

**Aggravating and mitigating factors in
sentencing guidelines and their
expanded explanations**

Research report

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Contents

1. Summary	3
1.1. Background	3
1.2. Methodology	4
1.3. Findings	5
2. Introduction	7
2.1. Background	7
2.2. Aims	8
2.3. Research objectives	9
3. Methodology	10
3.1. Stage one	10
3.2. Stage two	13
3.3. Ethical considerations and data security	14
3.4. Limitations and reporting conventions	15
4. Stage one findings	16
4.1. Awareness	16
4.2. Identification and interpretation of factors and expanded explanations	19
5. Stage two findings	37
5.1. Deprived and/or difficult background or personal circumstances	37
5.2. Pregnancy and maternity	41
5.3. Prospects of or in work, training or education	44
5.4. Overall perceptions of the three proposed factors	47

6. Overarching findings: broader perceptions of the expanded explanations	49
6.1. Ease of use	49
6.2. Ease of interpretation	50
6.3. Suggestions for new expanded explanations	51
7. Overarching findings: perceptions of sentencing disparities	53
7.1. Groups with protected characteristics (sex, race and age)	53
7.2. Groups with other characteristics	55
7.3. The sentencing guidelines and sentencer experience	57
8. Conclusions	60
8.1. Impact	61
Annex A: Aggravating and mitigating factors and their expanded explanations included in stage one of the research	63
Annex B: Stage one hypothetical base scenarios	69
Annex C: Summary tables of offender characteristics and identifiable factors in the hypothetical scenarios	77
Annex D: Stage one base interview schedule	79
Annex E: Stage two focus group discussion guide	84
Annex F: Expanded explanations with proposed changes	89

1. Summary

1.1. Background

The Sentencing Council for England and Wales has responsibility for developing sentencing guidelines, assessing the impact of the guidelines on sentencing practice, and promoting public confidence in the criminal justice system.

The Sentencing Council produces offence specific guidelines relating to particular offences or sets of offences, and overarching principles guidelines, which provide guidance on cross-cutting areas that can be applied across a range of offences. There is also a [General guideline](#), which should be used where no specific guideline exists for a certain offence (for example, where it is new or less common), and in conjunction with other guidelines to provide further guidance.

Sentencing guidelines typically follow a stepped approach. At step 1, sentencers assess the offender's culpability and the harm caused by the offence and determine the sentence starting point, while at step 2, any aggravating factors (which may increase a sentence) or mitigating factors (which may decrease a sentence) are taken into account. Some of these factors have [expanded explanations](#). These explanations add extra information to aggravating and mitigating factors to provide guidance on the type of considerations to take into account when applying the factors, and to make it easier for courts to maintain consistency and transparency in sentencing. Expanded explanations came into force both as part of the [General guideline](#) and offence specific guidelines in October 2019.

This research contributes to work to address the [Sentencing Council's strategic objectives for 2021 to 2026](#), in which a commitment was made to “explore how the Council's expanded explanations are being interpreted and applied by sentencers in practice”, in line with the Council's duty to monitor guidelines and promote fairness in sentencing.

In addition, this research forms part of the [Council's response](#) to findings from research on [Equality and Diversity in the work of the Sentencing Council](#), which was undertaken by the University of Hertfordshire and published in 2023. This research was commissioned by the Council as part of their strategic objective to “explore the potential for the Council's work to inadvertently cause disparity in sentencing across demographic groups”.

1.2. Methodology

The research used a qualitative design and consisted of two stages. For stage one, in-depth interviews using offence specific scenarios were conducted with 20 judges (which included circuit judges and recorders) and 20 magistrates. The interviews explored the identification and interpretation of nine existing aggravating and mitigating factors and their accompanying expanded explanations, some of which were included based on recommendations made by the previously mentioned [equality and diversity research](#) commissioned by the Council. Three of these expanded explanations included potential amendments to the wording for sentencers to consider. These factors were:

Aggravating factors

- 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
- Victim is targeted due to a vulnerability (or a perceived vulnerability)
- A leading role where offending is part of a group activity
- Commission of offence whilst under the influence of alcohol or drugs
- Offence committed in a domestic context

Mitigating factors

- Good character and/or exemplary conduct (amendment proposed)
- Sole or primary carer for dependent relatives (amendment proposed)
- Remorse (amendment proposed)
- Age and/or lack of maturity

For stage two, six focus groups were conducted: three with judges and three with magistrates. The focus groups discussed the potential introduction of three possible new mitigating factors and their accompanying expanded explanations, proposed in response to recommendations from the equality and diversity research. These mitigating factors were:

- Pregnancy and maternity
- Deprived and/or difficult background or personal circumstances
- Prospects of or in work, training or education

1.3. Findings

- Findings from the interviews with 20 judges and 20 magistrates suggest that some factors may be more straightforward than others to identify and/or interpret when considering hypothetical sentencing scenarios. Factors that were broadly identified and interpreted as expected by the scenario design and related expanded explanation content were 'Previous convictions', 'Commission of offence whilst under the influence of alcohol/drugs', 'A leading role where offending is part of a group activity', 'Victim is targeted due to a vulnerability (or perceived vulnerability)' and 'Sole or primary carer for dependent relatives'.
- A small number of factors were not always identified or interpreted as expected. These were 'Offence committed in a domestic context', 'Age and/or lack of maturity', 'Remorse' and 'Good character and/or exemplary conduct'. For these factors, where there were differences in understanding this was often due to assumptions being made about a factor's meaning based on its title alone, without consultation of the associated expanded explanation.
- When sentencers were asked to examine accompanying expanded explanations during interviews, they generally found the explanations clear and straightforward to understand. The exception was the factor 'Good character and/or exemplary conduct', which had been amended in this research to remove the example of charitable works. Although participants felt removing this single example was better than keeping it due to the possibility that including it may create sentencing disparities, some participants felt it would be helpful to provide a more varied list of examples. However others preferred that interpretation of what might constitute good character or exemplary conduct was left open-ended.
- The 11 judges and nine magistrates who took part in focus groups were generally not in favour of introducing the three new proposed mitigating factors of 'Pregnancy and maternity', 'Prospects of or in work, training or education' and 'Difficult background and/or difficult personal circumstances' explored in this research. While there was a recognition that the content of their respective expanded explanations was generally useful to bear in mind when sentencing, the prevailing view was that these factors were already being accounted for where appropriate and it was unnecessary to formally include them in sentencing guidelines.
- Sentencers considered whether they thought any aggravating or mitigating factors could create sentencing disparities. Sentencers did not feel guideline content itself

created disparity but felt there could be other unconscious influences on sentencing such as the sex or background of the offender, as well as a judge or magistrates' level of sentencing experience or training.

- Based on the findings of this research, amendments were proposed for a small number of selected factors and/or their accompanying expanded explanations. These proposed changes were then consulted on as part of the Sentencing Council's [third annual consultation on miscellaneous amendments to guidelines.](#)

2. Introduction

2.1. Background

The Sentencing Council for England and Wales was set up in April 2010 under the [Coroners and Justice Act 2009](#), to promote greater transparency and consistency in sentencing while maintaining the independence of the judiciary. The Sentencing Council is an independent arm's length body of the Ministry of Justice (MoJ). It has responsibility for developing sentencing guidelines, assessing the impact of the guidelines on sentencing practice, and promoting public confidence in the criminal justice system. The guidelines are intended to help ensure a consistent approach to sentencing, while preserving judicial discretion. Courts must follow the guidelines unless it is in the interests of justice not to do so.

The Council produces offence specific guidelines and overarching principles guidelines. There is also a [General guideline](#), which can be used where no specific guideline exists for a certain offence (for example, where it is new or less common), to provide further guidance. Offence specific guidelines relate to particular offences or sets of offences. Overarching principles guidelines provide guidance on cross-cutting areas that can be applied across a range of offences - for example, sentencing children and young people and domestic abuse.

Sentencing guidelines typically follow a stepped approach. At step 1, sentencers assess the offender's culpability and the harm caused by the offence and determine the sentence starting point, while at step 2, any aggravating factors (which may increase a sentence) or mitigating factors (which may decrease a sentence) are taken into account. Some of these factors have [expanded explanations](#). These explanations add extra information to aggravating and mitigating factors to provide guidance on the type of considerations to take into account when applying the factors and to make it easier for courts to maintain consistency and transparency in sentencing. Sentencers then take into account whether there should be a reduction for a guilty plea, and where applicable, consider a range of other issues, such as the dangerousness of the offender. Expanded explanations came into force both as part of the [General guideline](#) and offence specific guidelines in October 2019.

2.2. Aims

This research contributes to work to address the [Sentencing Council's strategic objectives for 2021 to 2026](#), in which a commitment was made to “explore how the Council's expanded explanations are being interpreted and applied by sentencers in practice”, in line with the Council's duty to monitor guidelines and promote fairness in sentencing.

It also forms part of the [Council's response](#) to findings from the Council's report on [Equality and Diversity in the work of the Sentencing Council](#), which was undertaken by the University of Hertfordshire and published in 2023. This research was commissioned by the Council as part of their strategic objective to “explore the potential for the Council's work to inadvertently cause disparity in sentencing across demographic groups”. The report put forward a number of recommendations, including the need to potentially consider changes to some of the guideline factors, to consider providing new ones in some areas, and on how to mitigate for any disparities, if possible. It examined the role of selected sentencing guidelines for their impact on certain groups of offenders and presented perceptions about equality and diversity in the application of the sentencing guidelines.

These recommendations included:

- extending the expanded explanation of the mitigating factor (referred to as a ‘downward’ factor in the report) of ‘Remorse’, to include ‘learning disability, communication difficulties and cultural differences’
- amending the expanded explanation of the mitigating factor of ‘Good character and/or exemplary conduct’
- considering providing guidance for sentencing young adults (explored here through the mitigating factor ‘Age and/or lack of maturity’)
- examining the potential impact of the aggravating factors (referred to as ‘upward’ factors in the report) of ‘Previous convictions’ and ‘Group membership’
- exploring the potential impact of ‘victim-related’ aggravating factors (explored here through the aggravating factor of ‘Victim is targeted due to a vulnerability (or a perceived vulnerability)’)
- specifying ‘Pregnancy and maternity’ as a discrete factor
- including new mitigating factors of ‘Difficult/deprived background’ and ‘In work or training’

The research also included two additional factors that were not recommended for consideration by the [equality and diversity report](#). The first is ‘Commission of the offence

whilst under the influence of alcohol/drugs'. This factor was included to explore how sentencers may consider it in terms of aggravation or mitigation. Previous research has suggested that in some instances, sentencers can view the factor as part of mitigation, rather than aggravation as the Council intends. See for example the Sentencing Academy's [Intoxication and Sentencing report](#) and research on contextual culpability by [Lightowers, Pina-Sánchez and Watkins](#). The second factor is 'Offence committed in a domestic context'. This factor was included to contribute to evaluation of the Council's [Overarching principles: domestic abuse guideline](#). This guideline revised a previous version to reflect important changes in terminology and ensure that courts identify and treat cases involving domestic abuse seriously and appropriately, factoring it into all relevant sentencing decisions in a consistent manner.

2.3. Research objectives

This research aimed to explore selected aggravating and mitigating factors and their expanded explanations, including:

- sentencer awareness of the expanded explanations
- sentencer identification of factors
- how sentencers interpret the content of expanded explanations
- any potential impact factors/expanded explanations may have on sentencing disparities for different demographic groups (for example, by race, age or sex)

It also looked to gather views on proposed changes to the expanded explanations for three existing mitigating factors, and on the potential introduction of three new mitigating factors and their accompanying explanations.

The research did not seek to explore how far sentencers agreed with the presence and content of the selected aggravating and mitigating factors in the sentencing guidelines, or perceptions of the structure and approach of the guidelines more broadly.

3. Methodology

The research used a qualitative design and consisted of two stages.

3.1. Stage one

Stage one used in depth one to one interviews with a sample of 20 judges and 20 magistrates who were willing and able to take part in the research. The Crown Court judges (which included circuit judges and recorders) were recruited from the Sentencing Council's 'research pool', which is a database of sentencers who have voluntarily indicated an interest in taking part in Sentencing Council research. The magistrates were recruited from a sample who had taken part in previous [User testing of sentencing guidelines](#) research and consented to be recontacted about participating in other research. Data about the level of sentencers' experience or other characteristics such as regional distribution were not collected for this research.

The interviews explored sentencers' general awareness of expanded explanations as well as their identification and interpretation of selected factors. The focus on particular existing aggravating and mitigating factors and their accompanying expanded explanations was based on the recommendations from the previously mentioned [equality and diversity research](#) commissioned by the Council. Three of these expanded explanations included potential amendments to the wording for sentencers to consider. The factors and expanded explanations explored were:

Aggravating factors

- 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
- Victim is targeted due to a vulnerability (or a perceived vulnerability)
- A leading role where offending is part of a group activity
- Commission of offence whilst under the influence of alcohol or drugs
- Offence committed in a domestic context

Mitigating factors

- Good character and/or exemplary conduct (amendment proposed)

- Sole or primary carer for dependent relatives (amendment proposed)
- Remorse (amendment proposed)
- Age and/or lack of maturity

The full text for all of the expanded explanations for the factors listed above can be found in [Annex A](#).

3.1.1. Scenario design

To provide a framework for the interviews and consideration of the different expanded explanations, four hypothetical sentencing scenarios were produced, each of which had four variations (see [Annex B](#) for the text used for all scenario variations). Each scenario variation explored one aggravating factor, one mitigating factor and their accompanying expanded explanations.

The selection of offences and their respective guidelines for the scenarios were guided by the different sentencing powers that magistrates and judges have, as well as their familiarity to sentencers, so that the focus of the interviews could be on the factors and expanded explanations rather than the offence. Magistrates sentence either summary or triable either way offences and can impose a maximum sentence of 6 months' custody. Circuit judges sentence triable either way offences and indictable only offences, some of which have a maximum sentence of life imprisonment.

For magistrates, the sentencing scenarios covered the offences of theft (hereafter referred to as the 'theft' scenario) and assault occasioning actual bodily harm (ABH): the 'assault' scenario. The relevant guidelines for magistrates were therefore [Theft from a shop or stall](#) and [Assault occasioning actual bodily harm \(ABH\)](#). The offences used for judges were robbery (the 'robbery' scenario) and possession of a controlled drug of class A with intent to supply (the 'supplying drugs' scenario). The relevant guidelines for judges were [Robbery – street and less sophisticated commercial](#) and [Possession of a controlled drug with intent to supply it to another](#).

Aggravating and mitigating factors were allocated to scenario variations based on their relevancy to the offence described. This meant that the number of magistrates or judges who considered each factor differed, as shown in Table 1 below.

Table 1: Consideration of factors by scenario

Scenario	Factor	Number of magistrates	Number of judges
'theft' and 'supplying drugs'	Previous convictions	20	20
'robbery'	Victim is targeted due to a vulnerability (or perceived vulnerability)	0	10
'robbery'	A leading role where offending is part of a group activity	0	10
'assault'	Commission of offence whilst under the influence of alcohol or drugs	10	0
'assault'	Offence committed in a domestic context	10	0
'theft' and 'robbery'	Good character and/or exemplary conduct	10	10
'theft' and 'supplying drugs'	Sole of primary carer for dependent relatives	10	10
'assault' and 'supplying drugs'	Remorse	10	10
'assault' and 'robbery'	Age and/or lack of maturity	10	10

Scenarios also featured a range of different offender characteristics, including race, age and sex. The age and sex of the offender was explicitly stated in the scenarios, while race was left ambiguous and open to interpretation by sentencers as it was difficult to present realistically. Information provided that could potentially be interpreted as an indicator of race included the name or background of the offender. Based on scenario design, it was anticipated that sentencers might assume an offender's race to be white, Asian, black or Gypsy, Roma or Irish Traveller. Please see [Annex C](#) for summary tables of offender characteristics across all scenarios. For the characteristic of age, we primarily focussed on younger adults, exploring this via the factor of 'Age and/or lack of maturity'.

While the design of this research meant meaningful analysis in respect to the offender demographics of age, race and sex was not possible, the variation was included in

scenarios to indicatively explore any potential impacts this might have on identification and interpretation of factors. Findings regarding this and sentencer's overarching perceptions of sentencing disparities can be found in [section seven](#) of this report.

3.2.1. Interview design

Two pilot interviews were run with judicial members of the Sentencing Council ahead of fieldwork. This helped us to assess whether we were asking the right questions to explore the research aims and informed the design of the interview schedules (see [Annex D](#) for an example interview schedule).

In the interviews, sentencers were asked to review the information contained in the scenarios and then to work through step 2 in the appropriate sentencing guideline, which concerns aggravation and mitigation. The information for step 1, which involves an assessment of the level culpability and harm, was provided in advance to allow for a focus on the step 2 factors and their respective expanded explanations.

3.3.1. Interview analysis

Interviews were recorded, transcribed and then manually entered into a coding framework, which was based on the content of each factor's expanded explanation. Thematic analysis was conducted to consider sentencers' identification (or non-identification) of the factor and how they interpreted it in relation to the content of the expanded explanation. Stage one findings in this report are therefore presented by thematically grouping factors to reflect how far factor identification and interpretation by participants was as might be expected by the scenario design and expanded explanation content. The analysis and reporting were quality assured by a second member of the Council's analytical team.

3.2. Stage two

Stage two used focus groups with some of the judges and magistrates who took part in the stage one interviews and were available to discuss the potential introduction of three proposed new mitigating factors and their accompanying expanded explanations. These mitigating factors were:

- Pregnancy and maternity
- Deprived and/or difficult background or personal circumstances
- Prospects of or in work, training or education

'Pregnancy and maternity' differed slightly from the other two proposed factors, as the expanded explanation included existing content from the expanded explanation for 'Sole or primary carer for dependent relatives', which was further expanded upon to develop a separate factor. The text for these proposed new expanded explanations is presented as part of the [Stage two findings](#).

Stage two was smaller in scale, as the aim was to gather initial insight from sentencers on the potential introduction of these factors to sentencing guidelines. Six focus groups were conducted, split between magistrates and judges. One magistrate who was unable to attend provided written feedback via email. Participation in the focus groups by judges and magistrates is shown in Table 2 below.

Table 2: Stage 2 focus group participation

Judge focus groups	Magistrate focus groups
Group 1: 4 judges	Group 1: 4 magistrates
Group 2: 3 judges	Group 2: 3 magistrates
Group 3: 4 judges	Group 3: 2 magistrates
Total: 11	Total: 9

Focus group discussions were recorded and transcribed. A focus group discussion guide was used to ask groups about the content and presentation of each proposed factor. This can be found in [Annex E](#). The discussion guide was used to produce a framework for coding responses that was applicable to all three factors. Some factor-specific codes were also produced for 'Difficult and/or deprived background or personal circumstances' and 'Prospects of or in work, training or education' to address particular areas of policy interest. The coding framework and analysis were quality assured by a second member of the Council's analytical team. Reporting on the new proposed mitigating factors is by factor.

3.3. Ethical considerations and data security

Participation in this research was voluntary. Participants gave consent for interviews and focus groups to be recorded. Recordings and transcripts were stored securely and only accessed by the Office of the Sentencing Council's social research team. Any verbatim

quotes used in reporting are anonymous. Retention and deletion of data will follow the [Sentencing Council's Privacy Notice](#).

3.4. Limitations and reporting conventions

This research has a number of limitations which should be borne in mind when interpreting the findings. The research was small in scale, using a qualitative approach to explore sentencers' identification and interpretation of some of the aggravating and mitigating factors and their expanded explanations in the sentencing guidelines, as well as a small number of proposed new factors. It did not cover all factors with expanded explanations in the guidelines and findings should not be considered as applicable to all such factors.

The findings presented in this report reflect the perspectives of those who were interviewed or took part in focus groups. Respondents were self-selecting. The small sample size overall and the fact that the number of magistrates and/or judges that had the opportunity to consider each factor differed means findings cannot be generalised to the overall sentencer population.

For stage one of the research, there are some reporting conventions to acknowledge. Where this report references factors being identified or interpreted as expected, this refers to instances where sentencers identified a factor that had been designed to be identifiable in a scenario variation. Where interpretation of a factor is presented as being as expected, this is in respect to both the scenario design and the content of that factor's expanded explanation being reflected in participant's responses before they were directed to examine the expanded explanation by the interviewer. All stage one findings are further caveated by the acknowledgement that identification and interpretation of any factors will have been influenced by the hypothetical scenario descriptions and offences used.

4. Stage one findings

This section presents findings from the one to one research interviews with judges and magistrates. These used hypothetical scenarios to explore existing aggravating and mitigating factors and their accompanying expanded explanations.

4.1. Awareness

A recent report on [how users, such as sentencers, use and interact with the Sentencing Council's website](#) found that of those surveyed (1,731), 76 per cent were aware of expanded explanations and referred to them, six per cent were aware but did not refer to them and 18 per cent were not aware of them. For this research, we also asked sentencers about awareness. This is an important part of the context for the findings overall.

4.1.1. How aware were judges and magistrates of the expanded explanations?

Judges and magistrates were asked if they were aware of the expanded explanations in the sentencing guidelines at the start of the interview in stage one. Most of the sentencers were aware, as shown in Table 3 below.

Table 3: Sentencer awareness of expanded explanations before taking part in the research

Aware of expanded explanations prior to research	Judges	Magistrates
Yes	17	18
No	3	2
Total	20	20

Several sentencers who were aware of expanded explanations commented that they had discovered them “by accident”; for example, by spontaneously noticing them while using a guideline in court, as part of preparation to mentor a new magistrate or because of involvement in judicial recruitment exercises. One magistrate suggested that the dotted

line that indicated a factor had an accompanying expanded explanation at the time the research was conducted was “not obvious”.

One judge commented that they felt awareness levels were not strong among judges:

I believe there are a number of judges, particularly part time judges ... [who are] not aware of the expanded explanations. I only recently attended [Judicial College training]. And when I identified the expanded explanations by the dots, they were totally unaware of it. Judge

Those who were aware were also asked if they referred to the expanded explanations as part of their sentencing practice. All of the judges who were aware of them referred to them, but two of the magistrates who had said they were aware did not. However, neither magistrate provided a reason for why they did not.

Of those that said they were not aware, two judges had assumed the aggravating and mitigating factor titles were the expanded explanations, one judge had only recently become aware of them through participation in previous Sentencing Council research, and the two magistrates were not aware they existed at all. After showing the magistrates how to locate the expanded explanations, one suggested “they should be flagged or marked in some way” and the other felt presenting them as dotted lines under some factors did not suggest they needed to be engaged with:

The dotted line doesn't imply it needs to be clicked on. There's no prompt at the moment. There isn't enough to say 'you have to look at this'. Magistrate

Sentencers pointed out some broader issues related to awareness of the expanded explanations. A judge and a magistrate mentioned that some sentencers may still be using printed guidelines, which meant they would not notice the expanded explanations or be able to access them. A similar finding was reported in the [user testing research](#) mentioned previously. Magistrates also highlighted challenges around being “bombarded” with a lot of information in emails or while sitting for cases, creating time pressures that meant they were less likely to have time to read content such as the expanded explanations.

As well as raising challenges around awareness, sentencers made helpful suggestions for how to improve this. For example, it was suggested that sending out reminders about the existence of expanded explanations to sentencers via Sentencing Council email updates or using stronger highlighting techniques in the sentencing guidelines could aid

awareness. Similar suggestions were made as part of the previously mentioned [user testing research](#).

As a result, the Council took action to improve the presentation of the expanded explanations to help increase awareness. As of 11 August 2023, the presentation of the expanded explanations has been changed. Aggravating and mitigating factors now display a line with a downward arrow to the right-hand side if they have an accompanying expanded explanation, instead of a dotted line.

4.1.2. When and why do judges and magistrates use the expanded explanations?

Where sentencers had said they were aware of expanded explanations (35 of 40 participants), they were also asked how often they referred to them, and why. How often sentencers looked at expanded explanations was spilt into two groups: those who said they referred to them “routinely” or “nearly every time”, and those who referred to them on an infrequent, usually case dependent basis. For example, if there was “something novel or unusual” about a case.

...they are fairly basic principles. Once you know what the expanded explanations say, you wouldn't need to look at them every time. Judge

Judges and magistrates spoke about using expanded explanations to remind themselves of what should or should not be taken into account, to consider cases on culpability and harm category borders, to ensure they were not double counting issues taken into account, if they were unfamiliar with a topic, or if there was “a need to dig deeper”. One judge commented that the expanded explanations were an important part of sentence justification:

If you're looking at three, four, five, seven, ten years it is important that you are giving as full a justification as you can for your sentence, because locking people up for that long is a big deal...with more serious cases, even the smallest detail can be an important one and more help is welcome. Judge

A small number of magistrates also highlighted the usefulness of the expanded explanations to help new magistrates better understand the sentencing process, to aid discussion when sentencing as a bench and that generally, “anything that helps you clarify your own mind for arriving at a just outcome to the case - anything like that is helpful”. Another magistrate stated:

If two or more magistrates on a bench have a different view about what the aggravating or mitigating circumstance means, looking at the expanded explanations provides a wider, more detailed definition that allows us to break that deadlock.

Magistrate

4.2. Identification and interpretation of factors and expanded explanations

For stage one of the research, thematic reporting focusses on the identification of factors and how they were interpreted. The findings explore how far the identification and interpretation of factors were in line with what was expected by the design of the hypothetical scenarios and factors' accompanying expanded explanation content.

If a sentencer identified a factor, we asked them to explain why they had identified it and how they had interpreted it. If they did not identify an expected factor, we asked them to explain why they felt it was not relevant for that scenario. Whether a factor was identified or not, as part of the interview we asked them to look at the detail contained with the expanded explanation and consider if they thought any of the content was particularly important. This enabled us to explore what content in the expanded explanations being tested participants felt was particularly important organically as well as after they had been prompted to examine it.

4.2.1. Factors that were identified and/or interpreted as expected

Out of the nine factors explored in the stage one research interviews, there were five where magistrates' and judges' identification and interpretation of the factor was broadly as expected by the scenario design and accompanying expanded explanation content.

These were:

Aggravating factors

- 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
- Commission of offence whilst under the influence of alcohol or drugs
- A leading role where offending is part of a group activity
- Victim is targeted due to a vulnerability (or a perceived vulnerability)

Mitigating factors

- Sole or primary carer for dependent relatives (amendment proposed)

Previous convictions

'Previous convictions' is the only statutory aggravating factor that we tested in the research interviews. Statutory aggravating factors are those specified in legislation ([see sections 64 to 72 of the Sentencing Act](#)) and appear in all sentencing guidelines. 'Previous convictions' was relevant in all of the 'theft' scenario versions examined by 20 magistrates, and all of the 'supplying drugs' scenario versions examined by 20 judges (see the 'theft' and 'supplying drugs' scenarios in [Annex B](#)).

For the 'theft' scenarios, the offender had either eight or 20 previous convictions, mostly for the same offence type as in the scenario. For all the 'supplying drugs' scenarios, the offender had four previous convictions that were not similar to the scenario offence.

Magistrates considering the 'theft' scenario all identified 'Previous convictions' as a factor without prompting. The reasons given for identifying this factor broadly reflected the content of the expanded explanation. The dominant theme in responses was the fact that the convictions were all similar to the scenario offence, as they were "...all relating to theft – she [the offender] isn't progressing in terms of awareness and the damage it does."

The fact that the offender had previously received a non-custodial disposal for one of these convictions was also frequently highlighted:

I did think about the fact that there hadn't been anything [convictions] in the last six months because they'd had the conditional discharge; there hadn't been anything in between until this one, which I thought was good. And then the previous one was two years ago...there's obviously a significant improvement. Magistrate

A less prominent theme, connected to the similarity of offence type and the scenario version where the offender had 20 previous convictions, was the suggestion of a long-term trend of offending:

She has got quite a lengthy list of previous convictions at 20. When you take her age, she's 35, they're all adult convictions, so that's averaging about one a year. They're mostly for shops, so they're directly related to the offence for which she's in

court today...In other words, there's a consistent pattern of offending with shop theft and this is the latest in a long string of similar offences... Magistrate

There were some differences in what magistrates highlighted after they had been directed to read through the expanded explanation for 'Previous convictions', though the similarity to the offence type remained the dominant point. Magistrates raised the context for any previous offending and the potential presence of underlying problems such as addiction.

Underlying problems – [the] number of shop thefts, depending on the value of them, we might go is it drugs or an alcohol issue? And are they stealing because they need it for food...or are they stealing high value items to sell or barter for drug use?

Magistrate

Recognition that the aggravating effect of relevant previous convictions reduces with the passage of time was also prominent.

Judges examining the 'supplying drugs' scenario frequently identified 'Previous convictions' but were less likely to give it weight. The commonly held view was that as the offence types covered in their previous convictions were different to the scenario offence, they were either not relevant, or only had minor relevancy to any sentencing considerations. This is in line with expanded explanation content. For example, one judge commented that the offences were not relevant as "They are limited and even the drugs-related one is only possession". The age of any previous convictions was also present in discussions, to a lesser extent, along with the effectiveness of previous sentences:

[I] don't regard previous convictions for anything other than [drug] possession as significant. I would want to find out what the previous conviction for this involved, for quantity and how long ago. If...it's not very much then I would probably leave it out of account, but I would also want to see what sentences he received for anything in the past so as to have an idea about whether community penalties appear to have kept him out of reoffending and to check he's been compliant with orders in the past. Judge

After being directed to look at the content of the expanded explanation, there was little change in what judges felt was relevant, though one judge noted the value of ordering a pre-sentence report (PSR) due to other features in the case (for example, potential mental health issues). PSRs are expert assessments of the nature and causes of an offender's

behaviour, the risk they pose and to whom, as well as an independent recommendation of the sentencing option(s) available to the court.

Commission of offence whilst under the influence of alcohol or drugs

The factor of 'Commission of offence whilst under the influence of alcohol or drugs' was only explored using the 'assault' scenario with 10 magistrates and was included in this research to explore how sentencers may consider it in terms of aggravation or mitigation. Previous research has suggested that in some instances, sentencers can view the factor as part of mitigation, rather than aggravation as the Council intends. In the relevant scenario versions (see 2B and 2C in [Annex B](#)), the offender had consumed a large amount of alcohol before committing an assault on either his girlfriend or the partner of a friend.

Nearly all magistrates who examined those scenarios identified the factor of 'Commission of offence whilst under the influence of alcohol or drugs' as an aggravating factor. Prominent themes discussed by magistrates when explaining their rationale for identifying this factor focussed on the fact that the offender was voluntarily intoxicated, and that their behaviour was a consequence of this consumption. Both of these points are included in the expanded explanation.

He says he wouldn't normally behave like that – understanding that the effect of alcohol – what it can make you do, we are poor at understanding that as a society, a message that when you drink, bad things can happen, you do things that you shouldn't do – is an important message that some people need to take home and a punishment in this kind of context may help to do that. Magistrate

There was little difference in participants' responses after they had been directed to the expanded explanation, with the exception of one magistrate, who said that ordering a PSR would be useful to determine whether there were any underlying issues with addiction.

Two magistrates did not initially identify the factor, but then decided it was present in the scenario after being directed to read through the expanded explanation:

...voluntarily intoxicated, meaning his drink wasn't spiked by somebody else or whatever and it does contribute to the offending. This is increasing the seriousness of the offence – extremely helpful...[The] last sentence – must accept the consequences [of consumption]. Gives you the confidence when formulating a conclusion. Magistrate

A leading role where offending is part of a group activity

'A leading role where offending is part of a group activity' was only explored in the 'robbery' scenario with 10 judges (see 3A and 3D in [Annex B](#)). This factor was included in the research following a recommendation in The [Equality and diversity in the work of the Sentencing Council report](#) which advised that the Council review the potential impact of group affiliation as a factor in robbery cases. This research found differences between perceptions of participants (civil society organisations, defence lawyers and sentencers) about the way this factor is applied and the quantitative analysis on how it had been applied in practice.

The expanded explanation for this factor states that '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'. The example given in the relevant 'robbery' scenarios was the offender handing a mobile phone they had stolen to an accomplice.

In line with the scenario design and the content of the expanded explanation, no judges applied this factor in the 'robbery' scenario where it was potentially identifiable. The reasons judges provided for not identifying this factor as relevant closely aligned to the expanded explanation content, without any prompting to examine it by the interviewer. For example, judges frequently raised the fact that the "mere fact of handing on [the phone] to someone else does not count as group activity". Another judge stated:

A group activity for robbery – I usually think of, and I know it doesn't have to be, is the group [being] there together. It's the pressure of numbers. So if for example, the accomplice was next to him when he pushed [the victim] ...But as I understand it, this is potentially one where the accomplice is a number of streets away. Judge

Another prominent theme among responses from judges was the potential coercion or exploitation of the offender by others, and to a lesser extent the potential lack of maturity of the offender. These points also reflect the expanded explanation content.

I look at this the other way. The accomplice would be paying him something. I would be looking at this in the context of his background, so it could probably [be] more of a mitigating factor. He is perhaps pressurised to offend. Judge

Victim is targeted due to a vulnerability (or a perceived vulnerability)

'Victim is targeted due to a vulnerability (or a perceived vulnerability)' was only explored with the 10 judges who reviewed the 'robbery' scenarios. In the scenario versions where this factor could potentially be identified (see 3B and 3C in [Annex B](#)), the victim was a 14 year old girl in school uniform and the offender stole her mobile phone.

The identification and interpretation of this factor by judges was broadly as expected by the scenario design and accompanying expanded explanation content. Only one judge did not initially identify it as a relevant factor in sentencing the offence.

In line with the expanded explanation content and without prompting to examine it, the rationale judges provided for identifying this factor focussed on the increased culpability of the offender due to the vulnerability of the victim through age. The level of physical, psychological or financial harm caused was also frequently raised, and to a lesser extent, the location where the offence took place (a potentially isolated area in a park).

There's quite a disparity of age...he's 28 and she's 14. And...she's in school uniform. So you would think, well, he automatically knew that she was under 16 and therefore a child...that's what I would perceive. There's a vulnerability because of her age...I'd obviously factor into the equation the fact she broke her wrist and she's shaken and she's got long-term issues about it. She's not someone who just got up and brushed herself down and also, what was taken was of sentimental value.

Judge

There was little difference in the points judges felt were important after they were specifically directed to examine the expanded explanation during the interview.

The one judge who did not initially identify the factor as relevant still felt they would not apply it after looking at the expanded explanation. While they felt the robbery could be said to be targeted, based on the information provided in the scenario they did not think this was necessarily due to a perceived vulnerability:

...if you spot someone alone and therefore more liable to be successfully robbed, that is to a degree targeting but vulnerability, I don't see it...I think I might make a general reference to the location of the offence here, just targeting a lone walker in a park, but it's more a comment on the facts of the case as opposed to something that merits any particular upward movement from the starting point.

Judge

Sole or primary carer for dependent relatives

The expanded explanation text for 'Sole or primary carer for dependent relatives' was amended for the research as a result of the [Equality and Diversity in the work of the Sentencing Council report](#). The content related to pregnancy in the expanded explanation was removed from 'Sole or primary carer for dependent relatives' and expanded upon to develop a proposed new factor, 'Pregnancy and maternity'. The findings for that factor are presented later in this report.

'Sole or primary carer for dependent relatives' was explored in the scenarios of 'theft' with 10 magistrates (see 1A and 1C in [Annex B](#)) and 'supplying drugs' with 10 judges (4A and 4C in [Annex B](#)). The 'theft' scenario versions used the example of a female offender who had children, while the 'supplying drugs' scenario versions used the example of a female or male offender providing care for their 17-year-old sibling, who had learning disabilities.

All magistrates and judges examining the relevant scenario versions identified this as a factor to take into consideration for sentencing. Discussion of the factor before participants were directed to look at the expanded explanation strongly reflected its content. In particular, magistrates and judges frequently highlighted the need to consider the impact of immediate custody on dependents.

[The] impact on the kids of losing [their] mother to custody – naturally it's going to have an impact, but I don't know anything about family members or their options, and if it's a community order, how is that going to impact against unpaid work or a curfew...we will be asking ourselves lots of questions about what her responsibilities are for the kids and what needs to be done to understand that.

Magistrate

The importance of 'Sole or primary carer for dependent relatives' for cases that were on the cusp of custody (particularly relevant for the 'theft' scenario) was also recognised, as "that's where the Imposition [of community and custodial sentences] guideline comes in". Offenders on the cusp of custody denote cases where an appropriate sentence may be custodial or non-custodial (for example, a community sentence). The [Imposition of community and custodial sentences guideline](#) sets out the general principles for imposing community orders and custodial sentences, and in what circumstances a custodial sentence can be suspended. This includes consideration of whether there would be an impact on dependents which would make custody disproportionate.

Correspondingly, a recurrent theme in magistrates' responses when discussing sentencing for the relevant 'theft' scenarios was that the offender being a sole or primary carer was "the most important consideration". In contrast, while judges did all identify the factor for the relevant 'supplying drugs' scenario versions, it was noted in some interviews that while it would "feature within assessment of the overall sentence", it might not always be given significant weight due to the nature of the caring arrangements described:

Although she's 26, her caring responsibilities in relation to a 17-year-old [sibling] who's got some learning difficulties – it really means that [the] mother can't go out to work. But it's not a situation where she's, for example, the mother of three young children who otherwise would be put into care. [It] carries some weight here but not as much as it would in other scenarios. Judge

The severity of the offence in the 'robbery' scenario also meant that the sentence could very likely only be custodial (suspended or immediate). Therefore, the point raised in interviews with magistrates regarding the factor's importance due to the offence being on the cusp of custody was not applicable to the scenario judges examined.

When directed to look at the expanded explanation for this factor, the value of PSRs became a more prominent theme among magistrates, with one magistrate suggesting they would order one as they would not want to "set her [the offender] up to fail" and others noting that probation would be able to "dig deeper" to better establish the context of the offending and accurately determine the potential impact of the sentence of any dependents.

In contrast and in line with the previously mentioned perspectives around the weighting of the factor for the 'supplying drugs' scenario, ordering a PSR was not a prominent theme among judges. However, one judge did state that they would order a PSR to tell them "just how much she [the offender] has to care" for her brother with learning difficulties, and another felt they would request a PSR "as this may be the first offence of this seriousness" for the offender.

As well as highlighting the potential impact on dependents and the potential usefulness of PSRs, when directed to look at the expanded explanation one judge said they found the point about community order requirements (such as unpaid work or undertaking a rehabilitation activity) helpful. The judge felt the expanded explanation reminded them to consider the feasibility of an offender completing any such requirements:

...it's very infuriating if you have considered a sentence and then you think ... I'm going to suspend this and give her a community order and she can do whatever conditions probation suggest and then get them coming back...saying, well actually she can't do any of the conditions, because of her caring responsibilities...[the] expanded explanation made me stop and think about that... I need to think about the impact on the dependents. Judge

While the expanded explanation content regarding cusp of custody was not relevant to the judge's scenario, after being directed to examine it, some judges felt the reminder about this was "particularly useful" for sentencing generally, with one judge suggesting that "in the zone of a suspended sentence... that (the expanded explanation) might just tip the balance".

Some judges and magistrates discussed the final sentence they might impose if they were sentencing the scenario presented in the interview. In these discussions, the factor of 'Sole or primary carer for dependent relatives' was frequently highlighted. In particular, the dominant theme for magistrates considering the 'theft' scenario was the desire to avoid custody "because of the children", as the offender's role as a carer (the children's mother) was "significant". For judges considering a 'supplying drugs' scenario, there was a suggestion that the care the offender provided their sibling was "the only reason for suspending [the sentence]".

4.2.2. Factors that were not always identified and/or interpreted as expected

There were four factors in the stage one research interviews where the identification of a factor by magistrates and judges, and how it was interpreted, was not always as expected by the scenario design or accompanying expanded explanations. These factors were:

Aggravating factors

- Offence committed in a domestic context

Mitigating factors

- Age and/or lack of maturity
- Remorse (amendment proposed)
- Good character and/or exemplary conduct (amendment proposed)

Offence committed in a domestic context

'Offence committed in a domestic context' was only explored with 10 magistrates, in 'assault' scenario versions 2A and 2D (see [Annex B](#)). In both relevant scenario versions, the offender and the victim were described as being in an intimate relationship (boyfriend and girlfriend) and sharing the same accommodation, with the offender committing assault after becoming angry with the victim in public. 'Offence committed in a domestic context' is different to the other factors explored in the research. Instead of text, the expanded explanation consists of a hyperlink which directs sentencers to the [Overarching principles: domestic abuse guideline](#).

Only two magistrates did not identify 'Offence committed in a domestic context' when initially considering what factors might apply to the scenario. Magistrates who did identify the factor provided reasons closely aligned to the content in the domestic abuse guideline. They frequently cited the offender/victim relationship as the key rationale for its identification (being in an intimate relationship). The features of coercive or controlling behaviour and abuse of trust/power were also highlighted. In addition, the victim deciding they did not want to proceed with prosecuting the offender was also discussed, which aligns with recognition in the domestic abuse guideline that the victim deciding they do not wish to proceed does not indicate a lack of seriousness.

After being prompted to examine the domestic abuse guideline in the interview, magistrates were asked if they felt any points were particularly important. Responses tended to reiterate the points raised before being directed to look at the guideline, although one difference in what was emphasised was the statement in the guideline that the domestic context increased the offence severity. After examining the expanded explanation, the two magistrates who did not initially identify the factor both felt it would apply and highlighted the offender/victim relationship and the victim's withdrawal from prosecution. One magistrate felt the feature of coercive or controlling behaviour was particularly important.

A minor issue apparent in relation to this factor was uncertainty around application. One magistrate felt domestic context was already counted in the assessment of culpability, due to the scenario featuring a 'prolonged/persistent assault' (a high culpability factor at step 1 of the assault sentencing guideline). Another magistrate was uncertain whether it would apply because the incident "happened in public" as opposed to, for example, inside a

shared residence. An offence does not need to be committed in a shared residence for domestic context to apply.

The factor was also identified in 'assault' scenario versions where it was not expected to be identified. In these scenario versions (2B and 2C, see [Annex B](#)), the victim of the assault was the girlfriend of the offender's friend. Magistrates who identified the factor in these scenarios suggested that 'Offence committed in a domestic context' could apply because the offender and victim knew each other and had a pre-existing relationship, as "it's the girlfriend of a friend [and] that's quite close. Closer than a random person off the street". This contrasts with the guidance in the domestic abuse guideline, which states that it applies where the offender and victim are in an intimate relationship, married or in a civil partnership (or have agreed to be), have a parental relationship in relation to the same child, are relatives, or live in the same household and have a relationship that involves an expectation of mutual trust and security.

After looking at the [Overarching principles: domestic abuse guideline](#) linked in the expanded explanation, some sentencers discussed what sentence they might impose on the offender in their sentencing scenario. The factor of 'Offence committed in a domestic context' was a prominent feature for magistrates as something they would give "more weight" to when considering a sentence type or length, "depending on what the pre-sentence report said".

Age and/or lack of maturity

'Age and/or lack of maturity' was explored with 10 magistrates and 10 judges using the scenarios of 'assault' and 'robbery', respectively. Identification of this factor was mostly as expected by the scenario design; however, this was more the case for the judges who considered the relevant 'robbery' scenarios than magistrates who considered the 'assault' scenarios. This was likely influenced by the age of the offender in the scenarios.

In the 'assault' scenario versions, the offender was 22 years old, was drunk and had assaulted a friend's partner after they intervened in an argument (2B and 2C in [Annex B](#)). In the 'robbery' scenario versions, the offender was 19 years old and had stolen the victim's phone on the promise that he would receive money for doing so (see 3A and 3D in [Annex B](#)). Both of these ages fall into the bracket provided in the expanded explanation for 'Age and/or lack of maturity' (18 to 25 years old).

All but one judge identified the factor of 'Age and/or lack of maturity'. The dominant theme was its relevance due to the emotional and developmental age of the offender (in line with his actual age of 19). Other points frequently raised were peer presence or pressure, the offender's capacity for change, and neurological considerations around risk-taking and impulsivity.

[There is] lack of maturity – as a function of age. The living with parents, being unemployed, no qualifications is not unusual in a criminal. The expanded explanation is helpful, [it's] handy to have in one place. Judge

All of these points closely align to the expanded explanation content. Judges did not tend to raise additional points after being directed to examine the expanded explanation, although one did note the importance of ordering a PSR after doing so. The judge who did not identify the factor commented that they would still be asking "Does his actual age reflect his maturity?", suggesting that they would still be factoring this into their sentencing considerations. However, they still felt they would not formally apply the factor after being directed to read the expanded explanation.

Among magistrates, frequency of identification was more mixed. Those that did identify 'Age and/or lack of maturity' often gave similar reasons to those provided by judges, which were in line with the expanded explanation: the emotional and developmental age of the offender and neurological considerations around impulsivity and understanding consequences. One magistrate also raised the potential impact of the sentence on the offender, which aligns with the expanded explanation point that an immature offender may find it particularly difficult to cope with custody or the requirements of a community order without support.

The reasons for non-identification suggest differences in interpretation of the factor. One magistrate said they did not identify the factor as the factor title 'Age and/or lack of maturity' "didn't ring a bell with me until I looked at the expanded explanation". Another suggested "The fact he's [the offender's] 22 as opposed to 17 or 18 [means] he should be a bit more mature", and therefore the factor would not apply.

After examining the expanded explanation, additional points were identified as important by magistrates, including the offender's capacity for change, the use and importance of PSRs, potential addiction issues, the impact of a custodial or community sentence, and a potential reduction to the sentence due to the level of offender responsibility. This

suggests that looking at the expanded explanation helped magistrates to draw out additional points for consideration.

Some sentencers also discussed what sentence they might impose on the offender in their sentencing scenario. In line with the findings above, the factor of 'Age and/or lack of maturity' did not prominently feature in the sentence rationale for magistrates but did for judges in some cases. For example, one suggestion made by a judge was that the length of a custodial sentence could be at "the bottom of the bracket" because of the age and/or lack of maturity of the offender. The importance of a PSR (cited in the expanded explanation) was also highlighted, with one judge noting that the "decision of whether to suspend or not would come down to the PSR".

Remorse

The expanded explanation text for 'Remorse' was amended for the research as a result of a recommendation in the [Equality and Diversity in the work of the Sentencing Council report](#). Discussions with participants highlighted that the presence of learning disabilities, communication difficulties and/or cultural differences, could hinder communication of remorse, with the resulting recommendation being that they should be included within the expanded explanation. Alongside including these issues, some of the text on how remorse can present itself was reformulated into a bulleted list for the research. The full text can be found in [Annex F](#).

'Remorse' was potentially present in two of the 'assault' scenario versions for 10 magistrates (see 2A and 2D in [Annex B](#)) and two of the 'supplying drugs' scenario versions for 10 judges (see 4B and 4D, [Annex B](#)). For the 'assault' scenario versions, the offender expressed their shock when they saw CCTV footage of their assault, said that they weren't proud of what they'd done and that they knew they needed to change. For the 'supplying drugs' scenario versions, the offender was described as distracted in court but said that they understood what was happening and expressed remorse through a representative.

While most judges identified the factor of 'Remorse', as expected by the scenario design, only half of magistrates did. Across those that did and did not identify it, the dominant theme was the assessment of genuine remorse, and whether the examples provided in the scenarios presented enough evidence for remorse to be accounted for. Although the factor was not always applied where expected by the scenario design, this interpretation closely

reflects the expanded explanation, which notes that a simple assertion of remorse may be insufficient.

I wouldn't say that that's remorse, but you'd have a range of...opinions on that. Him saying that he's shocked...and he isn't proud, and he know he needs to change because he has a short fuse - some may say that's remorse but I don't think it is.

Magistrate

Other prominent considerations raised organically by judges and magistrates included the different ways remorse can present itself and the value of ordering a PSR, which was “vital” to aid assessment of genuine remorse.

...sometimes people really are remorseful, but they have an odd way of presenting it. In particular young people or ethnic minorities may look defiant, presenting in [a] different way. [It's] good and helpful to be reminded about all of these factors in remorse.

Judge

After participants had been directed to look at the expanded explanation for ‘Remorse’ during the interview, both magistrates and judges typically highlighted the same or similar content to what they discussed prior to reading the text. However, some more particular details around consideration of learning disabilities were acknowledged and to a lesser extent, cultural differences. Both of these points are proposed amendments to the expanded explanation.

One magistrate who had not initially identified the factor noted the importance of a PSR after reading the expanded explanation: “It says in the expanded explanation that a PSR would be valuable, and it would be - [I] wouldn't sentence something like this [assault scenario] without a PSR.”

We asked participants what they thought of the proposed changes to the expanded explanations for remorse. Generally, magistrates and judges were positive about the proposed considerations, feeling they were “worthwhile additions” to the factor:

[I] think the additions are a very intelligent thing to have. Having an awareness of such things gives you more insight into the person you are dealing with. Bulleting them is really helpful [because it] makes you think of them separately. Judge

However, there were some concerns expressed among magistrates over the inclusion of 'cultural differences'. There was a suggestion that the relevance of this in relation to remorse was less apparent and might benefit from further explanation:

Cultural differences – how does that fit into remorse...or is it the fact that some cultures wouldn't know how to show remorse or that we wouldn't be aware of it particularly...I'm just wondering if there could be cultural differences flagged up in the offence side of things as well. Magistrate

Good character and/or exemplary conduct

The expanded explanation for 'Good character and/or exemplary conduct' was amended for the research by removing charitable works, which is the only example given for positive good character in the factor's current explanation. While the [Equality and diversity in the work of the Sentencing Council report](#) recommended that more inclusive examples were given, it was difficult to ensure that any that were provided were inclusive enough. As an alternative, the research tested identification and interpretation of the explanation without any examples.

For judges with the relevant 'robbery' scenario versions (see 3B and 3C, [Annex B](#)), the example of good character was provided via a character reference from a tutor for a literacy programme that the offender (who had no employment or qualifications) had recently enrolled in, praising how hard they were working to improve their core skills. For magistrates with relevant 'theft' scenario versions (see 1B and 1D, [Annex B](#)), the evidence was a character reference from the organiser of a local netball team, who said the offender had been a positive influence on younger members of that team.

Of all the factors explored in the stage one research interviews, 'Good character and/or exemplary conduct' was the only factor where the identification and interpretation were rarely as expected by scenario design and accompanying expanded explanation content. This was the case for both judges and magistrates. The dominant reason for this was that judges and magistrates felt the examples they were given in the scenarios were not strong enough to warrant applying the factor:

It doesn't say he is of good character. It is a fundamental thing because it's the potential to reduce the sentence...His reference shows that he is recognising that he needs to turn his life around a bit and I think that's positive. It means that maybe I can give him some credit for that. A character reference would be something like,

I've known him and he's always been very good, I'm surprised, this is out of character. This reference seems to say he's worked really hard so it's more like an educational reference rather than a character reference. Judge

[I] didn't see her involvement in netball as a point of good character. [I] thought it was more like something that would point to the Probation Service investigating that area of her life... Magistrate

Another potential reason for judges not identifying the factor was the seriousness of the robbery offence, which could limit the weight that could be given to it; one judge noted that it would be "quite an exception to not send a lad of 28, more than a lad, to custody for robbery on a lone 14 year old." Another agreed that while there was "some value" in the example given in the scenario, ultimately it would not carry much weight: "[I] wouldn't ignore but [it's] not significantly changing the sentence". These views reflect the expanded explanation, which specifies that the factor is less likely to be relevant where the offence is very serious. Magistrates did not raise this issue, in line with the less serious offence used in their 'theft' scenario.

Another finding specific to judges was concern around double counting. A reminder to take care to avoid double counting factors (including those already taken into account in assessing culpability or harm) can be found at the top of each expanded explanation. One judge said that they would rather apply 'Determination and/or demonstration of steps taken to address addiction or offending behaviour', as they felt this was a better fit for the example. Therefore, they would not want to also consider 'Good character and/or exemplary conduct' and risk double counting. Another judge also discussed double counting good character alongside a lack of previous convictions, implying that they viewed them synonymously:

I wouldn't double count in effect [what] I'm giving him for no previous convictions because he had someone saying a good thing about him. Judge

The conflation of good character with a lack of previous convictions when interpreting this factor was a prominent theme, particularly among magistrates. One magistrate suggested that "frankly, her [the offender's] good character disappeared, certainly after the first, second, third or eighth previous attempts that she's done shoplifting" and another commented that they "didn't immediately think it [the factor] would apply because of their previous record". These views contradict the expanded explanation for 'Good character

and/or exemplary conduct', which states the factor 'may apply whether or not an offender has previous convictions'. There is a separate mitigating factor in sentencing guidelines for 'No previous convictions or no relevant/recent convictions'.

Magistrates tend to ignore this [expanded explanation content] completely and go to previous convictions, although this [expanded explanation] clearly says this factor may apply whether or not there are previous convictions. [They] think of them as the same thing. Magistrate

A separate issue raised during the discussion of this factor was difficulty in identifying examples that might demonstrate positive good character or exemplary conduct. As mentioned previously, for this research the example of 'charitable work' was removed from the expanded explanation. We asked judges and magistrates for their views on this proposed change. Participants were broadly in favour of removing this example as "to volunteer with charity you've got to have the time and the income to do so":

I agree with the removal of charitable works. If you're dealing with people who require charity rather than give charity, how can charitable works be a plus? Only the middle class, or even the very rich, are ever going to benefit from that. Judge

A very small number of sentencers were then asked what they thought might be a suitable example of good character and/or exemplary conduct, or spontaneously provided thoughts when discussing the factor. One suggestion given was that a letter from an employer or educational institution could provide an example of good character, but others found it challenging to identify examples that fell outside of various forms of volunteering:

I guess being a magistrate is one. Volunteering, giving back to the community...Those are all things you can do when you have time on your hands and the people who might end up shoplifting are unlikely to be those who've got time on their hands. An example of good character that might be relevant for somebody who hasn't got spare time, that does restrict it considerably and I'm struggling. Magistrate

There were contrasting views on how far the expanded explanation aided interpretation of the factor, with one view being that an "open" definition which provided no specific examples of good character was sensible, and another view that it was unhelpful. Those who preferred an open definition felt that this allowed for the flexibility needed to judge character, as you "could dream up ten things to demonstrate good character, and

charitable works would be one, but why pick one?”. There was also a suggestion that the openness mitigated against possible class bias:

That is exactly what defendants think of the courts as, as filled with middle class people who do little bits of good work and so on. Taking it [charitable works] out is a good idea. Having an example might limit the thinking. It could be helping with family. It could be out of our cultural bandwidth. Better [to] have it more open, without an example. Magistrate

Those who said they would prefer a more detailed explanation suggested that more guidance on the point in the expanded explanation that “someone could have previous convictions but still be considered to have good character and or exemplary conduct...would be useful”. A magistrate also suggested more examples would better aid consistency of sentencing:

I would prefer to see more examples. It is helpful to understand what it is that you [the Sentencing Council] mean, what you're looking for when you're writing those guidelines for us, and what kinds of things you are looking for. You'll get people applying different interpretations, [though] you might still get that even if you do provide examples. Magistrate

These findings suggest that the identification and interpretation of ‘Good character and/or exemplary conduct’ can be complex. In particular, the conflation of the factor with having no previous convictions by some participants implies that they were not familiar with the content of the expanded explanation, or that the factor title may be contributing to incorrect assumptions about its meaning. Discussion of how helpful the content of the expanded explanation content was by participants also suggests that amending this factor or its explanation could be beneficial for sentencers’ understanding.

5. Stage two findings

This section presents findings from focus groups with judges and magistrates. These discussed three proposed new mitigating factors that could potentially be introduced across sentencing guidelines, based on recommendations from the [Equality and diversity in the work of the Sentencing Council report](#). The factors recommended were:

- 'Deprived and/or difficult background or personal circumstances'
- 'Pregnancy and maternity'
- 'Prospects of or in work, training or education'

The text for these proposed expanded explanations has been provided below. All focus groups discussed all factors.

5.1. Deprived and/or difficult background or personal circumstances

The [Equality and diversity in the work of the Sentencing Council report](#) found that participating civil society organisations felt that insufficient consideration of mitigating factors might have a bigger impact on certain offenders. Within this, they included offenders from deprived backgrounds, as they felt that some issues may be more relevant for these offenders (such as a lack of family support) and that it can be harder for these groups to evidence and advocate mitigation at court. They recommended considering including a mitigating factor of 'difficult/deprived backgrounds'. The current research tested the proposed factor of 'Deprived and/or difficult background or personal circumstances' with the expanded explanation of:

The court will be assisted by a pre-sentence report in assessing whether there are factors in the offender's background or current personal circumstances which may be relevant to sentencing. Such factors **may** be relevant to:

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

Courts should consider that different groups within the criminal justice system have faced multiple disadvantages which may have a bearing on their offending. Such disadvantages include but are not limited to:

- experience of discrimination
- negative experiences of authority
- early experience of loss, neglect or abuse
- early experience of offending by family members
- experience of having been a looked after child (in care)
- negative influences from peers
- misuse of drugs and/or alcohol
- low educational attainment
- insecure housing
- mental health difficulties
- poverty
- direct or indirect victim of domestic abuse

There are a wide range of personal experiences or circumstances that may be relevant to offending behaviour. The [Equal Treatment Bench Book](#) contains useful information on social exclusion and poverty (see in particular Chapter 11, paragraphs 101 to 114). The [Sentencing offenders with mental disorders, developmental disorders, or neurological impairments](#) guideline may also be of relevance.

Focus group participants held predominantly negative views about introducing this factor and discussed many issues that they perceived with it and its accompanying expanded explanation. Dominant among these was the view that there were “probably far more people [offenders] who are in that category than outside the category”, to the point that some concerns were expressed about how offenders who did not fall under this bracket might then be sentenced: “...the converse of it is what about people who don't have those [characteristics]? Do they get treated fairly and differently?”

There was a view that because of its “very broad” applicability, introducing the factor would lead to “a very significant change” in sentencing practice that some participants found “worrying”.

I'm a little bit concerned if something quite as wide as this is seen to be a significant sentencing factor; you'll find defendants scrambling and, in many cases, without the prospect of successfully checking it, to say that they had early experiences of abuse, early experience with offending by family members, negative influences by peers. [It]

potentially opens up a floodgate of everyone finding a way to get within one or other of these brackets. Judge

One judge also raised the increased likelihood of sentences being submitted for appeal as a result of this factor, due to the length and range of examples given in the expanded explanation: "If in sentencing the judge doesn't refer to each of them [the expanded explanation points], then there could be an appeal on the basis that the judge didn't take 'X' into account when it's actually obvious that the judge did".

Magistrate focus groups raised concerns around the risk of double counting some of the content contained in the expanded explanation with other text elsewhere in the sentencing guidelines, as a "lot of these [points] are also dealt with separately". One magistrate suggested that a particular difficulty with the expanded explanation was that it "feels to me we're double counting some things, whereas other [points] we haven't thought about at all".

In particular, the inclusion of alcohol misuse as part of the factor was described as a "direct contradiction" to existing guideline practice, where it is considered an aggravating factor under the factor of 'Commission of the offence whilst under the influence of alcohol or drugs'. 'Mental health difficulties' was another point flagged as problematic, as it is already considered both as a separate mitigating factor ('Mental disorder or learning disability (where not linked to the commission of the offence)') and in the overarching guideline for [Sentencing offenders with mental disorders, developmental disorders or neurological impairments](#).

One judge also expressed concern around the potential impact of the factor's introduction on an offender's culpability and sentence severity in domestic abuse cases:

...there might be a risk with domestic abuse because a lot of domestic abusers would say, well, actually, there are these mitigating features which explain why he has this appalling attitude towards women and his partners, and therefore it's not really his fault. There could be a conflict with the domestic abuse guideline ... I can see counsel trying to use this - it's not his fault he's got this appalling attitude towards women, it's because of his background and had he had a better background, this would never have happened, and you should take that into account. Judge

A prominent criticism shared in some focus groups was that the expanded explanation looked more like "a probation checklist" or "something that's been printed off for defence

advocates to go through”. One judge suggested it “might be more helpful...to say how some of these might be relevant” and another noted that probation already had a very similar template for the PSR that covered the expanded explanation content. It was suggested that some of the points were “straying out of the mitigation area” and that it was inaccurate to imply being disadvantaged made criminality more likely:

There are many people who are in desperate straits who remain steadfast, honest, good citizens so to assume too readily that these factors will lead to criminality is quite unfair on a lot of honest but disadvantaged individuals. Judge

There were also some less common, positive perceptions of the factor. One raised by magistrates was that the list of considerations made you “think more about what they’ve been through”. Another view was that the factor wouldn’t necessarily result in over-identification but would encourage sentencers to recognise when the offender’s background might be significant in sentencing:

It's really clear because it's not saying that just because you come from a deprived background you should be treated in a different way. It does make sure that there are key factors that would affect the way that people think and make decisions...it's not just about one of them, it's about multiple disadvantages. If you start to start to tick two, three or four on the list then you can start to move things forward. Magistrate

When asked whether they felt introducing the factor would particularly impact sentencing for any demographic groups (for example, race, sex or age), some magistrate focus groups suggested that both younger and older offenders might be affected, although it was “more likely to apply to younger people”:

...you think of earlier experience of offending by family members, you would hope by the time you're an adult, 30 or 40...you know what's right and wrong. But you can see that as a youth or maybe as an 18- to 24-year-old, that maybe this is a factor that should be taken into account. Magistrate

Other reasons provided by magistrates for why it might particularly impact on younger offenders, included a recognition that peer pressure was more likely to be present for younger age ranges (for example, age 18 to 24), and that they may be “more likely to respond” to rehabilitative programmes or requirements. Judge focus groups felt that there would be no sentencing impact for any demographic groups, with the exception of one

group who raised the potential conflict with the domestic abuse cases, reported earlier in this section.

Groups had no issue with the presentation of the expanded explanation. One magistrate felt that having the reference to the PSR at the start of the explanation was “excellent as I missed that in other sections”. A reoccurring theme across groups was also that content presented in bullet points was useful as they were “easy to follow”, as was providing hyperlinks to other relevant content like the mental health guideline.

5.2. Pregnancy and maternity

Another recommendation from the [Equality and diversity in the work of the Sentencing Council report](#) was that there was a need to specify pregnancy and maternity as a discrete phrase, in line with its recognition as a named category in the [Equality Act 2010](#). This was based on a finding that a small number of participants felt that pregnancy and maternity posed very specific challenges for the criminal justice system. The current research tested the proposed factor of ‘Pregnancy and maternity’ with the expanded explanation of:

When sentencing an offender who is pregnant relevant considerations may include:

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

The impact of custody on pregnant women can be harmful for both the mother and the unborn child. Pregnant women in custody are more likely to have high risk pregnancies with reduced access to specialised maternity services. There may also be difficulties accessing medical assistance and with being transported to hospital when in labour and giving birth.

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.

When considering a custodial or community sentence for a pregnant offender the Probation Service should be asked to address these issues in a pre-sentence report.

Unlike the other proposed new mitigating factors, the expanded explanation for 'Pregnancy and maternity' included existing content from the expanded explanation for 'Sole or primary carer for dependent relatives', which was expanded on to produce a separate factor.

Focus group participants were divided over how useful introducing 'Pregnancy and maternity' as a specific factor would be. A recurrent perspective was that the condition of pregnancy and care of dependents was already well-accounted for in sentencing considerations as part of the existing factor of 'Sole or primary carer for dependent relatives':

It's [pregnancy and maternity] all part and parcel of a family responsibilities section which starts pre-birth and goes on till the child's left home...how many breakdowns you have within that period...it is perhaps unnecessary. Judge

One alternative proposal was that it may be useful to add the information given in the expanded explanation for 'Pregnancy and maternity' into the expanded explanation for 'Sole or primary carer for dependent relatives', as it contains more specific detail on pregnancy that may make considerations "clearer":

...my view would be if you feel that judges are not dealing with pregnancy despite what's already there in terms of the sole carer [factor], then to expand that rather than have an entirely separate section...so when you're looking at being a sole carer, that doesn't just include a child that's already born, but also one that is potentially going to be born during the course of a sentence. Judge

Magistrates were more likely than judges to feel there were some positive components to the expanded explanation. One said that it was "really useful...that it makes it completely clear that the impact of custody on pregnant women can be harmful to both the mother and child" and another that given that pregnancy can be an emotive topic, including the factor in the guidelines would help with victim and public understanding:

...if the interested party or the injured party, thought that they [the offender] got off lightly because they were pregnant, and then you're giving an explanation as to why

we've done what we've done... this really sets it out and gives us a good explanation which we can then explain in court as to why we're doing...this says it's not great for somebody with a small child to be going into custody or who is pregnant and about to give birth to go into custody, and is there an alternative that is still a punitive alternative to show that they're being punished for their crime. Magistrate

One magistrates' focus group discussed how the maternity aspect of 'Pregnancy and maternity' would benefit from further clarification, as there was "an assumption that this means infants, as in child in arms". There was also a view raised around whether the level of consideration given to pregnancy would change dependent on the trimester, as that might create "a big difference on how a bench [of magistrates] might look at someone":

Would you treat somebody differently if they're in their first trimester versus about to give birth? If [it's] potentially a short sentence, would we consider it differently if they were only two or three months pregnant versus being eight or nine months pregnant? I don't know...There's a bit of thinking around that that isn't covered in this...

Magistrate

A prominent theme for judges was an unease with some of the statements made in the expanded explanation regarding the negative impact of custody on pregnant offenders. Participants felt the explanation needed to "be careful not to run too quickly to validate assumptions that might not be actually correct" and that some of the statements were "not necessarily valid". In particular, it was felt that custody did not always have a harmful impact on pregnant women. Some identified benefits from being in a custodial environment were the removal of the offender from a chaotic or dangerous home environment, prevention of substance abuse, and the levels of monitoring provided by prison staff being beneficial to an offender's safety. It was also suggested that service access was the wrong focus in the expanded explanation, as "It's the innocent unborn child that should be uppermost in our minds rather than...the access to services by the mother".

Groups generally had no issues with the presentation of the expanded explanation. Although one magistrate mentioned that block text was not easy to read, a judge felt it was "short and sweet" and another magistrate thought that compared to the other factors, pregnancy and maternity "stands out a bit more" because it was "punctuated in a way that [means] we can absorb bits of information".

One judge suggested that it might be helpful to link to the [Imposition of community and custodial sentences guideline](#) or to case law, as the Court of Appeal has covered the topic of pregnancy thoroughly. One magistrates' group suggested that the 'and' at the end of the two bullet points could be bolded to clarify that there are two points to consider, and that the two points made about being on the cusp of custody could be combined.

5.3. Prospects of or in work, training or education

Another recommendation from the [Equality and diversity in the work of the Sentencing Council report](#) was that the Council consider 'in work of training' and 'loss of job or reputation' as mitigating factors, particularly for acquisitive offences such as theft or robbery. This was based on findings that suggested these features appeared to impact the length of sentence for some offender groups. The current research tested a proposed factor of 'Prospects of or in work, training or education' to ensure relevancy across all guidelines instead of acquisitive offences only, with the expanded explanation of:

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](#).

Where an offender is in, or has the confirmed prospect of starting work, education or training this may indicate a willingness to rehabilitate and desist from future offending. Similarly, the loss of employment, education or training opportunities may have a negative impact on the likelihood of an offender being rehabilitated or desisting from future offending. The court may be assisted by a pre-sentence report in assessing the relevance of this factor to the individual offender.

The absence of work, training or education should never be treated as an aggravating factor.

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

Views on introducing this factor were predominantly neutral or negative among both judges and magistrates. Only one group of judges shared any positive views on this factor, feeling that it was especially good mitigation when on the cusp of custody and "well-

formulated”. Focusing on employment, they recognised that continuing the routine of getting up and going to work was a positive reflection on an offender, particularly if they had continued while waiting for a sentencing hearing. Magistrates who felt more positive about the factor noted that it was helpful when thinking about the impact of the sentence and would make a bench “really think harder” about chances for rehabilitation. Similarly, another magistrate in the same group felt recognition of prospects was a “really positive” factor:

I think it would be really useful because if someone offers that in court... they're in a serious situation and...they're trying to improve and change. So I think that this statement here, which is about confirming the prospect of starting work, it's showing in maybe a very limited way, but they're trying their best and I think it's worth exploring with them. I've always seen it as a really positive factor. Magistrate

Sentencers questioned the mention of a ‘confirmed prospect’ of starting work, education or training in the expanded explanation and what suitable evidence of this would be. One group of magistrates also wondered whether this could unintentionally discriminate against particular groups such as those with disabilities or on benefits who may be less likely to be in work, education or training. More than one focus group also highlighted that it would be more likely apply to younger people:

...to expect someone in their seventies to go out and get a job is perhaps less significant than a...15–16-year-old who's left school and just doesn't do anything. I think the younger the person that the more important it is. Judge

One group of judges also considered that sentencers might have different ideas about what confirmed work should look like that were rooted in “middle class bias”. For example, one discussed how they often dealt with people living chaotic lives for whom jobs are “not always on paper”, such as those with ad hoc or cash in hand arrangements. One magistrate also noted that the world of work “looks very different to 10 years ago”, with, for example, use of zero hours contracts. For such individuals, a confirmed prospect of work might be different to having a formal job offer letter or contract. One view that was shared was that the term ‘realistic’ might be more helpful than ‘confirmed’, to reduce these risks of disparity.

A more uncommon cluster of thought among magistrates was around the double counting risks this factor could create. They felt the expanded explanation directly contradicted guidance on driving disqualifications.

I found it very vague...I agree that this is what we do take into account when we're imposing, say, curfew or unpaid work, etcetera, etcetera. But I'm also concerned about the inherent contradiction where for an ancillary order such as disqualification from driving, we do not take [it] into account unless it's exceptional circumstances that somebody may lose their job.

Magistrate

Judges who were markedly not in favour of introducing the factor predominantly felt introducing it was “totally unnecessary”; one judge was “slightly troubled that it [was] deemed necessary to spell it out”. Another judge in the same group agreed, feeling that consideration of work, training or education “is a very generalised matter that every judge is going to take into account”. A judge in a different group was concerned about the pressure its introduction might place on probation.

...it says the court may be assisted by a pre-sentence report. What I can see happening is every time there is a sentence to be carried out in relation to somebody who may be looking to get...or is in work training, education, that essentially the advocate will be saying to the sentencing judge well you know, the sentencing guidelines say you should really be thinking about a pre-sentence report here in this instance and it will simply delay matters.

Judge

Overall, focus groups did not tend to feel the introduction of the factor would impact on sentencing of any particular demographic group, although it was felt that it would more likely apply to younger offenders. However, one magistrate noted that there might be an additional challenge when applying the factor in respect to education or training, as the weighting of this might be affected by the timings of the academic year:

...an awful lot of education starts in August or September. A lot of training starts in August or September. This [factor] would significantly favour someone who was being sentenced in June or July compared to someone who was being sentenced in January or February.

Magistrate

Group views on the presentation of the factor were mixed. Some felt the expanded explanation was “well formulated” and “well set out”; others felt the block of text was more difficult to read compared to, for example, the bullet points used in the ‘Deprived and/or

difficult background or personal circumstances' expanded explanation. Suggestions were also made to use bolding to highlight particularly important information such as the point on loss of employment, and that the positioning of the statement on the absence of work, training or education never being treated as an aggravating factor should be nearer to the start to ensure it was not missed.

5.4. Overall perceptions of the three proposed factors

Overall, although groups generally felt the content of the expanded explanations for the proposed three new factors was “sensible”, “clear” and “useful to bear in mind”, the prevailing perspective appeared to be that it was not necessary to introduce any of them into the guidelines because the issues covered in them were already being accounted for in sentencing.

Some groups were asked whether there was any value in formally recognising factors that sentencers felt they were already taking into account in the guidelines. One magistrate acknowledged that “there’s definitely an advantage to having it written down, because then everyone is doing it consistently”. However, others highlighted concerns around “overburdening” sentencers with “so much information it can’t be looked at” or that the expanded explanation content related more to context for offending and sentencing, rather than formal mitigation:

...these factors would not be factors which I would necessarily be referring to when looking at aggravating or mitigating factors relating to the effects, but they will be personal mitigating factors. I would be mentioning [them] when I'm talking about the defendant's personal circumstances and the personal mitigation...if you're wanting to give defendants a potential sort of list of things that they might want to raise then obviously that is fine, but that's not my understanding [of] what the aim ultimately of the Sentencing Council guidelines is. Judge

One of the judges' groups also discussed some “unintended consequences” that introducing the three factors might have. It primarily concerned the potential impact on the Probation Service and potential delays to sentencing due to the need to order a pre-sentence report, as recommended in all three of the factors.

I also have an overriding concern about all three that...it may mean extra work for the Probation Service. It keeps suggesting that a pre-sentence report will assist.

Well my view for instance on this one is I'm happy to hear what the advocate says.

Our Probation Service are understaffed and overwhelmed.

Judge

The strength of the views expressed by this small number of sentencers indicated that further consultation on these factors would be beneficial. The factors have therefore been included in the most recent [miscellaneous amendments consultation](#) by the Council.

6. Overarching findings: broader perceptions of the expanded explanations

As part of stage one of the research, as well as exploring the selected factors through scenarios, we asked sentencers more broadly about guideline factors and expanded explanations (including those that were not part of the scenarios). These questions focussed on general ease of use and interpretation, as well as giving sentencers an opportunity to make suggestions for expanded explanations they might find useful for factors that do not currently have one.

6.1. Ease of use

Judges and magistrates generally said that expanded explanations were “straightforward”, “easy to use” and “useful”. One magistrate summed it up by saying that the expanded explanations “added colour and shades of meaning” to aggravating and mitigating factors. Other responses suggested expanded explanation content was “standard good sense”, that they could “make you stop and think sometimes” and that “even when you think you know [what a factor means], expanding is a useful aide memoir that you might not have remembered”.

Alongside this, some judges and magistrates flagged that the issue was not with the content of any expanded explanations, but with awareness of them.

I think, I really want to stress this, I think if there is a problem, it's people not knowing about them. They are really useful when you know about them. Judge

Another issue raised was having enough time to look at them, with respondents describing very busy caseloads that meant they had limited time to reflect on expanded explanations alongside all their other considerations:

...when you've got...12 or more cases sentencing a day and you're looking through, you sometimes get worried you might overlook something important. Magistrate

This reflects a finding from recent [Sentencing Council user testing research](#), which explored sentencer perspectives of expanded explanations as part of the research. A small number of participants suggested that the expanded explanations were not helpful because there was a lack of time in court to refer to them. Additional reasons given were

that expanded explanations could be difficult to interpret or repetitive in nature (between like offences) and might benefit from being more specific.

In our stage one interviews respondents had mixed views on the length and level of detail of the expanded explanations. Some felt they were “as concise as possible” and that they couldn’t be too prescriptive as there was no “one size fits all” in sentencing. Others noted that the more you put in, the greater the risk that it wouldn’t get used or, conversely, the more attention would need to be given to them for the justification of a sentence:

A danger [is] that the more you say, the more it becomes a battle of semantics. Sentencing remarks are picked over like chicken entrails and the expanded explanations are potentially going...to encourage having to say more and more.

Judge

Respondents also commented on the use of hyperlinks to connect expanded explanations to other guidelines where relevant. This was viewed as “really useful”, particularly the link to the [Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline](#) in the expanded explanation for the ‘Mental disorder or learning disability’ mitigating factor, and the link to the [Imposition of community and custodial sentences guideline](#) in the expanded explanation for ‘Sole or primary carer for dependent relatives’.

One judge did note that while the expanded explanations were not contradictory, “it’s hard sometimes to see the path clear[ly]” because of the frequent need to refer to multiple offence specific and overarching guidelines for sentencing.

6.2. Ease of interpretation

Although the stage one factor-specific findings suggest that some factors may be more challenging to interpret than others, when asked, most respondents did not feel there were any expanded explanations that were difficult to understand. However, a very small group did share a couple of examples that they felt could be more difficult.

One judge said that they felt the expanded explanation for ‘Previous convictions’ (found in all guidelines for sentencing individuals) could be clarified further. They felt more information could be provided to emphasise that where someone had previous convictions for offences similar to the offence they were currently being sentenced for, this was more aggravating than if they were not. Similarly, another judge said that the weight to give to

relevant offences was a “key discussion” in sentencing and could be more difficult for inexperienced judges.

A small number of participants suggested that the mitigating factor of ‘Remorse’ (found in all guidelines for sentencing individuals) could be difficult to interpret in respect to the need to evidence remorse and what this could look like. One magistrate said that the mitigating factor of ‘Good character and/or exemplary conduct’ (also found in all guidelines for sentencing individuals) was “not especially straightforward to apply”, reflecting our finding that it was the least consistently identified factor in the first stage of the research.

6.3. Suggestions for new expanded explanations

Not every aggravating and mitigating factor has an accompanying expanded explanation. We asked participants if they felt there were any factors where one might aid their understanding and sentencing practice.

For the [Assault occasioning actual bodily harm/Racially or religiously aggravated assault ABH guideline](#), one magistrate suggested that it would be useful to have an expanded explanation for the aggravating factor of ‘History of violence of abuse towards victim by the offender’. They noted that they were aware from training that there may be many incidences of abuse “before someone even rings the police...so the likelihood is that this is not the first time [there has been an incident]”. However, because there are no previous convictions, they cannot take previous history into account.

For the same guideline, the aggravating factor of ‘Degree of provocation’ was highlighted by a different magistrate, who said that provocation could be in different ways and that sometimes, an offender can say they are provoked when there is no notable evidence for it. An expanded explanation might bring some clarity on those points.

A small number of magistrates mentioned the mitigating factor of ‘Offender experiencing **exceptional** financial hardship’ (emphasis in original text) in the [Theft from a shop or stall guideline](#). One magistrate felt the factor was “quite controversial” because many people experiencing financial hardship do not commit crimes, and therefore an expanded explanation would be helpful to understand why it was there. Others felt it would be useful to define what was meant by ‘exceptional’ financial hardship as opposed to financial hardship.

Finally, one judge suggested that a specific factor might be needed for “professional criminals”, who operated on a different scale and with different motivations:

I've...had some pickpockets and they're organised people who come over to this country and you look at their track record...it's quite odd that they tend to get much higher sentences abroad. And here because of the guidelines... because it's theft from person, you're hard pressed to give them any more than three years, even though they've got loads of previous [convictions] for it. I think perhaps there should be specific ones [factors] for professional criminals.

Judge

7. Overarching findings: perceptions of sentencing disparities

One of the aims of the research was to consider whether there were any potential impacts that factors and expanded explanations might have on sentencing outcomes for different demographic groups (for example, by race, age or sex). This is to support the commitment within the [Sentencing Council's strategic objectives for 2021 to 2026](#) to “explore and consider issues of equality and diversity relevant to our work and take any necessary action in response within our remit”. There were opportunities for sentencers to discuss any potential impacts during the interviews and the focus groups.

We did not find that offender race or sex had any indicative impact on factor identification or interpretation in the stage one interviews, although some discussion of sex did occur when sentencers were considering the mitigating factor of ‘Sole or primary carer for dependent relatives’ (see section 4.2.1. of this report). We did find that offender age had an impact on the identification and interpretation of the mitigating factor ‘Age and/or lack of maturity’ and this is discussed in section 4.2.2 of this report.

During the stage one interviews, sentencers were asked whether they thought the sentencing of any offender groups may be particularly impacted by any aggravating or mitigating factors in the sentencing guidelines. During the stage two focus groups, participants were asked if they thought the introduction of any of the three proposed mitigating factors might have an impact on sentencing for any offender groups.

Discussions considered protected characteristics such as race, age and sex as well as other characteristics such as socioeconomic status.

Not all the magistrates and judges who took part in the research thought that there were risks of sentencing disparities for different offender groups. Responses also went beyond the factors and expanded explanations to consider broader or associated areas, such as a sentencer's level of experience.

7.1. Groups with protected characteristics (sex, race and age)

Sex was a prominent theme among sentencers who discussed risks of disparities. There was a particular focus on female offenders, with sentencers discussing various issues that they considered when sentencing this group. For example:

- influences upon female offending (such as poor mental health, pressure from relationship partners or alcohol/drugs)
- a “need for community treatment” for female offenders
- caring responsibilities, as sole carers “tend to be female”

The impact of sex on sentencing severity was mentioned, with a small number of sentencers expressing the view that sentences for female offenders may be “more lenient”. For example, one view was that the presence of caring responsibilities “can make things unfair” where you have two offenders who have committed the same offence, but one has children. A view was also shared that male offenders were less likely to have a sentence reduced or suspended, because it was less common for them to have caring responsibilities. However, one magistrate also shared the opposite view that female offenders were sentenced more harshly:

I'm aware that some reports suggest that women, particularly, can be sentenced more harshly for things like theft offences as somehow there is an assumption that a woman shouldn't be doing it. Magistrate

Race was another protected characteristic discussed. Sentencers shared perceived issues around sentencing being “unduly harsh” for some groups, though an opposing opinion shared by a minority of sentencers was that sentencing is not affected by the offender’s race, as when sentencing “you look at the offence, not the person”.

Some views raised by some of the sentencers were that:

- ethnic minority groups were more harshly sentenced for drug offences
- it was more likely that black offenders would receive a custodial sentence compared to other races
- white offenders might receive less severe sentences because they have more mitigating factors accounted for

Age was a less prominent topic of discussion in comparison to race and sex. Where it did arise, this was mainly in relation to how age could impact both sentencing outcomes and how any mitigation for offending was considered. Points raised by sentencers were that the factor of ‘age and/or lack of maturity’ has had a positive impact on sentencing, as criminal activity “can be more excusable” if young. Other points raised were that despite the usefulness of this factor in the guidelines, consideration of maturity could be

“inconsistent” in PSRs and that generally speaking, judging the correct sentence severity for young people could be “difficult to manage”.

7.2. Groups with other characteristics

Sentencers frequently highlighted other characteristics in relation to sentencing disparities. The dominant theme was the childhood experiences and general background of an offender, particularly where this background was “chaotic” or “deprived”:

If you are dealing with someone who comes from a terribly poor background who’s had a dreadful childhood upbringing, that goes [in]to the moral culpability of the offending in the first place. But how do you reflect that in sentencing? Judge

Discussion of offenders with deprived backgrounds or gang involvement was largely focussed on the likelihood of increased mitigation. This encompassed offenders who had avoided offending prior to adulthood and those who had managed to “turn their life around” after previously offending. One judge noted that these kinds of circumstances would “count [for] more in mitigation” than if someone from a more privileged background had committed an offence. Similarly, one magistrate suggested that identifying mitigation was an especially prominent consideration when sentencing an offender with a deprived background:

...if you have somebody from a more deprived background and whose prospects are poor, finding some mitigation is further forward in one's mind when it comes to sentencing because you want to seize on any green shoots of recovery. So compliance with orders, engagement with drug services, getting on to a training course, they will assume a greater proportionality of your consideration...

Magistrate

Conversely though, views were also shared around offenders from more privileged backgrounds potentially being more likely to benefit from mitigation than those from disadvantaged backgrounds. Reasons given for this included the “real danger” that offenders from deprived backgrounds “don’t get the input that allows them to present themselves in the best possible light” and that it might be easier for offenders with privileged backgrounds to present evidence of good character:

...those with a privileged background often present the court with many testimonials as to character because they have a network of friends and a network of

contacts...whereas those from deprived backgrounds will only have mum writing a letter, possibly their partner, and so when you're considering and saying, well, I've read the 13 references that show a different side to your character, [a] wholly different side... that will generally give greater mitigation, I suspect. Judge

The prominence of an offender's deprived or difficult background as a theme when discussing sentencing disparities is of interest, as in some ways it contrasts with the more negative discussions reported in the stage two findings around potentially introducing a mitigating factor of 'Deprived and/or difficult background or personal circumstances' that could effectively encompass this.

Socioeconomic status (SES) was another notable theme in sentencer responses. This occurred in discussion of the mitigating factor of 'Offender experiencing **exceptional** financial hardship' (a factor not explicitly explored within the research) by magistrates examining the 'theft' scenario, but also in more general terms.

Specifically, the impact of a custodial sentence on offenders of low SES was highlighted, as custody could lead to a loss of housing if it was rented, or a loss of benefits. Conversely, another view expressed was that offenders from a high SES would be less impacted financially and so could be sent to prison, as opposed to someone with low SES where a sentencer would not "want to add to [their] problems", so might suspend the sentence instead.

Class bias was also discussed. This was in relation to this type of offender (higher SES) being more likely to have a supportive family background which can "create favour in terms of sentence", as well as their background making it "easier" to not commit offences (presumably because there was less motivation, for example, to commit acquisitive offences such as theft). In contrast, it was suggested that offenders with low SES would be more likely to be isolated from support, less likely "to receive benefit of a doubt" and generally be more "vulnerable".

Level of education, mental health, and culture were less prominent topics raised by sentencers. Currently, there is a [Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline](#) and a mitigating factor of 'Mental disorder or learning disability' included in all guidelines for sentencing individuals. Some suggestions made by participants were that some groups of people could be

“reluctant” to present this as mitigation and that having a mental health condition increased vulnerability to exploitation by others.

Level of education is not currently a factor in sentencing guidelines, although the general topic was discussed as part of focus group conversations about the proposed factor of ‘Prospects of or in work, training of education’. The issue of a low level of education was suggested to contribute to offending, as it could lead to low SES and be associated with a lack of opportunities. One magistrate felt that offenders having a low level of education was a feature “broadly present” across cases.

Issues related to the influence of culture on offender behaviour were discussed when sentencers were asked for their views on the proposed changes to the expanded explanation of ‘Remorse’. Some sentencers suggested that cultural peer pressure could affect mitigation. For example, by impacting whether or not the offender felt able or willing to express remorse. It was also suggested that cultural aspects needed broader consideration beyond the factor of ‘Remorse’ (where it is currently proposed that cultural differences are added to the list of considerations that affects how remorse can be presented). A lack of willingness from some demographic groups to co-operate with court and police bodies was also discussed.

7.3. The sentencing guidelines and sentencer experience

The prevalent view shared about the sentencing guidelines was that the guidelines themselves “were not biased in any direction”. The factors were considered to be “neutral” and made what to account for “clear”. Positive views were shared about the usefulness of linking to other guidelines such as the [Sentencing offenders with mental disorders, developmental disorders, or neurological impairments guideline](#), that the dropdown information that accompanied certain elements of guidelines were “really helpful” and that the expanded explanations provided for some factors could help sentencers “be less subjective”.

However, it was suggested that sentencer interpretation of guidelines could create disparities. Sentencers primarily spoke of this in relation to the experience or approach of individual sentencers. Wide-ranging influences on sentencers’ interpretation of the guidelines were highlighted, including:

- a lack of diversity of sentencers
- the extent of training received on issues such as unconscious bias

- the impact of personal experience
- how long they had been a sentencer (level of experience)
- difficulty trying to keep track of changes or issues due to caseload
- a reliance on PSRs to take such issues into account

Many sentencers said they had received training related to disparities and unconscious bias. The [Equal Treatment Bench Book](#) was also recognised as a “marvellous” and “useful” resource when considering disparities, although one or two sentencers did suggest it was not always used and could be “user unfriendly”.

Three offence specific guidelines were discussed in sentencer responses, all of which were used in the stage one research interviews as part of sentencing scenarios. The most discussed guideline was [Theft from a shop or stall](#). Magistrates noted a range of considerations related to financial hardship and SES, including that theft could be directly motivated by severe financial hardship or that shoplifting could often be coercive, with the offender being forced or pressured to do so by another person. Another view shared was that there were more cases of theft in poorer areas. Specific offender groups, such as migrants struggling to access financial support or those on minimum wage jobs, were also highlighted.

[Community impact statements](#), which are referenced in the aggravating factor ‘Established evidence of community/wider impact’, were discussed by a very small proportion of sentencers. They are used to assess the prevalence and harm a particular crime may be causing in an area. It was suggested by one or two sentencers that the statements can make “a lot of assumptions” and therefore unintentionally create disparities.

The guideline for [Supplying or offering to supply a controlled drug/Possession of a controlled drug with intent to supply it to another](#) also featured in discussions. Judges noted that exploitation of offenders was common in drug offences and it was felt that the guideline seemed to have a “disproportionate impact” on ethnic minority groups. However, sentencers did not feel that this impact was caused by the guideline. Instead, it was suggested that that the disparity was possibly because drug-dealing and related offences often involved the “deliberate targeting and recruitment” of young, disadvantaged ethnic minority groups.

One judge felt that the non-exhaustive approach to aggravating and mitigating factors in guidelines was positive as it meant sentencers could adjust for such examples of

exploitation. Another judge commented that where a gang was involved that was applying pressure on the offender, this might form part of mitigation. One judge felt that that the only way to stop gang influence in such cases was to impose immediate custody.

The guideline for [Assault occasioning actual bodily harm/Racially or religiously aggravated ABH](#) was also briefly mentioned. This was in relation to two factors. The first was 'Deliberate spitting or coughing', with one magistrate noting that this could be culturally acceptable for some groups. Another magistrate raised the factor of 'Offence committed in a domestic context', suggesting that more weighting was needed for this to reflect the vulnerability of the victim.

8. Conclusions

This research aimed to explore selected aggravating and mitigating factors and their accompanying expanded explanations. It also collected views on three new proposed mitigating factors. The focus on particular aggravating and mitigating factors was informed by recommendations from the University of Hertfordshire's [Equality and diversity in the work of the Sentencing Council report](#), which the Council commissioned to investigate any potential for the its work to cause disparity in sentencing outcomes across demographic groups.

Although findings are caveated by the size and design of the study, they suggest that sentencers found some factors more straightforward to identify and interpret than others when considering hypothetical sentencing scenarios. Factors that appeared to be straightforward to identify and interpret were 'Previous convictions', 'Commission of offence whilst under the influence of alcohol/drugs', 'A leading role where offending is part of a group activity', 'Victim is targeted due to a vulnerability (or perceived vulnerability)' and 'Sole or primary carer for dependent relatives'.

A small number of factors were not always identified or interpreted as expected. These factors were 'Offence committed in a domestic context', 'Age and/or lack of maturity', 'Remorse' and 'Good character and/or exemplary conduct'. This was often due to assumptions being made about the meaning of a factor from its title, without consultation of the accompanying expanded explanation. This could be because a sentencer felt the meaning of the factor was clear (and therefore examination of the expanded explanation was not needed) or occasionally, because the sentencer was not aware that there was an expanded explanation for that factor.

Once sentencers had been directed to look at a factor's expanded explanation, they tended to agree that the text and meaning was clear and helpful. This was evidenced by some sentencers changing their view on whether a factor was relevant in a scenario after looking at the expanded explanation - for example, a magistrate deciding that the factor of 'Age and/or lack of maturity' was present in a scenario for a 22 year old offender, having previously thought that someone of this age did not fall under this bracket.

The exception to this was the factor 'Good character and/or exemplary conduct', which had been amended in this research to remove the example of charitable works. Although

the dominant view by participants was that removing this single example from the expanded explanation was better than keeping it due to the possibility that including it may create sentencing disparities, views were mixed as to whether it would be more helpful to provide a more varied list of examples in the explanation or leave interpretation of what might constitute good character or exemplary conduct broad and open-ended.

The judges and magistrates who took part in focus groups were generally not in favour of introducing the three new proposed mitigating factors explored in this research. These factors were 'Deprived and/or difficult background or personal circumstances', 'Pregnancy and maternity' and 'Prospects of or in work, training or education'.

While there was a recognition that the content of their respective expanded explanations was generally useful to bear in mind when sentencing, the prevailing view was that these factors were already being accounted for where appropriate, and it was unnecessary to formally include these in sentencing guidelines.

Sentencers considered whether they thought any aggravating or mitigating factors could create sentencing disparities. Sentencers did not feel guideline content itself created disparity but felt there could be other unconscious influences on sentencing such as the sex or background of the offender, as well as a judge or magistrate's level of sentencing experience or training.

8.1. Impact

Findings for factors where identification and interpretation were not always as expected have been used to develop proposals for the [third annual consultation on miscellaneous amendments](#). This includes for, example, the proposal that the title of 'Good character and/or exemplary conduct' be amended to 'Good character and/or exemplary character (regardless of previous convictions)' to provide better clarification for sentencers, and that 'Age and/or lack of maturity' be amended to 'Age and/or lack of maturity (typically applicable to offenders aged 18-25)' to ensure that the age bracket of offender that it could apply to is immediately apparent.

In addition, the three proposed new mitigating factors and expanded explanation changes for 'Remorse' and 'Good character and/or exemplary conduct' are being consulted on to build upon the perspectives shared in this research.

Acknowledgements

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Annex A: Aggravating and mitigating factors and their expanded explanations included in stage one of the research

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

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 65 of the Sentencing Code states that:

(1) This section applies where a court is considering the seriousness of an offence (“the current offence”) committed by an offender who has one or more relevant previous convictions.

(2) The court must treat as an aggravating factor each relevant previous conviction that it considers 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.

(3) Where the court treats a relevant previous conviction as an aggravating factor under subsection (2) it must state in open court that the offence is so aggravated.

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 imposed 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 of less relevance** 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

Commission of offence whilst under the influence of alcohol or drugs

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 sought help or engaged with any assistance which has been offered or made available in dealing with the addiction.

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.

A leading role where offending is part of a group activity

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.

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.

Victim is targeted due to a vulnerability (or a perceived vulnerability)

- 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.

Offence committed in a domestic context

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

Sole or primary carer for dependent relatives

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 must be considered in determining suitable requirements.

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 adjourning sentence for this to be done.

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.

Useful information can be found in the Equal Treatment Bench Book (see in particular Chapter 6 paragraphs 131 to 137)

Good character and/or exemplary conduct

This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character 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.

Remorse

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).

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

Remorse can present itself in many ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to for example:

- nervousness

- a lack of understanding of the system
- learning disabilities
- communication difficulties
- cultural differences
- a belief that they have been or will be discriminated against
- peer pressure to behave in a certain way because of others present
- a lack of maturity etc.

If a PSR has been prepared it will provide valuable assistance in this regard.

Age and/or lack of maturity

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.

Immaturity can also result from atypical brain development. Environment plays a role in neurological development and factors such as adverse childhood experiences including deprivation and/or abuse may 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.

Many young people who offend either stop committing crime, or begin a process of stopping, in their late teens and early twenties. Therefore a young adult's previous convictions may not be indicative of a tendency for further offending.

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 applying 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 Probation Service should address these issues in a PSR.

Annex B: Stage one hypothetical base scenarios

Base 'theft' scenario (1A, 1B, 1C, 1D) and variations- magistrates' courts

A, a 35-year-old woman, has pleaded guilty to theft from a shop.

She went into an electronics store and was noted acting suspiciously near a display of iPads. She left without buying anything. A member of staff alerted a security guard who stopped her just outside the store. An iPad valued at £499 was discovered in her bag.

The police were called and in interview she admitted going into the store with the intention of stealing. Her eldest child needed to use a computer for his schoolwork and the very old laptop that she owned had stopped working and she could not afford to buy him one.

There was an order in place (imposed three years ago) banning her from going into that store.

Step 1:

This is assessed as high culpability (there was some planning and she was banned from the store) and category 2 harm (value £200 to £1,000). Starting point: 12 weeks' custody, category range: high level community order to 26 weeks' custody.

Variation A

Annie McCreery has 20 previous convictions as an adult, mostly for shop theft. Two years ago she was sentenced to 4 months' custody for 2 offences of theft. Since then she has had only one conviction (before today) when she received a 6 month conditional discharge for theft. She did not reoffend during the period of the discharge.

She works as an office cleaner on minimum wage.

She lives with her two children aged 8 and 12. Her boyfriend (not the children's father) has recently moved in following his release from prison for an offence of GBH.

Variation B

Annie McCreery has 8 previous convictions as an adult mostly for shop theft. Two and a half years ago she was sentenced to a community order with 200 hours unpaid work for 2

offences of theft. She was subsequently breached for failing to attend on time and was given an extra 20 hours of unpaid work. She completed the order without further breaches.

She works as an office cleaner on minimum wage.

She presents a character reference from the organiser of a local netball team who says Annie has been a positive influence on younger members of that team.

Variation C

Adenike Edo has 20 previous convictions as an adult, mostly for shop theft. Two years ago she was sentenced to 4 months' custody for 2 offences of theft. Since then she has had only one conviction (before today) when she received a 6 month conditional discharge for theft. She did not reoffend during the period of the discharge.

She works as an office cleaner on minimum wage.

She lives with her two children aged 6 and 8. Her boyfriend (not the children's father) has recently moved in following his release from prison for an offence of GBH.

Variation D

Adenike Edo has 8 previous convictions as an adult mostly for shop theft. Two and a half years ago she was sentenced to a community order with 200 hours unpaid work for 2 offences of theft. She was subsequently breached for failing to attend on time and was given an extra 20 hours of unpaid work. She completed the order without further breaches.

She works as an office cleaner on minimum wage.

She presents a character reference from the organiser of a local netball team who says Adenike has been a positive influence on younger members of that team.

Base 'assault' scenario (2A and 2D) and variations– magistrates' courts

J and V were observed in a cafe together by several witnesses. J was seen to remonstrate with V over a coffee that was spilt and was heard to say; "It's always the same with you, you're a fucking useless girlfriend, you can't do anything right. I don't know why I put up with you. Nobody else would want you."

V seemed upset but she said very little. When they left the cafe they were captured on CCTV walking across the car park. J appeared animated and then was seen to push V, who stumbled and fell to the ground. J stood over V, landed two kicks to V's back and walked out of shot. V stood up and J reappeared and punched V twice in the abdomen. V doubled up and sank to the ground. J kicked V one further time and then left.

A customer from the cafe who had observed the earlier incident then came to V's aid and called the police, who took statements from witnesses.

V visited the GP the next day. She had extensive bruising to the abdomen and back but no broken bones.

V has moved out of the accommodation shared with J and is staying with friends. V gave an initial statement but later says she does not want to prosecute.

J was arrested and made no comment when interviewed.

J pleads guilty to ABH.

Step 1:

This is assessed as high culpability and category 2 harm. Starting point: 1 year six months' custody, category range: 36 weeks' custody to 2 years six months' custody.

Variation A

Jack Clarke is 32 years old, he works as a bricklayer. He has one previous conviction for careless driving 3 years ago. He says he was shocked when he saw the CCTV, he isn't proud of what he did and he knows that he needs to change because he 'has a short fuse'. He wants to get back with the victim.

Variation D

Jimmy Lee is 32 years old, he works on a travelling fair. He has one previous conviction for careless driving 3 years ago. He says he was shocked when he saw the CCTV, he isn't proud of what he did and he knows that he needs to change because he 'has a short fuse'. He wants to get back with the victim.

Base 'assault' scenario (2B and 2C) and variations– magistrates' courts

J was seen with a group of friends in a bar. He had consumed a large amount of alcohol and was becoming loud and argumentative.

J left with his friend Ben and Ben's girlfriend Lucy. They were seen on CCTV walking across the car park. J appeared animated and was seen to confront Ben, Lucy intervened and J pushed Lucy who stumbled and fell to the ground. J stood over Lucy, landed two kicks to Lucy's back and walked out of shot. Lucy got to her feet with Ben's help and Ben went to get his car. J reappeared and punched Lucy twice in the abdomen. Lucy doubled up and sank to the ground. J kicked Lucy one further time and then left.

Ben then came to Lucy's aid and called the police, who took statements from witnesses.

Lucy was taken to A&E as a precaution. She had extensive bruising to the abdomen and back but no broken bones.

J was arrested and made no comment when interviewed.

J pleads guilty to ABH.

Step 1:

This is assessed as high culpability and category 2 harm. Starting point: 1 year six months' custody, category range: 36 weeks' custody to 2 years six months' custody.

Variation B

Jack Clarke is 22 years old, he is employed as a bricklayer. He has one previous conviction for drink driving 3 years ago. He says wouldn't normally behave like that, it was because he had drunk too much on an empty stomach.

Variation C

Jimmy Lee is 22 years old, he works on a travelling fair. He has one previous conviction for drink driving 3 years ago. He says wouldn't normally behave like that, it was because he had drunk too much on an empty stomach.

Base 'robbery' scenario (3A, 3B, 3C, 3D) and variations– Crown Court

V was walking in the local park using a mobile phone. D approached unnoticed from behind on foot and pushed V hard to the ground causing the phone to fly out of V's hand. D then grabbed the phone and ran off. V has a broken wrist from the fall, is very shaken by the incident and upset at the loss of the phone which in addition to the financial loss (about £800) contained personal information and items of sentimental value not backed up elsewhere. V reports having nightmares, is reluctant to go out alone and has not returned to the local park.

D was identified from CCTV in the area and arrested the next day. The phone is not recovered.

D has pleaded guilty at the first hearing.

Step 1:

This is assessed as medium culpability (the level of force used falls between high and lesser) and category 2 harm (the physical and psychological harm falls between 1 and 3). Starting point: 4 years' custody, category range: 3 to 6 years' custody.

Variation A

V is a 20-year-old male. CCTV shows that D handed the phone to an accomplice who has not been identified.

David O'Malley is aged 19. He lives with his parents. He is unemployed and has no qualifications. He told the police that he was promised £50 if he took the phone but he didn't get the money. He is from an Irish Catholic family and his parents are very upset about him getting into trouble with the police.

Variation B

V is a 14-year-old girl who was in school uniform.

Duwane Brathwaite is aged 28. He lives with his parents. He is unemployed, has no qualifications and is dyslexic. He is from a Jamaican evangelical Christian family and his parents are very upset about him getting into trouble with the police.

He presents a character reference from a tutor for a literacy programme he has recently enrolled in which praises how hard he is working to improve his core skills.

Variation C

V is a 14-year-old girl who was in school uniform.

David O'Malley is aged 28. He lives with his parents. He is unemployed, has no qualifications and is dyslexic. He is from an Irish Catholic family and his parents are very upset about him getting into trouble with the police.

He presents a character reference from a tutor for a literacy programme he has recently enrolled in which praises how hard he is working to improve his core skills.

Variation D

V is a 20 year old male. CCTV shows that D handed the phone to an accomplice.

Duwane Brathwaite is aged 19. He lives with his parents. He is unemployed and has no qualifications. He told police that he was promised £50 if he took the phone but he didn't get the money. He is from a Jamaican evangelical Christian family and his parents are very upset about him getting into trouble with the police.

Base 'supplying drugs' scenario (4A, 4B, 4C, 4D) and variations– Crown Court

K was observed at a music festival by undercover police officers providing small packets to others in exchange for money. K was arrested and searched and found to be in possession of 60 bags – each bag containing 15 tablets, and £150 in cash. Upon analysis the tablets have been found to contain MDMA (ecstasy).

K pleads guilty to possession of a class A drug with intent to supply on the basis that they were performing a lesser role, having been provided with the drugs and told where to sell them and for how much. The proceeds were to be given to the supplier who would then pay K in drugs for personal use and a small amount of cash. The prosecution accepts that this amounted to performing a limited function under direction.

K is an occasional recreational drug user - there is no suggestion of a drug habit.

Step 1:

This is assessed as lesser culpability and category 3 harm (selling directly to users).
Starting point: 3 years' custody, category range: 2 to 4 years six months' custody.

Variation A

Asif Khan is aged 26. He has previous convictions for possession of cannabis, theft, common assault and driving without insurance.

He lives with his mother and 17-year-old brother. The brother has learning difficulties and K looks after his brother while his mother works four evenings a week and helps her to care for him at other times. In a letter to the court his mother says that she would not be able to cope without his help.

Variation B

Arthur King is aged 26. He has previous convictions for possession of cannabis, theft, common assault and driving without insurance.

He lives with his mother and 17-year-old brother. He is dyslexic and has diagnosed ADHD. He left school without any qualifications.

In court he appears to be distracted, often looking at his family in the public gallery. When asked, he says that he understands what is happening. Through his representative he expresses remorse.

Variation C

Sunita Khan is aged 26. She has previous convictions for possession of cannabis, theft, common assault and driving without insurance.

She lives with her mother and 17-year-old brother. The brother has learning difficulties and K looks after her brother while her mother works four evenings a week and helps her to care for him at other times. In a letter to the court her mother says that she would not be able to cope without her help.

Variation D

Abby King is aged 26. She has previous convictions for possession of cannabis, theft, common assault and driving without insurance.

She lives with her mother and 17-year-old brother. She is dyslexic and has diagnosed ADHD. She left school without any qualifications.

In court she appears to be distracted, often looking at her family in the public gallery. When asked, she says that he understands what is happening. Through her representative she expresses remorse.

Annex C: Summary tables of offender characteristics and identifiable factors in the hypothetical scenarios

Table 1: Scenario 1 variations for magistrates, using the [Theft from a shop or stall guideline](#)

Scenario 1	Offender race(identifier)	Offender sex (stated)	Aggravating factor	Mitigating factor
A	White	Female	Previous convictions	Sole or primary carer for dependent relatives
B	White	Female	Previous convictions	Good character and or/exemplary conduct [with proposed change]
C	Black	Female	Previous convictions	Sole or primary carer for dependent relatives
D	Black	Female	Previous convictions	Good character and or/exemplary conduct [with proposed change]

Table 2: Scenario 2 variations for magistrates, using the [Assault occasioning actual bodily harm/racially or religiously aggravated ABH guideline](#)

Scenario 2	Offender race (identifier)	Offender sex (stated)	Aggravating factor	Mitigating factor
A	White	Male	Offence committed in a domestic context	Remorse [with proposed change]
B	White	Male	Commission of offence whilst under the influence of alcohol/drugs	Age and/or lack of maturity
C	Gypsy, Roma or Irish traveller	Male	Commission of offence whilst under the influence of alcohol/drugs	Age and/or lack of maturity
D	Gypsy, Roma or Irish traveller	Male	Offence committed in a domestic context	Remorse [with proposed change]

Table 3: Scenario 3 variations for judges, using the [Robbery- street and less sophisticated commercial guideline](#)

Scenario 3	Offender race (identifier)	Offender sex (stated)	Aggravating factor	Mitigating factor
A	White	Male	A leading role where offending is part of a group activity	Age and/or lack of maturity
B	Black	Male	Victim is targeted due to a vulnerability (or a perceived vulnerability)	Good character and/or exemplary conduct [with proposed change]
C	White	Male	Victim is targeted due to a vulnerability (or a perceived vulnerability)	Good character and/or exemplary conduct [with proposed change]
D	Black	Male	A leading role where offending is part of a group activity	Age and/or lack of maturity

Table 4: Scenario 4 variations for judges, using the [Supplying or offering to supply a controlled drug/Possession of a controlled drug with intent to supply it to another guideline](#)

Scenario 4	Offender race (identifier)	Offender sex (stated)	Aggravating factor	Mitigating factor
A	Asian	Male	Previous convictions	Sole or primary carer for dependent relatives
B	White	Male	Previous convictions	Remorse [with proposed change]
C	Asian	Female	Previous convictions	Sole or primary carer for dependent relatives
D	White	Female	Previous convictions	Remorse [with proposed change]

Annex D: Stage one base interview schedule



Interview guide

Expanded Explanations stage one

March 2023

Introduction

- Thank you for agreeing to participate in this research.
- As part of its strategic objectives, the Sentencing Council is conducting research on the expanded explanations in the sentencing guidelines. This includes looking at the current wording of some of these, and several where the Council is considering making changes. The aim of our discussion is to explore how expanded explanations are being used and interpreted as part of sentencing practice.
- The interview today should take between 45 minutes and an hour. If the video link or sound fails, the interview will be rearranged at your convenience.
- I will ask you to carry out two sentencing exercises using hypothetical scenarios. We have sent you links to some mock guidelines that have been created solely for this research and are not in force. They contain proposed amendments to some expanded explanations.
- Given that the explanations we would like to discuss fall into step 2 of the guidelines, I will only be asking you to consider how you would sentence from step 2 onwards – the scenarios therefore give you the decision regarding step 1 of the guideline. I will also ask you some overarching questions about the expanded explanations and your views on possible changes.

- With your permission, I would like to record our discussion. The recording will provide a back up to my notes taken during the interview and will also help when writing up the discussion to feed into the research report.
- The findings of this research will be presented back to the Council and we may use verbatim quotes. Please note that anything said in this discussion will be held in the strictest confidence. Any comments made will be anonymised in any reporting, so nothing is attributable to you.
- Have you had an opportunity to read the scenarios and the accompanying mock guidelines that have been created for this research? If not, please take your time to read them now. Feel free to turn off your camera during this time and let me know when you are ready to begin.
- Are you happy to proceed? Do you have any questions before we start?

Screening questions

1. To begin, before volunteering to take part in this research, were you aware that sentencing guidelines contain expanded explanations for some aggravating and mitigating factors?
2. Have you referred to the expanded explanations in guidelines as part of your sentencing practice?
 - i. [if yes] How often do you typically refer to expanded explanations?
 - ii. [if yes] Why would you typically look at expanded explanations?
 - iii. [if no] can you tell me why you don't refer to them?

[scenario text- see Annex C]

Scenario-specific questions

As mentioned before, the information for step 1- culpability and harm- has already been provided, so please use this information as your starting point for sentencing the scenario.

3. **To start with, which, if any, aggravating factors would you apply to this case?**

[placeholder for expanded explanation text- see Annex A]

Aggravating and mitigating factors in sentencing guidelines and their expanded explanations

[For those who apply the factor in interviewer note] You mentioned [e.g., previous convictions]. Can you talk me through your rationale for applying this?

- a) Thinking about the accompanying expanded explanation for [xxx], are there any details or issues that you feel are of particular importance for this scenario?
 - b) [If more than one issue identified] Did you have to balance these issues? If so, how?
- ii. [if the anticipated factor is not mentioned] the scenario says that [e.g. Annie has 20 previous convictions.] Can you tell me about why you felt this factor didn't apply in this instance?
 - iii. [if other aggravating factors were also identified] You also mentioned xx was a factor. Can you talk me through your rationale for applying this?
 - iv. [If no aggravating factors at all are identified] Why do you feel no aggravating factors apply?

4. Moving on, which, if any, mitigating factors would you apply to this case?

[placeholder for expanded explanation text- see Annex A]

[For those who apply factor in interviewer note] You mentioned [e.g., sole or primary carer for dependent relatives]. Can you talk me through your rationale for applying this?

- a) Thinking about the accompanying expanded explanation for [xxx], are there any details or issues that you feel are of particular importance for this scenario?
- b) [If more than one issue identified] Did you have to balance these issues? If so, how?

- v. [if an anticipated factor is not mentioned] the scenario says that [e.g., Annie has two young children.] Can you tell me about why you felt the factor of [e.g. sole or primary carer] didn't apply in this instance?
- vi. [If other mitigating factors were also identified]. You also mentioned xx. Can you talk me through your rationale for applying this?
- vii. [If no mitigating factors at all are identified] Why do you feel no mitigating factors apply?
- viii. [if scenario includes remorse or good character] The expanded explanation for [e.g. remorse] has a proposed change. This is [e.g. the addition of the wording 'learning disabilities', 'communication difficulties' and 'cultural differences' as part of considerations for how remorse can present itself]. What is your view on this proposed change?

5. For this scenario, would you order a PSR report? Why/Why not?

6. Based on the information you have for this case, can you explain what your final sentence would be and why?

Overarching questions

Now I am going to ask you some broader questions.

7. We're interested in hearing your views on whether the sentencing guidelines could create any potential disparities in sentencing for different groups of people. Do you think the sentencing of any groups may be particularly impacted by any aggravating or mitigating factors in the sentencing guidelines, thinking both of those with protected characteristics (e.g., race, age, sex) or others (e.g., socioeconomic status or other groups)?

- [if factors are identified] Why do you think they would be particularly impacted by these factors?

- [if no factors are identified] Why don't you think they would be impacted by any factors?

8. Generally speaking, how straightforward did you find it to interpret and apply the expanded explanations for the factors we've talked about in this interview?
9. As mentioned previously, there are some expanded explanations that have proposed changes. These are for [delete depending on factors in scenarios-remorse and good character]. What are your views on the proposed changes?
10. Do you have any further comments about any other expanded explanations that you haven't discussed today?
 - i. Are there any expanded explanations (either discussed in this interview or that we haven't mentioned) that you think can be more difficult to interpret or apply?
 - ii. Is there anything else you think it would be useful to have an expanded explanation for that doesn't currently exist?
11. Is there anything else you would like to add?

Annex E: Stage two focus group discussion guide



Focus group discussion guide

Expanded explanations stage two

June 2023

Welcome and introductions (5m)

- Thank you very much for offering to take part in this focus group. My name is [insert] and I am a [insert] at the Office of the Sentencing Council. I will be facilitating this discussion today. [Insert] is also on the call. They will be taking notes in the background.
- The purpose of this focus group today is for you to share and discuss your views on the three new proposed mitigating factors and their accompanying expanded explanations that you received beforehand. If you have not had a chance to look at them before today, please do not worry as I will be sharing them on my screen as well.
- All information collected in this focus group will be confidential and your names and any direct quotations will not be disclosed in any reporting. I will be recording this discussion for my records- is everyone content to be recorded? I would ask that you treat any views shared in this group as confidential. We would like to hear your personal thoughts so please be assured that you can speak freely.
- Finally, this will be a bit different to the interviews you took part in for phase 1. Focus groups allow for open discussion and my role is to facilitate this. I will ask questions, but otherwise take a backseat as the intention is to allow you space to share your thoughts with each other. You do not need to use the hands-up function or the comments box today as these can affect the flow of conversation.
- As we only have around an hour, I may interject at times to move the discussion on, to make sure you all have a chance to share your views on everything we would like to cover today. If we have to move on while you still have views you would like to

share, please do feel free to email these to me after this group ends. Is everyone happy to begin?

Warm-up (2m)

Difficult and/or deprived background or personal circumstances (10m)

The court will be assisted by a pre-sentence report in assessing whether there are factors in the offender's background or current personal circumstances which may be relevant to sentencing. Such factors **may** be relevant to:

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

Courts should consider that different groups within the criminal justice system have faced multiple disadvantages which may have a bearing on their offending. Such disadvantages include but are not limited to:

- experience of discrimination
- negative experiences of authority
- early experience of loss, neglect or abuse
- early experience of offending by family members
- experience of having been a looked after child (in care)
- negative influences from peers
- misuse of drugs and/or alcohol
- low educational attainment
- insecure housing
- mental health difficulties
- poverty
- direct or indirect victim of domestic abuse

There are a wide range of personal experiences or circumstances that may be relevant to offending behaviour. The [Equal Treatment Bench Book](#) contains useful information on social exclusion and poverty (see in particular Chapter 11, paragraphs 101 to 114). The [Sentencing offenders with mental disorders, developmental disorders, or neurological impairments](#) guideline may also be of relevance.

The first mitigating factor and expanded explanation I would like you to discuss is difficult and/or deprived background or personal circumstances.

1. What were your initial thoughts when you first looked at this factor and the content of the expanded explanation?
 - a. What are your views on the definition? Like/dislike?
 - b. What comes to mind when you think of an offender having a difficult or deprived background or personal circumstances?
 - c. What are your views on the presentation of the text?
 - i. Prompts if needed: length, structure, use of bullets etc
2. Do you feel this factor/expanded explanation would be useful?
 - a. Do you already take this issue into account in your sentencing?
3. Do you feel this would be relevant to any offences in particular?
 - a. Prompts if needed: acquisitive, non-acquisitive
4. Do you feel this would have an impact on sentencing for any demographic groups?
E.g. race, age, sex

Prospects of or in work, training or education (10m)

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.

Where an offender is in, or has the confirmed prospect of starting, work, education or training this may indicate a willingness to rehabilitate and desist from future offending. Similarly, the loss of employment, education or training opportunities may have a negative impact on the likelihood of an offender being rehabilitated or desisting from future offending. The court may be assisted by a pre-sentence report in assessing the relevance of this factor to the individual offender.

The absence of work, training or education should never be treated as an aggravating factor.

For more serious offences where a substantial period of custody is appropriate, this factor will carry less (if any) weight. The second mitigating factor and expanded explanation I would like you to discuss is titled prospects of or in work, training or education.

1. What were your initial thoughts when you first looked at this factor and expanded explanation?

- a. What are your views on the definition? Like/dislike?
 - i. Prompt: would use of 'Confirmed prospects' in the title of the factor be more helpful than 'prospects'?
 - b. Do you think prospects of or being in work, training or education should be applied similarly or differently?
 - c. What are your views on the presentation of the text?
 - i. Prompts if needed: length, structure, use of bullets etc
2. Do you feel this factor/expanded explanation would be useful?
 - a. Do you already take this issue into account in your sentencing?
 3. Do you feel this would be relevant to any offences in particular?
 - a. Prompts if needed: acquisitive, non-acquisitive
 4. Do you feel this would have an impact on sentencing for any demographic groups?
E.g., race, age, sex, socio-economic status

Pregnancy and maternity (10m)

When sentencing an offender who is pregnant relevant considerations may include:

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

The impact of custody on pregnant women can be harmful for both the mother and the unborn child. Pregnant women in custody are more likely to have high risk pregnancies with reduced access to specialised maternity services. There may also be difficulties accessing medical assistance and with being transported to hospital when in labour and giving birth.

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.

When considering a custodial or community sentence for a pregnant offender the Probation Service should be asked to address these issues in a pre-sentence report.

The last factor I would like you to discuss is pregnancy and maternity. This is slightly different to the other two factors in that not all of the content is new- some has been taken out of the current expanded explanation for sole or primary carer for dependent relatives and it has then been extended to provide a fuller explanation, with the intention that it will become a standalone factor.

1. What were your initial thoughts when you first looked at this factor and expanded explanation?
 - a. What are your views on the definition? Like/dislike?
 - b. What are your views on the presentation of the text?
 - i. Prompts if needed: length, structure, use of bullets etc
2. Do you feel this factor/expanded explanation would be useful?
 - a. Do you already take this issue into account in your sentencing?
3. Do you feel this would be relevant to any offences in particular?
 - a. Prompts if needed: acquisitive, non-acquisitive

Stimulus (10m)

Thank you for sharing your thoughts. I would now like you to consider this discussion statement as a group.

[Share screen of statement- these are designed to provoke discussion and are not reflective of Council views]

For pregnancy and maternity:

An offender who is pregnant or has recently given birth should never receive an immediate custodial sentence.

For difficult and/or deprived background AND prospect of or in work, training or education:

Offenders with a more privileged background (in terms of career or education) generally benefit more from mitigation than those with deprived backgrounds.

To what extent do you agree or disagree with this statement and why?

Annex F: Expanded explanations with proposed changes

The expanded explanation for 'Good character and/or exemplary conduct' was amended by removing 'charitable works' as an example of positive good character for the research. The full text used in the research interviews is below:

Good character and/or exemplary conduct

This factor may apply whether or not the offender has previous convictions. Evidence that an offender has demonstrated positive good character 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.

The expanded explanation for 'Remorse' was amended by adding learning disabilities, communication difficulties and cultural differences to the examples of what may affect an offender's demeanour in court. The full text used in the research interviews is below:

Remorse

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).

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

Remorse can present itself in many ways. A simple assertion of the fact may be insufficient, and the offender's demeanour in court could be misleading, due to for example:

- nervousness
- a lack of understanding of the system
- learning disabilities
- communication difficulties
- cultural differences
- a belief that they have been or will be discriminated against

- peer pressure to behave in a certain way because of others present
- a lack of maturity etc.

If a PSR has been prepared it will provide valuable assistance in this regard.

The expanded explanation for 'Sole or primary carer for dependant relatives' was amended by removing some lines on what to consider if an offender is pregnant, including the effect of the sentence on the health of the offender and the unborn child. This information has been developed further and presented in a proposed new factor, 'Pregnancy and maternity', which was explored in stage two of this research. The full text used for 'Sole or primary carer for dependent relatives' in the research interviews is below:

Sole or primary carer for dependent relatives

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 must be considered in determining suitable requirements.

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 adjourning sentence for this to be done.

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.

Useful information can be found in the Equal Treatment Bench Book (see in particular Chapter 6 paragraphs 131 to 137).

