We respectfully question whether these proposed guidelines, with some exceptions, will do the same. *Council of HM Circuit Judges*

> The CLSA would be grateful if the Council would consider the need for certainty and clarity as opposed to constantly changing and reviewing best practise. Perhaps more training for the Judiciary as to what is expected of them when sentencing is considered, as opposed to tinkering around the edges, may be more appropriate. *CLSA*

3.5 Despite their strong reservations both the Council of HM Circuit Judges and the CLSA commented positively on some of the proposed expanded explanations and made suggestions for changes to others.

Question 1: Does the Council agree to continue with the project to add expanded explanations to factors in offence specific guidelines?

Information on fines, community orders and custodial sentences

3.6 In general, the provision of this information was welcomed. There were some suggestions for changes or additions.

3.7 The West London Bench made the following comments and suggestions on the information in the fines dropdown box:

> It is particularly important to stress the need to try and get reliable financial means information from defendants to aid in setting the appropriate level of financial penalty. However, in the absence of such information, or where there is sufficient doubt about the reliability of such information, it is important to provide guidance on what the magistrates should do.
>
> - It is important that the court should ask appropriate direct questions to try and ascertain as much financial background information as possible.
> - The court should not only draw reasonable inferences (as stated in Annex A) but also should apply common sense and draw on life experiences to set the level of the financial penalty, stating (for the record) any key assumptions made to justify the penalty.
> - We note that it is proposed to provide the following advice: "*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.*" We strongly support this.
> - We would suggest that the wording is amended to read "*Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived **(if any)** through the commission of the offence* …"

3.8 It is not proposed to make any changes based on these suggestions.

3.9 The CLSA commented:

> Whilst it has to be right that no person should gain economically from any criminal activity, this to an extent is dealt with by the Proceeds of Crime Act, and of course, the Courts have made it clear throughout the past 12 years that it is not cheaper to offend than comply. However, it is difficult to assess as to how any benefit can be quantified. Such benefit may be subjective or speculative, and therefore undermines

the purpose of any sentence as proposed. Equally, in adhering to the formula as proposed for assessing a financial penalty, this immediately takes away any fairness, as it does not take into account the relevant expenses per household, merely a straight line fine which may well be hugely disproportionate in dealing with the ability to pay. This seems both arbitrary and unfair in the extreme. Often, those who are perceived to earn the most have pro rata much higher overheads.

The sentencing of Organisations may have a disproportionate impact within the proposals. It appears that the Courts are expected to overlook the true economic impact upon an Organisation and its ability to continue functioning without the loss of employment under these proposals.

3.10 The Justices' Clerks' Society (JCS) suggested:

We propose that the phrase "gain made as a direct result of offence" be amended to "actual gain made as a direct or indirect result of offence". We envisage this would then cover a case where a defendant received the unexpected gain from another after the commission of the offence. We would suggest adding "the court, in calculating the fine, should be mindful that a substantial fine, may force a company into administration resulting in a disproportionate impact to that intended by the sentence"

3.11 Release (a charity with expertise on drugs and drugs law) commented:

In general, the inclusion of additional material on fines, community orders, and custodial sentences in all relevant guidelines is a good idea, as it will allow the public to access all information in one place without the need to refer to other resources. However, in relation to fines 'removal of gain' is described as an objective of sentencing. Whilst it is certainly a matter of consideration - as is already addressed in the MCSG under "Offence committed for 'commercial' purposes" - it is not an objective in the same way as punishment, deterrence, or of course reparation. There is the potential for an excessive financial penalty to be ordered where the amount determined to be applicable for the offence and circumstances of the defendant is then increased to take into account removal of gain. Further clarification should be provided to avoid this occurring.
Additionally, where relevant, further information should be given on double recovery. This should not just apply in cases where compensation is awarded, but also those where another financial order may be made. For example, if a confiscation order (or other ancillary order) is applied for or separate Proceeds of Crime proceedings have been instituted or are anticipated, a financial penalty as a substantive sentence would then amount to double recovery.

3.12 It is proposed to add the wording in the first bullet point on page 1 of Annex A, to ensure that the basic principles of setting a fine are not overlooked. The suggestion that reference to 'indirect' gain be added has not been adopted as this is already covered by reference to avoided costs and operating savings. Other gains are not excluded – the explanation refers to 'economic benefit [..] including'. Concerns raised about double recovery in cases of confiscation are not valid as any fine paid is deducted from the available amount for confiscation (s9(2)(a) POCA 2002). In any event, the reference to avoiding double recovery was not supposed to be limited to the consideration of compensation. This

has been made clearer by making this a separate bullet point. Points raised about the impact of high fines on organisations could be addressed by adding the suggested wording (taken from the Health and Safety guideline) in the penultimate bullet point.

3.13 There were also suggestions for amending some of the wording on community and custodial sentences. As this information is all taken directly from the *Imposition* guideline, and we did not consult on making any changes to that guideline (apart from the reference to guidance on ordering PSRs – discussed below), it is not proposed to amend this wording as part of this exercise. The suggestions will be retained and can be considered if and when the *Imposition* guideline is revised.

Question 2: Does the Council agree to make the suggested changes to the fines explanation?

3.14 There was a separate question in the consultation related to the proposal to link to a practice direction on when ordering a PSR may be unnecessary. At present no such practice direction exists, but respondents generally were keen for the provision of a link to any relevant guidance. The Prison Reform Trust (PRT), made the practical suggestion that the link in the community orders section should be moved to immediately under where reference is made to ordering a PSR.

3.15 In addition, some issues of a more general nature were raised by Andrew Ashworth:

> I think it will be helpful to provide the additional information on Fines, Community Orders and Custodial Sentences, thereby providing more information from the Imposition guideline in particular. However, at this point and elsewhere in the consultation document, I am a little unclear about the link with other sources of guidance such as a Criminal Practice Direction. There are two issues here. One is accessibility: there is reference here to a link "to forthcoming guidance (probably in a Criminal Practice Direction on when a PSR should be obtained". At M17 later there is direct advice to sentencers to obtain a PSR in cases of steps being taken to addressing addiction or offending behaviour. (There is also a reference to information in the Crown Court Compendium just before Q. 22.) Are there sufficient pointers, or is there sufficient ease of access, to these other sources? Do the Criminal Procedure Rules have a role to play too? How closely will the new guidance fit with the references to PSRs in the *Imposition* guideline, pp. 6 and 8? The second issue is one of authority: do these different sources have the power to lay down guidance to sentencing judges? The Council has the power to lay down definitive guidelines, but what of the other sources?

3.16 There are references to external sources of guidance at various points in existing and proposed guidelines. The Council is not in control of the accessibility of those sources, though we understand that there are plans to fully digitise the Criminal Procedure Rules and Criminal Practice Directions. In the meantime, all the guidelines can do is link to the page where the external sources can be found and provide the necessary information to locate the relevant information.

3.17 As to the authority of these sources: Criminal Procedure Rules and the Criminal Practice Directions have the authority of secondary legislation and therefore courts are obliged to follow them. There is no question of any CPD guidance on PSRs conflicting with that in the Imposition guideline or in the expanded explanations. There is, however, some uncertainty as to if and when a practice direction on PSRs will be issued. It is therefore proposed that the Council takes the decision to provide the link (in the places indicated at Annex A) if and when the guidance becomes available. The consultation response document can make it clear that this will be done and give the rationale for doing so.

3.18 Several respondents commented on the fact that some mitigating factors make specific reference to the desirability of obtaining a PSR:

- M8 – involved through coercion, intimidation or exploitation
- M13 – Age and/or lack of maturity
- M14 – Sole or primary carer
- M15 – Mental disorder or learning disability
- M17 - Determination to address addiction or offending behaviour

3.19 While most respondents were in favour of these reference one (the CLSA) read this as though it meant that in other circumstances the explanations were discouraging the ordering of a PSR. As the CLSA is alone in this misconception, no change is proposed to address it (though the response document can deal with the point).

3.20 The PRT thought that the guidelines should go further:

> The guidance should therefore make clear that whenever a woman defendant is before them, sentencers should make enquiries about whether she has experience of domestic abuse and whether this may be an underlying factor in her offending. Some women may be coerced into offending in distinct ways, including trafficked women, foreign nationals and those from minority ethnic and religious groups, as well as women with learning disabilities who are particularly vulnerable to abuse.

3.21 Any such guidance (even if considered desirable) is outside of the scope of this project. Any reconsideration of the guidance on PSRs would necessitate a revision of the Imposition guideline, which would require separate consideration and consultation.

Question 3: Does the Council agree to provide a link when (if) a practice direction is issued, but not to make any other changes to the general approach to PSRs?

4 AGGRAVATING FACTORS

Statutory aggravating factors

4.1 Most respondents agreed with the expanded explanation for previous convictions and any criticism related to whether it was necessary to tell sentencers what they already

know. Some respondents suggested changes or additions to the guidance on previous convictions:

> I wonder whether, in relation to SA1, the factors go far enough. Factor 5 refers to cases of previous convictions where there is an "underlying problem (such as addiction) that could be addressed more effectively in the community." This is rather less vigorous than the passage included in several Council guidelines. In the *Burglary Offences* guideline, for example, at p. 8, there is reference to the possible suitability of a community order with a drug rehabilitation requirement as "a proper alternative to a short or moderate custodial sentence." Could the wording in [the explanation] be equally specific? Courts are urged in point 12 to take a "rounded view" of the criminal record rather than to add up the previous offences/sentences. This is a gesture towards the "just and proportionate" phraseology of the guideline on *Offences taken into Consideration and Totality* which gives no assistance to sentencers at all. *Andrew Ashworth*
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> The guidance mentions terms such as "*Where the previous offence is* ***particularly*** *old*…" (bullet point 9) or "*Where there has been a* ***significant*** *gap between* …" (bullet point 10) – my emphasis. These are rather imprecise terms, capable of various interpretations. For consistency, is it possible to provide some guidance on what might be considered "particularly old" or a "significant gap" in various circumstances?
>
> - What factors / features of the offence and/or the offender should be considered when assessing whether any previous offence is old enough to be ignored or given almost no weight when considering the sentence?
> - Do these factors vary depending on factors such as the age of the offender (e.g. should it be different for young adult offenders aged 18 – 22?) or for particular offences (e.g. more serious previous relevant offences should be considered as an aggravating factor for longer than a less serious offence).
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> Care should be taken when assessing the time period lapsed since previous relevant offences to ensure that there are no factors which reduce the significance for this offender of any apparent period of non-offending, such as a significant period in custody or absence from the UK. Perhaps this could be noted as a bullet point? *West London Magistrates' Bench*
>
> The expanded explanations are useful, but could go further in relation to clarifying what might be considered as an 'old conviction'. Whilst it is important to avoid being too proscriptive, to allow for individual circumstances to be taken into account, it would be useful not have some guidance on what passage of time is likely or unlikely to cause a conviction to be classed as old or "particularly old".
> The recognition that "numerous and frequent convictions might indicate an underlying problem (for example addiction)" is welcomed but insufficient. It should be highlighted that substance use disorder is a mental health condition (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition). People who use drugs problematically commit a criminal offence - drug possession - as part of their health condition, and are therefore perhaps more likely to numerous and frequent previous convictions of the same type which may be seen as "an indication of persistent offending". This explanation can also be extended to cover acquisitive crimes committed in order to fund the purchase of drugs. *Release*
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> We would propose adding that "The court should consider that an apparent gap in offending may be due to a defendant remaining in custody whilst serving a custodial sentence, where this is evidenced on an antecedent record". *JCS*
>
> With the migration of the guidelines online, there is an opportunity to link to supporting evidence to assist sentencers in interpreting the directions and the

reasons behind them. Therefore, we recommend that this section includes a link to the Ministry of Justice research on the effectiveness of community orders and short sentences.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706597/do-offender-characteristics-affect-the-impact-of-short-custodial-sentences.pdf

In considering this factor, it is vital that sentencers are fully informed of any underlying issues which may be contributing to the individual's offending behaviour. Therefore, we recommend that this factor is cross referenced to relevant mitigating factors, including M13 (age and/or lack of maturity) and M16 (mental disorder or learning disability). Specific reference should be made in this section to Liaison and Diversion services and their role in providing the courts with detailed information about a defendant's mental health problems, learning disability, autism, substance abuse and/or communication requirements. In addition, we recommend the following changes to point 5:
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 **or appropriate**. *PRT*

4.2 In response to Andrew Ashworth's comments (which were not repeated by practitioners), the expanded explanations are in addition to, not in place of, the guidance on suitable alternatives to custody in some offence specific guidelines. It is not proposed that the Council should adopt the various suggestions that the explanations should define terms such as 'particularly old' as any attempt to do so would create more problems than it would solve. The request to include more detail on offenders with drug addiction or mental health conditions, would overcomplicate the explanation particularly as there are mitigating factors that relate to these issues. References to mitigating factors could be included, but as previous convictions apply to every guideline, such references would not be targeted to the case before the court and may serve just to clutter up the explanation. The suggested addition from the JCS appears unnecessary. A link to MOJ research on effectiveness would not be appropriate in practical guidance such as this. The suggested addition by the PRT of the words 'or appropriate' could be made if the Council feels that it adds anything useful.

4.3 The expanded explanations for the other statutory aggravating factors were broadly supported by respondents and no changes are proposed.

Question 4: Does the Council agree not to change the explanations for the statutory aggravating factors (SA1, SA2, SA3, SA4)?

4.4 Birmingham Law Society made the following comment:

Aggravating factors A1, A2 and A3.

4.5 Dr Carly Lightowlers made detailed observations on the factor 'Commission of offence whilst under the influence of alcohol or drugs' and makes a number of recommendations (edited):

Recommendation 1: Include a clear explanation, to which the guidelines can point, as to why alcohol or drug intoxication constitutes an aggravating factor
There is no clear rationale as to why a person who voluntarily consumes alcohol or drugs (AOD) and commits a (violent) offence is more culpable than a person who commits the same offence absent AOD consumption. The implicit assumption underpinning the guidance is that offenders who voluntarily become intoxicated are more culpable, presumably because they realise (or ought to realise) that this may lead to uninhibited conduct with unpredictable results. Yet such clarity would further assist in indicating how the aggravation of being 'under the influence of alcohol or drugs' is intended to be used across a variety of crime types; given that the strength of association is known to vary between AOD and crime type and by substance used.
Recommendation 2: Provide a clear explanation, to which the guidelines can point, for the lack of distinction between prescribed and recreational substances (both illicit and licit).
Reference to "being under the influence of alcohol or drugs" suggests both alcohol and drugs aggravate similarly in sentencing. Presumably based on the effect they have on decision making and culpability. Yet, there is substantial evidence to suggest alcohol use is significantly associated with violence but less evidence to link other drug use with violence. Sentencers are asked to consider intoxication from both alcohol and drug use similarly notwithstanding their differing legal status. As sentencing is known to be shaped by normative moral and social judgements about blameworthiness (rather than being a neutral practice), in practice this leaves considerable room for confusion and disparity in application (e.g. the relative weight that should be afforded based on aggravation in each instance) given that drug intoxication potentially represents further illicit behaviour. As the factor is currently described it is also potentially problematic for cases in which the interaction between prescribed medications and the consumption of non-prescribed AOD might impact upon offending behaviour.
Recommendation 3: Provide a clear definition or explanation of what is meant by "contributed to the offending" to assist sentencers achieve consistency in interpretation.
It is unclear how intoxication as having "contributed to the offending" will be established in practice. Whilst much of the literature points to an association between AOD (especially alcohol) and violence, this does not mean that intoxication is necessarily the cause of such behaviour or sufficiently explains it. Indeed, it is likely that the association between AOD and violence is a complex interplay of several (biological, psychological and social) factors including the social and environmental context for a particular offence. Whilst the Sentencing Council are careful to avoid causal language in their description (which is to be commended) it is still unclear how it will be established that the intoxication "contributed to the offending". This terminology is thus likely to produce complexity and a lack of coherence in sentencing as sentencers are faced with the task of determining whether a person was relevantly intoxicated based upon the 'lay knowledge' they hold about the effects of alcohol and other drugs. This again is likely to introduce a degree of variability in practice and is not clarified in the expanded definition.
Recommendation 4: Provide a clear definition or explanation of what is meant by "voluntary intoxication" to assist sentencers achieve consistency in interpretation.
It is unclear how the voluntary nature of intoxication (contributing to the offence) will be established in practice. Whilst I am sympathetic to the sentiment of making a distinction between self-induced intoxication and intoxication that is not self-induced. Challenges are presented when considering those with AOD addiction. The Sentencing Council acknowledge that in such instances an individual's intoxication may be considered in-voluntary. However, scientific debate in this field is ongoing and emerging evidence from a study of Magistrates in England and Wales points to

the varied interpretation of the role of intoxication in the case of drug addicted and intoxicated offenders. Establishing voluntary intoxication may also prove problematic for cases in which the interaction between prescribed medications and the consumption of non-prescribed AOD might impact upon offending behaviour.

Recommendation 5a: Clarify how 'Engagement with assistance in dealing with the addiction' in A1 and overlap with mitigation on the basis of 'determination, and/or demonstration of steps taken to address addiction or offending behaviour' is to be reconciled.

In its currently format, the way in which overlaps in mitigating factors will be dealt with is not clear. The Sentencing Council suggest the "court should have regard to the extent to which the offender has engaged with any assistance in dealing with the addiction". Precisely what is meant by this is not clear as, it shares considerable overlap with the mitigating factor of "determination, and/or demonstration of steps taken to address addiction or offending behaviour". As the new expanded explanations emphasise that "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", this introduces a degree of confusion - especially as further elaboration on this mitigating factor is also on offer as part of the new expanded explanations.

Recommendation 5b: Clarify how 'Applicable even where the offender has acted out of character' in A1 and overlap with other mitigating factors (detailed below) is to be reconciled.

The Sentencing Council suggests the aggravating factor of being 'under the influence of alcohol/drugs' is "applicable even where the offender has acted out of character as a result of being intoxicated". On the basis that "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". This clearly signals overlap with two mitigating factors in the assault guidelines; "Good character and/or exemplary conduct" and an offence being an "isolated incident".

4.6 The PRT were concerned that the explanation failed to take into account the difficulties that offenders may have in accessing the services to address mental health issues and related substance misuse.

These bullet points are misleading and give cause for concern. The relationship between substance misuse and mental ill health is more complex than this statement suggests. There is clear evidence that misuse of drugs and alcohol is often related to poor mental health. The use of the words 'voluntary' and 'voluntarily' fail to take into account that individuals with mental health problems or learning disabilities can find it hard to access medical advice and maintain contact with mental health services. Access can be particularly problematic for people from black and minority ethnic communities who experience poor mental health, and for women who commonly have histories of abuse and trauma. Consequently, individuals may self-medicate by using drugs and alcohol. Many local areas have a reduced availability of and long waiting lists for drug and alcohol services (due to significant public health funding cuts, for which offenders should not be penalised), especially for people with co-occurring mental health problems and/or learning disabilities. Unless these social realities are recognized, sentencing decisions are bound to have unintended unfair consequences on vulnerable and disadvantaged individuals.

4.7 Release made related points:

We welcome reference to the fact that "in a case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary" but the following

assertion "that 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" requires further explanation.
It must be recognised that substance use disorder is a chronic, relapsing condition that can exist for a number of years before someone identifies that they even have an issue, let alone feels in a position to seek help. This is exacerbated by the stigma surrounding substance use, which can deter people from accessing assistance.
There is a risk of "assistance in dealing with the addiction" being narrowly interpreted to mean treatment related to the use of drugs and/or alcohol only. We submit that a wider meaning should be attributed to the term to ensure that it also encompasses assistance related to the root causes of a person's substance use. Many people who have a substance use disorder also have mental health conditions. The ease with which someone with such complex needs to access assistance is often limited as those with a dual diagnosis of substance use and mental health are frequently passed back and forth between services, with each disputing whether the drug use is the symptom or cause of the mental health issue(s) and insisting that the other problem must be resolved before help can be provided. Therefore an attempt to access assistance may have been made, but been unsuccessful through no fault of the defendant's.
There are also specific issues faced by women and people of colour, and services are failing to ensure that the treatment provided meets their specific needs.
In light of the above, the fact that someone has not sought or accessed assistance in relation to their substance use, or associated issues, must not be seen as an indicator that they do not have a problem, or that their intoxication is voluntary.

4.8 Most practitioners considered that the proposed explanation was useful. Extending it to cover all of the points raised above could make it less clear rather than more so. The recommendations from Dr Lightowlers that various terms should be clarified do not immediately suggest how this could be done. Some suggested wording has been added to deal with the point that the licit or illicit nature of the intoxicant should not influence this factor.

4.9 It is submitted that the interrelation between this aggravating factor and the mitigating factor relating to addressing offending behaviour is not problematic – is some cases they may fairly balance each other out, in others one will carry more weight than the other depending on the circumstances. Equally an offender may still be able to rely on the ‘good character’ and ‘isolated incident’ factors if they apply, which will be balanced against the ‘influence of drugs or alcohol’ factor.

4.10 The difficulty of accessing help with addiction should not adversely affect offenders, because if they have not had access to assistance, they should not be penalised for not engaging with it. If that was not clear from the explanation, perhaps the wording could be adjusted.

Question 5: Does the Council wish to make any changes to the explanations for A1?

4.11 There were fewer comments on the explanation relating to membership of a group but concerns were raised by PRT that the reference to organised criminal networks could lead to a person named on the London gangs matrix being subject to this factor without further evidence. This concern overlooks the fact that the explanation states that mere membership of a group does not increase the sentence. The PRT also recommended that this factor should be cross referenced to the mitigating factor relating to involvement due to coercion, intimidation or exploitation. The difficulty with that suggestion is that the two factors do not appear in the same guidelines. If the Council felt that more guidance for those in a lesser role should be included, suggested text from the mitigating factor is provided.

4.12 Release suggested that the reference to criminal networks should also be qualified by explicit reference to the possibility of exploitation (they cite the exploitation of young people in criminal gangs). This factor does not currently appear at step two of any drugs offence guidelines, and it is submitted that the reference to role will be clear to all sentencers and it would not be helpful to repeat the same information within this explanation.

4.13 There were few references to the factor relating to the use or threat of a weapon, most respondents who commented agreed with the explanation. The MA, however, said:

> Whilst we appreciate the aim of providing further guidance to sentencers, we do not feel the explanation will be that helpful in relation to this factor which is often a difficult one for sentencers to negotiate.

4.14 There were no suggestions for how the explanation could be improved and therefore no changes are proposed.

Question 6: Does the Council wish to make any changes to the explanations for A2 or A3?

Aggravating factors A4, A5 and A6

4.15 In general comments on these explanations were supportive, or felt that they stated the obvious. The exception was the CLSA who felt that the explanations were unhelpful in that they introduce subjectivity and decrease certainty.

4.16 The West London Bench suggested that reference could be made to the role of the offender in A4 ‘Planning of an offence’. Proposed wording has been added to address this. They also suggest that the explanation could make it clear that the degree of success or failure of the implementation or execution of any planning should not be a consideration. The Insolvency Service asks that reference be made to planning being inferred from the length of time over which the offending was committed. The JCS suggests that planning could be inferred from the commission of more than one offence in a short period. It is not proposed to add any further wording to address these suggestions.

4.17 Several respondents noted the similarity between factors A5 and A6 and queried why both were included. It should be noted that A6 does not appear in any offence specific guidelines and was included in this consultation only because it is in the General guideline. The Insolvency Service which prosecutes offences many of which are not currently covered by offence specific guidelines was supportive of the explanations for both A5 and A6 but asked for guidance as to what would be considered a high level of profit. They suggested this could be related to a percentage of legitimate income/ profit where offending is in a commercial context. It is not proposed to attempt to define this.

Question 7: Does the Council wish to make any changes to the explanations for A4, A5 or A6?

Aggravating factors A7, A8 and A9

4.18 The explanations for these factors were widely welcomed. The Council of HM Circuit Judges considered the explanation of A7 to be useful and made a suggestion:

> *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*. *These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.*
>
> These are obvious examples but nonetheless helpful. The last sentence might be better worded as follows: … and do not necessarily indicate that the offender had a significant level of responsibility towards the victim on which the victim would be entitled to rely.

4.19 Several respondents suggested adding examples relating to domestic abuse or other instances of coercive behaviour. It is not proposed to adopt these suggestions as these are not excluded by the wording and are specifically covered by other factors.

4.20 The offence specific guidelines and step two factors to which this explanation would be applied are:

Guideline	**Factor**
Assault occasioning actual bodily harm	Abuse of power and/or position of trust
Causing grievous bodily harm with intent	Abuse of power and/or position of trust
Common assault	Abuse of power and/or position of trust
Inflicting grievous bodily harm / wounding	Abuse of power and/or position of trust
Aggravated burglary	Abuse of power and/or position of trust
Non-domestic burglary	Abuse of a position of trust

Harassment / Stalking (fear of violence)	Using a position of trust to facilitate the offence
Harassment/ Stalking	Using a position of trust to facilitate the offence
Unlawful act manslaughter	Abuse of a position of trust
Possession of indecent photograph of child	Abuse of trust
Communication network offences	Abuse of trust

4.21 The proposed explanation is clearly relevant to the factor as it will apply in most of these guidelines, but perhaps less so where abuse of trust may not relate to the relationship between the offender and the victim. Additional wording is proposed to cover this.

4.22 Suggestions were made by respondents for additional examples of behaviour that would come within A8:

> Perhaps a simple example would be where there has been gratuitous destruction and damage to property, as part of a domestic burglary – this might include where there has been significant use of graffiti within the property or soiling / urination / defecation within the property (if not separately charged as Criminal Damage). *West London Bench*
>
> We would add "soiling the victim as an act humiliation, e.g. following or during an assault" *JCS*
>
> Another commonly encountered example is in the context of burglary, namely gratuitous damage of the property beyond the damage caused by the burglary itself. *Law Society*

4.23 The difficulty with these suggestions is that they are less likely to be of general application and/or they are covered by specific step one factors in the relevant guidelines. A slight change of wording is proposed in relation to where such behaviour results in separate charges.

4.24 Andrew Ashworth commented on the explanation relating to vulnerable victims at A9:

> The expanded explanation in Appendix A is helpful, but it relates only to who should be treated as a vulnerable victim, and not to who should not. For example, there are quite a few Court of Appeal cases that have ruled that a particular type of victim does not satisfy the definition of "vulnerable" (e.g. *Sayed* [2014] 2 Cr App R (S) 39). While the Council may not wish to expand the explanations to give full coverage of CA decisions, it ought surely to offer some general guidance as to when a victim may not be considered to be vulnerable. Otherwise, it seems odd when a concept such as "vulnerable victim" requires definition, and the only definitional pointers given in the expanded explanation are positive factors and not negative factors. If the purpose of the expanded explanations is to offer guidance to sentencers and to conduce to greater consistency of approach, surely the text should go further than the present A9?

4.25 The JCS suggested:

> We would highlight that a victim, who would otherwise not be vulnerable may become vulnerable. This may include where they are assaulted while trapped in a confined space, whether or not isolated from others, or whilst they have become

temporarily immobile or in state where they are vulnerable to further assault e.g. on the ground.

4.26 It is submitted that the explanation as currently worded does serve to guard against applying vulnerability too widely or giving inappropriate weight to it and that no useful addition suggests itself. The JCS suggestion should already be covered by the fifth and sixth bullet points, unless they are not sufficiently clear.

Question 8: Does the Council wish to make any changes to the explanations for A7, A8 or A9?

Aggravating factors A10, A11 and A12

4.27 The explanations for these factors were widely supported. The CPS and MoJ suggested that A10 should explicitly reference those participating in the democratic process by adding "or was engaging in the democratic process, or was targeted because of that engagement" to the current wording. The West London Bench asked for examples of public facing roles and suggested 'jobs such as: Public Transport Driver or Conductor (or similar, like Ticket Inspector); Traffic Warden; Taxi Driver; Postman; Bank Clerk / Teller; DWP Administrative Assistant / Clerk; Refuse Disposal Operative; Meter Reader; Airline Employees such as Check-In staff or Cabin Crew'. The JCS suggested 'that the guideline should highlight that the public facing service is key rather than whether the victim is privately or publicly employed e.g. a security guard.' Similarly the PRT called for greater clarification as to whether the factor applies to victims in public facing roles more generally (which would include shop staff) or only to those in public sector roles to ensure consistency.

4.28 The provision of examples could be counterproductive but some additional wording is suggested to A10 to clarify the wide application of this factor.

4.29 Release suggested that in the context of drug offences the role of the offender would be relevant to the extent to which A11 would apply. The MA and the West London Bench suggested that examples would be helpful in the explanation for this factor. The provision of examples is likely to be problematic as their relevance would depend on the type of offence. As this factor relates to harm – it is submitted that role is not a relevant consideration. The only change proposed relates to the treatment of separate charges.

4.30 The PRT note that A12 may apply disproportionately to women

We refer you to pp.16-17 of PRT's response to the Government's Domestic Abuse Bill where we note the risks involved in creating a statutory aggravating factor regarding the impact on children. The Sentencing Council Overarching Principles: Domestic Abuse does include as an aggravating factor 'Impact on Children' and we would be interested in whether there has been any research about what effect this is having on sentencing. The guidance could be improved to alert sentencers to the potential impact of reliance on this aggravating factor in cases involving women with dependent children who are accused of domestic abuse

offences, and who, in the context of a controlling relationship, may be using reactive violence against a primary aggressor. In such instances, sentencers should use their discretion to take into account all the circumstances of the case in order to avoid unjust outcomes, including the imposition of prison sentences in cases which would not otherwise have merited this.

Question 9: Does the Council wish to make any changes to the explanations for A10, A11 or A12?

Aggravating factors A13, A14 and A15

4.31 Again these explanations were generally welcomed. Some respondents suggested that examples would be helpful as part of the explanations.

4.32 In relation to the explanation for A13, Release suggested that 'it should be expressly stated that unsophisticated, isolated incidents may not aggravate the offence'. The JCS suggested adding to the explanation 'that this should include attempts to place blame on others, where others have not suffered'.

4.33 In relation to the explanation for A14 the PRT commented:

> We welcome the inclusion of reference to the mitigating factor of age and lack of maturity in the expanded explanation for this aggravating factor. However, a reference to the mitigating factor M16 mental disorder or learning disability should also be included. People with a learning disability or autism may be disproportionately liable to consideration under this aggravating factor. People with a learning disability may be acquiescent and suggestible. When under pressure, they may try to appease people. This can make them vulnerable to coercion and giving false information to authorities. Furthermore, people with autism may have difficulty in recognising and understanding the feelings and emotions of others. This may mean they act in ways which could be seen as inappropriate or even callous. Therefore, we recommend that this explanation is amended to take account of these protected characteristics.

4.34 No changes are proposed arising from these suggestions

Question 10: Does the Council wish to make any changes to the explanations for A13, A14 or A15?

4.35 Several other respondents welcomed the cross reference to the mitigating factor of age and lack of maturity but questioned why it was not mentioned in other aggravating factors:

> It is not clear to us the criteria by which those aggravating factors which include the expanded explanation about young adults were chosen. In our view, maturity and age are just as relevant for other factors e.g. planning, committed in presence of others, commission of further offences etc. *T2A*
>
> We note that a lack of maturity in an offender aged 18-25 is reflected in these explanations. In principle, we welcome the proper and appropriate reflection of immaturity in the sentencing exercise, as indeed paragraph 4.14(d) of the latest version of the Code for Crown Prosecutors does. We question however whether it is appropriate to reflect it in these two particular factors rather than more generally. For

> instance, maturity could equally be said to be relevant to the likelihood that an offender would heed warnings from others. *CPS*
>
> Whilst we understand why this expanded explanation [re age and lack of maturity] is included here [A13 and A14] why is it not applicable in many more expanded explanations? *Council of HM Circuit Judges*

4.36 In addition to A13 and A14 the cross reference to the mitigating factor on age and immaturity is also in the explanation for A2 – Offence committed as part to a group. Other factors where the Council may wish to consider adding a cross reference could include:

> A3: Use or threat of a weapon – relating to reduced ability to evaluate consequences of actions and susceptibility to peer pressure.
>
> A8: Gratuitous degradation of victim – particularly relating to the likelihood of misusing social media
>
> A11: Others put at risk - relating to reduced ability to evaluate consequences of actions and limit risk taking
>
> A12: Offence committed in the presence of others – relating to likelihood of offending in group situations
>
> A15: Failure to respond to warnings - relating to reduced ability to evaluate consequences of actions and susceptibility to peer pressure
>
> A16: Offence committed on licence PSS or court orders - relating to reduced ability to evaluate consequences of actions limit impulsivity

4.37 There is clearly a danger of diluting the effect of the cross reference by making it ubiquitous – the Council's intention was to draw particular attention where it seemed most relevant. The evidence we have does not suggest that young adults are disproportionately likely to offend using weapons, and even if there are characteristics of immaturity that might be associated with the use of weapons it would be difficult to justify caveating this factor as sentencing policy has sought to deter the use of weapons. Of the other suggestions above, A15 would have a similar justification to A13 and A14.

Question 11: Does the Council wish to cross reference to the Age or lack of maturity mitigating factor from any other aggravating factors?

Aggravating factors A16, A17 and A18

4.38 The JCS and West London Bench suggested that the explanation for A16 should explicitly refer to the time that has elapsed since the commencement of the order or licence. Suggested wording has been added to cover this point.

4.39 The PRT had significant misgivings about including post-sentence supervision in this factor and its explanation arising from reports citing that PSS 'has had no discernible impact on reoffending but has led to "an expensive merry-go-round" of people being repeatedly released, breached and recalled to custody. Recall rates have increased significantly since

the introduction of the measures. For men recall rates have increased by 29%, while for women they have risen by 166%. This has occurred without any tangible gains in rehabilitative outcomes, which have remained stubbornly high, with nearly two-thirds (64 per cent) of short-term prisoners going on to reoffend'. They go on to say:

- 'An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending'. There is no corresponding obligation in statute and the logic is unclear. All citizens are under the same obligation to obey the law – you can't be under more or less of an obligation. Furthermore, the wording of the explanation fails to recognise that desistance is a joint venture, and that the probation service or other supervising agencies also have an obligation to assist the person to desist from crime. The wording here places all the responsibility firmly with the person under supervision. No account is taken of the contribution of the failures of rehabilitation services to reduce the likelihood of reoffending – failures which have been well documented in successive inspectorate reports. Relevant factors include a failure to provide housing, lack of training and employment opportunities, missed appointments cancelled by offending managers, or a failure to provide continuity of mental health or social care and treatment for drug or alcohol addictions.
- 'The extent to which the offender has complied with the conditions of a licence or order will be a relevant consideration'. Greater clarity is needed here on how compliance with licence or order conditions should be taken into account. Lack of compliance may suggest that conditions are inappropriate to the circumstances or characteristics of the offender. For instance, childcare responsibilities may mean an individual is unable to meet appointments at certain times. In addition, people with a learning disability may find it difficult to understand the conditions attached to a licence or court order.
- 'Where the offender is dealt with separately for a breach of a licence or order regard should be had to totality'. Here it should be borne in mind that a return to custody is likely often to represent a far more punitive consequence than the behaviour would warrant in any other circumstance. Again, impacts on dependent children of a parent/primary carer being returned to custody can be particularly harsh.

4.40 It is not immediately apparent how these concerns could be taken into account in the explanation. The Council may consider that reference could be made to having regard to the level of support that an offender subject to licence or PSS has received, or to attempts made by the offender to desist from offending.

4.41 The JCS suggested changes to the guidance on A17:

> We would propose that the guideline states "significantly" more serious" to mark the significant weight which should be attached to any offence committed in custody. We would highlight that offences, particularly of violence, may lead to the risk of reprisals by other inmates and escalation to others. We would propose that magistrates be reminded to give particular consideration to committing the case to the Crown Court for sentence. This would be due to the likely sentence but also to mark the seriousness of the offence to the defendant and others in the same prison establishment.

4.42 The PRT and Howard League raised a concern about this guidance:

> We are concerned that this aggravating factor and the accompanying explanation do not take sufficient account of the mitigating circumstances which may contribute to offending in custody. Offences committed in custody may result in part from poor treatment, from a failure on the prison's part to provide adequate protection for the defendant's personal safety, or from the unique stress inherent in incarceration. Therefore, the wider context of the treatment and conditions in prison which may have contributed to offending by an individual need to be taken into account in mitigation. *PRT*

> The proposed expanded explanation describes offences committed in custody as more serious, reasoning that they undermine the need for control and order which is necessary for running prisons and maintaining safety. The expanded definition as it stands fails to take into consideration the dire state of prisons today and how that may adversely impact on people's behaviour. The expanded definition ought to recognise that offences committed in custody may be a product of a stressful environment that causes some people, especially those who are young and vulnerable, to be hypervigilant. *Howard League*

4.43 The expanded explanation relating to offences committed in custody does not prevent relevant mitigating factors (which will vary depending on the details of the offence and offender) being considered.

Question 12: Does the Council wish to make any changes to the explanations for A16, A17 or A18?

Aggravating factors A19, A20, A21 and A22

4.44 There were very few comments on these factors aside from agreeing that the explanations were useful. In particular the guidance on prevalence was welcomed. The JCS suggested adding a reminder to A20 'that terrorism cases may only be dealt with, in the magistrates' court, by DJ(MC)s authorised by the Chief Magistrate or his/her nominated deputy'. This is a procedural point rather than a guideline issue and so it is not proposed to add it.

4.45 The PRT suggested adding a link to the information on domestic abuse in the Chapter on Gender in the Equal Treatment Bench Book to the explanation at A19.

Question 13: Does the Council wish to make any changes to the explanations for A19, A20, A21 or A22?

5 MITIGATING FACTORS

Mitigating factors M1, M2 and M3

5.1 Respondents were generally supportive of these explanations, though there were some suggestions for changes. The CPS queried the relevance of the factors M1 and M2 in some situations:

We invite consideration as to whether a lack of previous convictions or good character should be relevant considerations when considering offences such as fraud by abuse of trust, or misconduct in public office, or corruption or improper exercise of police powers and privileges contrary to section 26 Criminal Justice and Courts Act 2015, where the offender could only have been in the position to commit the offence by virtue of a lack of previous convictions/good character.

5.2 The rationale in the explanation for giving a reduction for no previous convictions is that i) first time offenders represent a lower risk of re-offending and ii) they are normally considered less blameworthy than repeat offenders. Both of these could still apply in the cases mentioned by the CPS. The explanation for good character does include the caveat: 'where an offender has used their good character or status to facilitate or conceal the offending it could be treated as an aggravating factor'. A similar caveat could be added to the explanation of previous convictions if it was felt to be appropriate.

5.3 There were several comments regarding the explanation for M3 – Remorse:

M3: Is there any guidance that can be provided to assist magistrates in determining whether remorse is genuine or not? This is often a point of contention, as a Defence advocate will often state that the offender is "truly sorry" for what they have done, or something similar. Perhaps the guidance could include the following points:

- In determining whether remorse is genuine or not, it is for the offender to convince the court of genuine remorse. Actions taken voluntarily by the offender will carry more weight than mere words.
- The offender should be asked what steps they have taken to date (voluntarily) to make reparation (either to individual victims or to wider society) for their offending.
- Such steps could include, for example: voluntary payment of compensation; writing of a letter of apology; voluntarily offering to participate in mediated counselling between the parties; volunteering to repair any damage done at their own expense.
- Absence of voluntary reparation may not necessarily mean that the remorse is not genuine (for example, the offender may be of very limited means). *West London Bench*

This brings into play the consideration of a Court being satisfied that remorse is genuine. It cannot be right that a defendant who pleads guilty to an offence at the first opportunity should have to prove genuine remorse. This is so subjective and likely to be unreliable. It promotes a lack of certainty, subjectivity should never form a part of any sentence. The Court already uses its own discretion. No evidence has been produced to suggest this is an ineffective or inconsistent position. Credit for an early guilty plea and remorse go hand in hand, no plea equates to no remorse. The effect of the proposed changes may be to, in some cases, discourage guilty pleas. *CLSA*

We would add remorse shown prior to conviction will normally carry more weight than after conviction. Remorse may be shown directly to the victim, recorded by a criminal justice or agency e.g. National Probation Service, mental health services. *JCS*

'Lack of remorse should never be treated as an aggravating factor.' We wonder whether this is a rather bald statement which might not be of general application. For

instance, where a defendant is convicted after a trial having run a defence which is designed to heighten the distress of a victim a judge would be entitled to reflect this. The same would be true of a politically motivated crime. *Council of HM Circuit Judges*

We welcome the clear direction included in this explanation that lack of remorse should never be treated as an aggravating factor. However, given the common misunderstandings that arise in relation to this factor, we recommend that additional guidance should be included under this section. In particular:

a. People with certain disabilities, such as autism, may find it hard to both understand and express remorse.
b. People with learning disabilities are unlikely to have come across the word before and may not understand what it means. Alternative phrasing should be included in the guidance. For example, during interviews with prison staff concerning prisoners with learning disabilities, one head of healthcare said: "[The prisoner] told me he couldn't understand why he had come to prison. He said, "when the judge asked me if I was remorseful, I said 'no', and then he told me I was coming here." This young man had not heard that word before. He also said that he didn't have much idea about what was going on in court and didn't understand what people were saying, although he knew they were talking about him. These sorts of conversations are not uncommon here." *PRT*

Greater clarity is needed regarding how the assessment of genuineness is carried out, and what is taken into consideration for this. There is a risk that this will be based solely on how the defendant presents to court, which may be affected by a number of factors including: general demeanour and personality; health conditions (especially mental health); nervousness because of the circumstances and/or environment. We welcome confirmation that "lack of remorse should never be treated as an aggravating factor." *Release*

5.4 The Council previously decided that any attempt to define or give further guidance on remorse was likely to be counterproductive. The assessment of remorse and the weight to be given to it are inevitably highly subjective. The concerns about some offenders having difficulty in articulating remorse could be allayed by the statement that lack of remorse does not aggravate. If the Council felt it would be helpful, some wording could be added to the effect that regard should be had to the difficulty some offenders may have in articulating remorse.

Question 14: Does the Council wish to make any changes to the explanations for M1, M2 and M3?

Mitigating factors M4 and M5

5.5 These explanations were widely supported. The only dissenting voice being the CLSA who were concerned that: 'Self-reporting may be an inducement to acknowledge behaviour which does not constitute a criminal offence'. They went on to say:

Co-operation with the investigation and early admissions have, in the experience of those practising within the CLSA, always been factors to be taken into account. It

has to be right that reducing stress on victims and witnesses should be taken into account, but the CLSA is of the view that such credit already exists. If this heading is intended to give additional credit, the concerns that those practising in the criminal justice system is as to how this should be applied.

5.6 In contrast the CBA commented:

The proposed inclusion of M4 and M5 is appropriate. Both accurately and adequately reflect what is the content of certain present offence-specific guidelines (if not the invariable common practice of sentencing courts, in cases where one or both of these issues arise, to take such a structured approach).

5.7 No changes are proposed.

Question 15: Does the Council wish to make any changes to the explanations for M4 and M5?

Mitigating factors M6, M7, M8 and M9

5.8 Most respondents were content with the explanations for these factors.

5.9 There were a few comments or suggestions relating to M8: Involved through coercion, intimidated or exploitation:

M8 all but identifies a defence. For example, under the slavery and drugs trafficking regulations, this situation is covered. If duress is raised, then that is a defence, as is exploitation. It appears to the CLSA that there is a tendency to rewrite potential defences and turn them into mitigation. This is not the correct approach and shows a misunderstanding of the law, the burden and standard of proof, defences, and mitigation. Where the matters raised of this type fall short of a defence in law, the courts have traditionally taken them into account where appropriate when considering sentence in any event. *CLSA*

We believe these [the 2nd 3rd and 4th bullets of M8] are useful expanded explanations. *Council of HM Circuit Judges*

M8 (coercion) and M9 (lack of awareness) could both usefully refer to the guidance on young offenders (as these factors may be particularly common in children, young people, and young adults). *Law Society*

We support the inclusion of the expanded explanation of this factor, and suggest this would benefit from a link to the relevant sections of the Equal Treatment Bench Book on domestic abuse and coercion, and trafficking and modern slavery. In relation to people with learning disabilities, additional guidance should be included under this section:

- People with learning disabilities may be suggestible – ready to accept and act on suggestions by others. Many people with learning disabilities experience social isolation and loneliness and, as a result, may be coerced, intimidated or exploited by so-called friends. Mate crime is when a perpetrator befriends a vulnerable person with the intention of then exploiting the person financially, physically, sexually or by asking them to carry out certain acts on their behalf, which may be criminal. For example, 'looking after' illegal drugs and stolen goods, shoplifting and acts of violence. *PRT*

We welcome reference to "trafficking or modern slavery" as being relevant for this factor, and that "an offender may have been the subject of coercion, intimidation or exploitation which the offender may find difficult to articulate", though we would hope that this would have been identified and addressed at an earlier stage in proceedings. This is particularly relevant to those who are brought to this country from abroad and forced to work cultivating cannabis. However, the explanation should be expanded to include situations which are not specifically related to this, but where a reluctance to provide information regarding the perpetrator of any coercion, intimidation, or violence is understandable in the circumstances. Release frequently deals with cases where vulnerable people are taken advantage of and their homes used as a base to produce and supply drugs, known as cuckooing. These people may be prosecuted for permitting their premises to be used in this way, or even for the substantive offences (including anti-social behaviour offences), but through fear of reprisal are not able to provide information about the perpetrators. It should be made clear that lack of evidence of this sort does not mean that the mitigating factor cannot be taken into account. *Release*

The second bullet point could also include the circumstance where the offender was part of a gang. The third bullet point states "*Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation* …". It would be helpful if some examples could be provided here to indicate what factors are important to be looked for, which might indicate coercion, intimidation or exploitation, particularly where the offender is unable or unwilling to articulate these themselves. *West London Bench*

5.10 It is not clear from the PRT's suggestion exactly which sections of the Equal Treatment Bench Book they consider would be relevant – although there is much that is of general relevance to these issues there do not appear to be sections that we could usefully link to for specific information.

5.11 The explanation in M8 states that the '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.' Some of the points made by PRT and Release could be addressed by expanding on these 'other contexts'. However, the Council may feel that it is better to leave this open rather than to give further examples. We would hope that defence advocates would be identifying such situations to the court, which makes the CLSA response particularly disappointing (although other practitioners who have responded have been much more positive).

5.12 The request for examples of factors indicating coercion, intimidation or exploitation is understandable, but the Council may feel there is a risk that examples might serve to limit the range of situations that a court would consider.

Question 16: Does the Council wish to make any changes to the explanations for M6, M7, M8 and M9?

Mitigating factors M10, M11 and M12

5.13 These were generally welcomed. There was a suggestion for a change in emphasis in the explanation for M11:

> In relation to delay I would suggest that the reason for giving a reduced sentence should be clarified by re-wording the explanation. It could say:
>
> Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, the court may take this into account by reducing the sentence [bold] if the delay has had a detrimental effect on the offender [end bold]. *Mr Justice Warby*

5.14 Other comments do not immediately suggest any amendment to the wording:

> We note that unreasonable delays are often quite hard to define. Usually the defence advocate point this out, however this means that unrepresented offenders may be at a disadvantage, and sentencers may need to consider asking appropriate questions of the offender to determine whether this factor is relevant. *MA*
>
> Given the increasing use of 'released under investigation' by police instead of bail, especially in relation to drug offences, we submit that the duration of time must be considered in relation to the applicability of this factor. Release frequently get inquiries from people who have heard nothing more from police many months after their initial apprehension, which causes a great deal of anxiety and distress. *Release*

Question 17: Does the Council wish to make any changes to the explanations for M10, M11 and M12?

Mitigating factors M13 and M14

5.15 The explanation relating to young adults was widely welcomed with three respondents making substantive suggestions:

> We welcome the inclusion of age and / or lack of maturity at step two and the detailed information about this factor. The detail as to what age and/or lack of maturity may mean for young adults is especially welcome. In relation to PSRs, the guidance should be strengthened so that a PSR including an assessment of maturity is always required for any offender aged 18-25 when considering a custodial or community sentence. An assessment of maturity is relevant both to the tailoring of the sentence to the particular individual and, in "cusp" cases an absence of maturity should be considered a relevant vulnerability militating against custody. *PRT*
>
> In relation to M13 [ ] the Council has clearly taken on board some of the principles outlined by the Howard League in its recent report with T2A, Sentencing Young Adults, which we welcome. We are especially pleased to see that the Council has sought to explain the implications of the research evidence on maturity for sentencing practice.
> Nevertheless, we consider that there is further opportunity to tighten up the wording to ensure utmost clarity. In response to the General guideline, the Justice Select Committee proposed that in its explanation the Council make clearer the distinction between young adults who are immature by virtue of their age (i.e. stage of maturational development) and other forms of immaturity due to impaired development, such as a learning disability. We are not convinced that the new wording makes this distinction sufficiently clear. In particular, the sentence “The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater)“ is followed by a statement referring to typical

characteristics of young adults aged 18-25 i.e. in which chronological age is of importance. Given the importance of ensuring that the guidance is comprehensive, concise and practical and the Council's expectation that the guidance will have a positive impact on sentencing practice, we suggest that different iterations of the wording are tested empirically, with outcomes compared, prior to finalising the text for the guideline.
There is evidence of disproportionate levels of neurodisabilities among young adults in custody when compared to the general population, including higher rates of learning disability, traumatic brain injury and communication impairment. We propose that M13 is cross-referenced with M16 to further reinforce this distinction. *T2A*

There is significant research to show that young adults are at a time of desistance and change, often preceded by extensive criminal activity as a child. Given the relevance of the pattern of desistance in respect of age and the extensive research supporting it, we urge the Council to briefly refer to this in the age and/or lack of maturity expanded explanation. *Howard League*

5.16 As to the suggestion from the PRT that the guidance on PSRs should be strengthened – it is not immediately apparent what is lacking strength in the current wording. T2A had misgivings about reference to a particular age group '(typically aged 18-25)'; this was inserted at the suggestion of the Howard League to provide guidance without being prescriptive. Realistically it will not be possible to conduct meaningful research into different iterations of the wording before finalising the guidance without causing substantial delay. The Howard League's suggestion that reference should be made to young adult's capacity for desistence and change is already included in the explanation: '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'. The Howard League have suggested that this could be strengthened by adding: 'Research shows that the vast majority of young people begin the process of desistance in their later teens. Therefore young adults' previous convictions may not be as indicative of a tendency for further offending by comparison with older adults'.

5.17 The explanation for M14: Sole or Primary Carer provoked several very detailed responses. Several of these comprehensively addressed issues relating to the sentencing of women which went beyond the scope of sentencing guidelines and certainly beyond the scope of this project. One response (from the authors of the Families and Imprisonment Study) also argued that 'both parents can have equally important parenting roles in families and that this should be taken into account when considering whether or not to impose a custodial sentence'.

5.18 In summary, respondents felt that the proposed wording did not go far enough to ensure that the human rights of children are taken into account by courts in sentencing carers. One issue that was raised by several respondents is that courts are not always aware of the existence of dependent children.

5.19 Lucy Baldwin, an academic with an interest in maternal imprisonment made recommendations including:

> Sentencing guidelines should be strengthened by the addition of an "overarching principle" setting out the court's duty to investigate sole or primary caring responsibilities of defendants and to take these responsibilities into account in sentencing. This would reflect the Court of Appeal decision in *R v Petherick.*
>
> Courts should establish mechanisms to ensure the provision of sufficient information to Sentencers where the offender has primary caring responsibilities, including a requirement for a full written pre-sentence report and a local directory of women's services and interventions.
>
> When imposing non-custodial sentences, sentencers must inquire about and consider a woman's family responsibilities and ensure 'rehabilitation activity requirements' are achievable within those constraints.
>
> Sentencers should be obliged to consider non-custodial sentences for offenders with primary care responsibilities, and in cases when imprisonment is an option should consider a community order, deferred or suspended sentence. If an immediate term of imprisonment is imposed, written reasons should be given for their decision.

5.20 The PRT stated:

> We strongly support the inclusion of an expanded explanation for this mitigating factor. We suggest a change to the wording so that it starts with a reminder that where the offender is known or suspected to have sole or primary care responsibilities the court *must* request a PSR; where the offender is a woman the court should be aware that it is particularly likely she has primary care responsibilities, and that there may be barriers to her disclosing this. We also suggest amending the third sentence to say "Where a custodial sentence is unavoidable, consideration of the impact on dependants may result in suspending the sentence, and/or be relevant to the length imposed…"
>
> It would be helpful to provide a link here to the information resource on *Safeguarding children when sentencing mothers*, produced by Dr Shona Minson with the support and guidance of a number of legal and judicial bodies. It is available through the Judicial College website

5.21 Dr Shona Minson stated:

> It is positive that the Sentencing Council are considering adding more detail to the factor 'sole or primary carer of dependent relatives' *however*, *it will not ensure consistent and best practice sentencing for two reasons*. Firstly, there is insufficient information in the proposed expanded explanation, and secondly, the information should not be contained in an expanded explanation but as a formal step in the sentencing process, or as a separate Guideline. I provide detailed comment on each of these reasons below: [summarised]
>
> - The wording suggested at M14 does not include any reference to a suspended sentence, which is included in the Imposition of Community and Custodial Sentences Definitive Guideline, where it states that if 'immediate custody will result in significant harmful impact upon others' it 'may be appropriate to suspend a custodial sentence'. This guidance should be included in the expanded explanation.

- The Child Cruelty Definitive Guideline provides for situations where the parent has committed the offence against the child, and yet, even in that situation where the child is directly the victim, it is brought to the sentencers' attention that the offender may have 'otherwise been a loving and capable parent/ carer.' The phrase 'otherwise been a loving and capable parent/ carer' is not included in the extended explanation and I contend that it should be. Research with Crown Court judges found that sentencers may presume that a parent's criminal behaviour is proof of their inadequacy of their parent, and this is not routinely the case.

- The Child Cruelty Definitive Guideline also states that what is to be considered is 'the effect that a custodial sentence could have on the family life of the victim and whether this is proportionate to the seriousness of the offence.' This articulates what is being considered (the child's Article 8 right to family life) more effectively than the phrase 'impact on dependents' which is used in the expanded explanation.
- The expanded explanation should include the requirement for a sentencer to request a Pre-Sentence Report in all cases where a primary or sole carer of dependents is sentenced. It should not be limited only to instances when the defendant is pregnant.
- The inclusion of 'primary or sole carer for dependents' as a factor which can be considered in mitigation, has been evidenced to be insufficient to ensure that sentencers fulfil their duties to uphold children's rights and follow the authorities on this point.

5.22 It was not the Council's intention that the reference to obtaining a PSR should be read as relating only to pregnant offenders. It is proposed to change the wording to clarify this. It is also proposed to adopt the suggestion that reference is made to the information in the Imposition guideline regarding the relevance of dependants to the decision whether to suspend a sentence. It is also proposed to include a link to the Imposition guideline within this explanation for completeness.

5.23 Sentencers have access (through the Judicial College) to the document 'Safeguarding Children When Sentencing Parents – Information for Sentencers'. The document is not published publicly so a link cannot be provided from guidelines. It includes a summary of relevant case law and contains the following paragraphs:

> The case of R v Bishop [2011] WL 84407 above, established that it is the duty of the court to ensure that it has all relevant information about dependent children before deciding on sentence. To sentence a parent to custody without having ascertained the whereabouts of and plans for the care of that child is a safeguarding issue, and denies a child their right not to be discriminated against because of the status or activities of their parents under Article 2 of the United Nations Convention on the Rights of the Child (1989)
>
> Even when a custodial sentence is necessary, sentencers must consider whether proper arrangements have been made for the care of any dependent children. If a defendant mother is at court with no provision for her children's care, the harm to children can be minimised if sentence is deferred to allow proper arrangements to be made. Research has found that many women in that position do not have anyone who could take on the care of their children, and even if they do, arrangements may not have been made because they have not been able to face the reality of the likely

court outcome. In such situations the probation staff can help women work through those issues to ensure that their children's welfare is protected.

5.24 It is proposed that additional guidance extracted from this information (which is already approved and available to sentencers) could be added (as shown underlined in Annex A).

5.25 The other matters put forward by respondents, such as providing a separate step or separate guideline for sentencing carers in general or women in particular, would go beyond the scope of this project.

Question 18: Does the Council wish to make any changes to the explanations for M13 and M14?

Mitigating factors M15, M16 and M17

5.26 The explanation for M15 – serious medical conditions etc. was welcomed by all respondents who expressed a view. M16 – Mental disorder or learning disability, was generally welcomed although there were some suggestions for changes. In light of the forthcoming overarching guideline for this factor, it is not proposed to make any changes.

5.27 M17 – Determination to address offending behaviour etc was also generally welcomed. The JCS suggested that reference should be made to the 'need for an evidenced commitment to address offending or steps to address an addiction including co-operation with relevant agencies'. Conversely Release suggested 'that it should be explicitly stated that there may not be evidence of "a commitment to address the underlying issue", because of the current environment, and that lack of such evidence must not be considered as an indication of lack or willingness or commitment.'

Question 19: Does the Council wish to make any changes to the explanations for M13 and M14?

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Annex A

Draft expanded explanations for factors in offence specific guidelines

STEP TWO

Band Ranges

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

- The court should determine the appropriate level of fine in accordance with this guideline and section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and that the court must take into account the financial circumstances of the offender.

Question 2

- 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.
- 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.

Question 2

- 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 eight below).
- 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. Whether the fine will have the effect of putting the offender out of business will be a relevant consideration; in some bad cases this may be an acceptable consequence.

Question 2

- Obtaining financial information: 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. 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.

Community orders table

For further information see the Imposition of Community and Custodial Sentences guideline

- 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). The culpability and harm present in the offence(s) should be considered to identify which of the three sentencing levels within the community order band is appropriate. 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.
- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence.
- Community orders can fulfil all of the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.

- A community order must not be imposed unless the offence is 'serious enough to warrant such a sentence'. Where an offender is being sentenced for a non-imprisonable offence, there is no power to make a community order.
- 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. In particular, a Band D fine may be an appropriate alternative to a community order.
- 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. The decision as to the appropriate range of community order should be based upon the seriousness of the new offence(s) (which will take into account any previous convictions).
- In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a community order and, if so, whether particular requirements or combinations of requirements are suitable for an individual offender. 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.
- For further guidance on when a PSR may be unnecessary see [Criminal Practice Direction]

Question 3

- It may be helpful to indicate to the National Probation Service the court's preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case. If an adjournment cannot be avoided, the information should be provided to the National Probation Service in written form and a copy retained on the court file for the benefit of the sentencing court. However, the court must make clear to the offender that all sentencing options remain open including, in appropriate cases, committal for sentence to the Crown Court.
- ~~For further guidance on when a PSR may be unnecessary see [Criminal Practice Direction]~~

Low	Medium	High
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 In general, only one requirement will be	Offences that obviously fall within the community order band	Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances

appropriate and the length may be curtailed if additional requirements are necessary		More intensive sentences which combine two or more requirements may be appropriate
• Suitable requirements might include: • Any appropriate rehabilitative requirement(s) • 40 – 80 hours of unpaid work • Curfew requirement for example up to 16 hours per day for a few weeks • Exclusion requirement, for a few months • Prohibited activity requirement • Attendance centre requirement (where available)	• Suitable requirements might include: • Any appropriate rehabilitative requirement(s) • 80 – 150 hours of unpaid work • Curfew requirement for example up to 16 hours for 2 – 3 months • Exclusion requirement lasting in the region of 6 months • Prohibited activity requirement	• Suitable requirements might include: • Any appropriate rehabilitative requirement(s) • 150 – 300 hours of unpaid work • Curfew requirement for example up to 16 hours per day for 4 – 12 months • Exclusion requirement lasting in the region of 12 months

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

BAND A FINE	BAND B FINE	BAND C FINE

Custodial sentences

Sentencing flowcharts are available at Imposition of Community and Custodial Sentences guideline

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 <u>not</u> be appropriate to suspend a custodial sentence	**Factors indicating that it may be appropriate to suspend a custodial sentence**
• Offender presents a risk/danger to the public	• Realistic prospect of rehabilitation
• Appropriate punishment can only be achieved by immediate custody	• 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.

For further guidance on when a PSR may be unnecessary see [Criminal Practice Direction]

Question 3

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

Suspended Sentences: General Guidance

i) The guidance regarding pre-sentence reports applies if suspending custody.

ii) If the court imposes a term of imprisonment of between 14 days and 2 years (subject to magistrates' courts sentencing powers), it may suspend the sentence for between 6 months and 2 years (the 'operational period'). The time for which a sentence is suspended should reflect the length of the sentence; up to 12 months might normally be appropriate for a suspended sentence of up to 6 months.

iii) Where the court imposes two or more sentences to be served consecutively, the court may suspend the sentence where the aggregate of the terms is between 14 days and 2 years (subject to magistrates' courts sentencing powers).

iv) When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community. The requirements are identical to those available for community orders, see the guideline on Imposition of Community and Custodial Sentences.

v) A custodial sentence that is suspended should be for the same term that would have applied if the sentence was to be served immediately.

For sentencing flowcharts see the guideline on Imposition of Community and Custodial Sentences.

Statutory aggravating factors

SA1. Previous convictions, having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction

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

Guidance on the Use of Previous Convictions

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

Section 143 of the Criminal Justice Act states that:

> In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to—
>
> (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and
>
> (b) the time that has elapsed since the conviction.

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

SA2. Offence committed whilst on bail

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

S143 (3) Criminal Justice Act 2003 states:

> In considering the seriousness of any offence committed while the offender was on bail, the court must treat the fact that it was committed in those circumstances as an aggravating factor.

SA3. Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity.

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

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.

SA4. Offence was committed against an emergency worker acting in the exercise of functions as such a worker.

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

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.

Other aggravating factors:

A1. Commission of offence whilst under the influence of alcohol or drugs

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

- 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**.
- This applies regardless of whether the offender is under the influence of legal or illegal substance(s).
- 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 they have been given 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.

Question 5

A2. Offence was committed as part of a group

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

The mere membership of a group (two or more persons) should not be used to increase the sentence, but where the **offence was committed as part** of a group 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 the involvement by the offender of others through coercion, intimidation or exploitation, to

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

Courts should be alert to factors that suggest that an offender may have been the subject of coercion, intimidation or exploitation (including as a result of domestic abuse, trafficking or modern slavery) which the offender may find difficult to articulate, and where appropriate ask for this to be addressed in a PSR.

Question 6

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/or lack of maturity when considering the significance of group offending.

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

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

- 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.

Question 11

A4. Planning of an offence

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

- Evidence of planning normally indicates a higher level of intention and pre-meditation which increases the level of culpability.
- Planning may be inferred from the scale and sophistication of the offending and the role of the offender in the offending.
- The greater the degree of planning the greater the culpability

Question 7

A5. Commission of the offence for financial gain

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

- 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.
- See the guidance on fines if considering a financial penalty

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A6. High level of profit from the offence

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

- 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.
- See the guidance on fines if considering a financial penalty

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A7. Abuse of trust or dominant position

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

- 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. These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.
- Additionally an offence may be made more serious where an offender has used a position of power or trust to facilitate and/or conceal offending. Examples may include a public servant using access to confidential information or an employee using access to company communication systems in their offending.

Question 8

- 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.

A8. Gratuitous degradation of victim / maximising distress to victim

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

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)~~.

Where any such actions are the subject of separate charges, this should be taken into account when assessing totality.

Question 8

A9. Vulnerable victim

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

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

A10. Victim was providing a public service or performing a public duty at the time of the offence

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

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.

This applies whether the victim is a public or private employee or acting in a voluntary capacity.

Question 9

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

A11. Other(s) put at risk of harm by the offending

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

- 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.

Where any such risk of harm is the subject of separate charges, this should be taken into account when assessing totality

Question 9

A12. Offence committed in the presence of other(s) (especially children)

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

- 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.

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

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

The more sophisticated, extensive or persistent the actions after the event, the more likely they are 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 lack of maturity when considering the significance of such conduct.

Where any such actions are the subject of separate charges, they should be taken into account when assessing totality at step seven.

A14. Blame wrongly placed on other(s)

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

- 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 lack of maturity when considering the significance of such conduct.

Question 11

A15. Failure to respond to warnings or concerns expressed by others about the offender's behaviour

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

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.

Question 10

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

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

- 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.
- The extent to which the offender has complied with the conditions of a licence or order (including the time that has elapsed since its commencement) will be a relevant consideration.

Question 12

- Where the offender is dealt with separately for a breach of a licence or order regard should be had to totality (see step seven)
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

A17. Offence committed in custody

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

- 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.

A18. Offences taken into consideration

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

Taken from the Offences Taken into Consideration Definitive Guideline*:*

General principles

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

Offences to be Taken into Consideration

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

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

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

Jurisdiction

The magistrates' court cannot take into consideration an indictable only offence.
The Crown Court can take into account summary only offences provided the TICs are founded on the same facts or evidence as the indictable charge, or are part of a series of offences of the same or similar character as the indictable conviction offence

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

- the police or prosecuting authorities have prepared a schedule of offences (TIC schedule) that they consider suitable to be taken into consideration. The TIC schedule should set out the nature of each offence, the date of the offence(s), relevant detail about the offence(s) (including, for example, monetary values of items) and any other brief details that the court should be aware of;

- a copy of the TIC schedule must be provided to the defendant and his representative (if he has one) before the sentence hearing. The defendant should sign the TIC schedule to provisionally admit the offences;
- at the sentence hearing, the court should ask the defendant in open court whether he admits each of the offences on the TIC schedule and whether he wishes to have them taken into consideration;
- if there is any doubt about the admission of a particular offence, it should not be accepted as a TIC. Special care should be taken with vulnerable and/or unrepresented defendants;
- if the defendant is committed to the Crown Court for sentence, this procedure must take place again at the Crown Court even if the defendant has agreed to the schedule in the magistrates' court.

Application

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

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

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

3. Continue through the sentencing process including:

- consider whether the frank admission of a number of offences is an indication of a defendant's remorse or determination and/ or demonstration of steps taken to address addiction or offending behaviour;
- any reduction for a guilty plea should be applied to the overall sentence;
- the principle of totality;
- when considering ancillary orders these can be considered in relation to any or all of the TICs, specifically:
  - compensation orders;
  - restitution orders

A19. Offence committed in a domestic context

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

Refer to the Overarching Principles: Domestic Abuse Definitive Guideline

Question 13

A20. Offence committed in a terrorist context

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

Where there is a terrorist element to the offence, refer also to the Terrorism Offences Definitive Guideline

Question 13

A21. Location and/or timing of offence

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

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

A22. Established evidence of community/ wider impact

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

- 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.

Prevalence

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

- that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);
- that the circumstances can properly be described as exceptional; **and**
- that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced.

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

M1. No previous convictions or no relevant/recent convictions

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

- First time offenders usually 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 receive a mitigated sentence.
- 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.

M2. Good character and/or exemplary conduct

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

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.

M3. Remorse

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

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. **Question 14**

M4. Self-reporting

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

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).

M5. Cooperation with the investigation/ early admissions

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

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). **Question 15**

M6. Little or no planning

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

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.

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

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

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

M8. Involved through coercion, intimidation or exploitation

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

- 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.

Question 16

M9. Limited awareness or understanding of the offence

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

The factor may apply to reduce the culpability of an offender

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

If the offender had genuinely failed to understand or appreciate the seriousness of the offence, 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.

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

M10. Little or no financial gain

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

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.

M11. Delay since apprehension

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

Where there has been an **unreasonable** delay in proceedings since apprehension which **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.

Note: No fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case.

Question 17

M12. Activity originally legitimate

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

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.

M13. Age and/or lack of maturity

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

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) are still developing neurologically and consequently may 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 adversity including deprivation and/or abuse will affect development.

An immature offender may find it particularly difficult to cope with custody and therefore may be more susceptible to self-harm in custody.

An immature offender may find it particularly difficult to cope with the requirements of a community order without appropriate support.

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.

Research shows that the vast majority of young people begin the process of desistance in their later teens. Therefore young adults' previous convictions may not be as indicative of a tendency for further offending by comparison with older adults. **Question 18**

Where the offender is a care leaver the court should enquire as to any effect a sentence may have on the offender's ability to make use of support from the local authority. (Young adult care leavers are entitled to time limited support. Leaving care services may change at the age of 21 and cease at the age of 25, unless the young adult is in education at that point). See also the Sentencing Children and Young People Guideline (paragraphs 1.16 and 1.17).

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.

M14. Sole or primary carer for dependent relatives

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

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. See also the Imposition of community and custodial sentences guideline.

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 and whether the sentence can be suspended.

For more serious offences where a substantial period of custody is appropriate, this factor will carry less weight.

When imposing a community sentence on an offender with primary caring responsibilities the effect on dependants should be a consideration in determining suitable requirements.

In addition when sentencing an offender who is pregnant relevant considerations may include:

- any effect of the sentence on the health of the offender and
- any effect of the sentence on the unborn child

The court should ensure that it has all relevant information about dependent children before deciding on sentence.

When an immediate custodial sentence is necessary, the court must consider whether proper arrangements have been made for the care of any dependent children and if necessary consider deferring sentence for this to be done.

~~In such situations~~ When considering a community or custodial sentence for an offender who has, or may have, caring responsibilities the court should ask the Probation Service to address these issues in a PSR.

Question 18

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

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

- The court can take account of physical disability or a serious medical condition by way of mitigation as a reason for reducing the length of the sentence, either on the ground of the greater impact which imprisonment will have on the offender, or as a matter of generally expressed mercy in the individual circumstances of the case.
- However, such a condition, even when it is difficult to treat in prison, will not automatically entitle the offender to a lesser sentence than would otherwise be appropriate.
- There will always be a need to balance issues personal to an offender against the gravity of the offending (including the harm done to victims), and the public interest in imposing appropriate punishment for serious offending;
- A terminal prognosis is not in itself a reason to reduce the sentence even further. The court must impose a sentence that properly meets the aims of sentencing even if it will carry the clear prospect that the offender will die in custody. The prospect of death in the near future will be a matter considered by the prison authorities and the Secretary of State under the early release on compassionate grounds procedure (ERCG).
- But, an offender's knowledge that he will likely face the prospect of death in prison, subject only to the ERCG provisions, is a factor that can be considered by the sentencing Judge when determining the sentence that it would be just to impose.

M16. Mental disorder or learning disability

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

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 court mental health teams) 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.

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

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

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.

Question 19