

8 November 2018

Dear Members

## Meeting of the Sentencing Council – 16 November 2018

The next Council meeting will be held in the **Queens Building Conference Suite, 2nd Floor Mezzanine at the Royal Courts of Justice**, on Friday 16 November 2018 at 9:45.

A security pass is not needed to gain access to this building and members can head straight to the meeting room. Once at the Queen's building, go to the lifts and the floor is 2M. Alternatively, call the office on 020 7071 5793 and a member of staff will come and escort you to the meeting room.

### The agenda items for the Council meeting are:

- |   |             |
|---|-------------|
| ▪ Agenda                                | SC(18)NOV00 |
| ▪ Minutes of meeting held on 19 October | SC(18)OCT01 |
| ▪ Action Log                            | SC(18)NOV02 |
| ▪ Law Commission update                 | No paper    |
| ▪ Mental Health                         | SC(18)NOV03 |
| ▪ Health and Safety Evaluation          | No paper    |
| ▪ Assault                               | SC(18)NOV04 |
| ▪ National Crime Agency presentation    | No paper    |
| ▪ Drugs                                 | SC(18)NOV05 |
| ▪ General guideline                     | SC(18)NOV06 |

Members can access papers via the members' area of the website. If you are unable to attend the meeting, we would welcome your comments in advance.

Best wishes



**Steve Wade**

Head of the Office of the Sentencing Council

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## COUNCIL MEETING AGENDA

**16 November 2018**  
**Royal Courts of Justice**  
**Queen's Building**

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|---------------|--|
| 09:45 – 10:00 | Minutes of the last meeting and matters arising (papers 1 & 2)             |
| 10:00 – 10:30 | Law Commission update  |
| 10:30 – 11.30 | Mental Health - presented by Mandy Banks (paper 3)                         |
| 11:30 – 12:00 | Health and Safety guideline evaluation - presented by Caroline Nauth-Misir |
| 12.00 – 13:15 | Assault - presented by Lisa Frost (paper 4)                                |
| 13:15 – 13:45 | Lunch  |
| 13:45 – 14:15 | Presentation and Q&A with National Crime Agency                            |
| 14:15 – 15:15 | Drugs - presented by Eleanor Nicholls (paper 5)                            |
| 15:15 – 16:15 | General Guideline - presented by Ruth Pope (paper 6)                       |

# Sentencing Council

## **COUNCIL MEETING AGENDA**

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## MEETING OF THE SENTENCING COUNCIL

19 OCTOBER 2018

## MINUTES

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Members present:

Tim Holroyde (Chairman)  
Rob Butler  
Mark Castle  
Rosina Cottage  
Rebecca Crane  
Rosa Dean  
Julian Goose  
Heather Hallett  
Maura McGowan  
Alpa Parmar  
Beverley Thompson

Apologies:

Sarah Munro  
Alison Saunders

Representatives:

Phil Douglas for the Lord Chancellor (Director,  
Offender and Youth Justice Policy)

Members of Office in  
Attendance:

Steve Wade (Head of Office)  
Mandy Banks  
Heidi Harries  
Sophie Klinger  
Eleanor Nicholls  
Ruth Pope

**1. MINUTES OF LAST MEETING**

- 1.1. The minutes from the meeting of 28 September 2018 were agreed.

**2. MATTERS ARISING**

- 2.1 The Chairman reported that Rob Butler and officials had attended the Magistrates' Association annual conference in Manchester and held a workshop on sentencing drugs offences, the results of which would be used in the revision of the drugs guideline.

**3. DISCUSSION ON FIREARMS – PRESENTED BY SOPHIE KLINGER, OFFICE OF THE SENTENCING COUNCIL**

- 3.1 The Council considered a revised culpability model for the four possession offence guidelines and agreed that a two stage approach should be used. It was agreed that officials would speak to firearms experts to ensure that the proposed categorisation of the type of weapon would work as intended.
- 3.2 The treatment of harm was discussed and agreed. Detailed consideration was given to the proposed aggravating and mitigating factors for these guidelines and amendments were agreed.

**4. DISCUSSION ON ARSON AND CRIMINAL DAMAGE – PRESENTED BY MANDY BANKS, OFFICE OF THE SENTENCING COUNCIL**

- 4.1 The Council considered responses from the recent public consultation on the arson and criminal damage/arson with intent to endanger life or reckless as to whether life endangered offences. The Council noted that the response to the draft guidelines was generally positive, with some suggestions made for amendments and clarification on the proposals.
- 4.2 The Council agreed changes to the guidelines to reflect issues raised during the consultation. The rest of the offences covered by the consultation will be considered at a future meeting.

**5. PRESENTATION ON THEFT EVALUATION – PRESENTED BY HEIDI HARRIES, OFFICE OF THE SENTENCING COUNCIL**

- 5.1 The Council was given a presentation of the assessment of impact for the Theft guideline. The Council agreed to publish the report in January 2019 and to wait until the 2018 data is available before deciding on next steps.

**6. DISCUSSION ON DRUGS – PRESENTED BY ELEANOR NICHOLLS, OFFICE OF THE SENTENCING COUNCIL**

- 6.1 The Council considered the approach to the assessment of culpability and harm, and the aggravating and mitigating factors for the offences of importation/exportation, supply, possession with intent to supply, and production/cultivation.
- 6.2 The Council agreed to maintain the current approach to assessing culpability and harm, but to make some changes to culpability factors relating to financial or other advantage, and to add in new culpability factors relating to exploitation of children and vulnerable people. The Council also made some small changes to aggravating and mitigating factors.

**7. DISCUSSION ON GENERAL GUIDELINE – PRESENTED BY RUTH POPE, OFFICE OF THE SENTENCING COUNCIL**

- 7.1 The Council considered the responses to consultation and the results of the research with sentencers on this guideline. The Council agreed that the guideline should apply to organisations and offenders aged 18 or over. For offenders aged under 18 there would be a link to the Overarching Principles – Sentencing Children and Young People guideline.
- 7.2 Detailed consideration was given to suggestions for amendments to step one of the guideline. In response to research findings and suggestions from consultation respondents, the Council agreed to provide more information on the identification of analogous guidelines and the assessment of harm.
- 7.3 The Council considered amendments suggested by consultees to aggravating factors and agreed a number of changes to clarify factors.

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### ACTION AND ACTIVITY LOG – as at 8 November 2018

	Topic	What	Who	Actions to date	Outcome
<b>SENTENCING COUNCIL MEETING 13 April 2018</b>					
1	Robbery	Full report for the robbery evaluation to be circulated to Council, once the time series analysis has been updated. Council will then decide whether or not to put robbery back on the workplan.	Sarah Poppleton	<b>ACTION ONGOING:</b> The report will be sent to members in January (put back due to delay in publishing sex offences assessment).	
<b>SENTENCING COUNCIL MEETING 22 June 2018</b>					
2	Expanded factors in offence specific guidelines	Council members to assist with reviewing factors in digital guidelines over the summer	Ruth Pope/ Council members	<b>ACTION ONGOING:</b> This has been delayed while we await the digital version of the guidelines.	
<b>SENTENCING COUNCIL MEETING 27 July 2018</b>					
3	Mental Health	Claire agreed to check the data held in relation to probation reports, specifically, what percentage of reports (oral and written) suggested that psychiatric reports were ordered.	Pamela Jooman	<b>ACTION ONGOING-</b> It has been determined that any information available in the reports is likely to be limited (in terms of both coverage and detail), and would require a large amount of resource to extract. SC A&R are instead investigating other sources of data and working with MoJ colleagues to determine what information may be available.	

**SENTENCING COUNCIL MEETING 28 September 2018**

4	Media Coverage	It was agreed that the suggested actions arising from Nick Mann's presentation on changing trends in media coverage be remitted to the Communications and Confidence Subgroup	Phil Hodgson	ACTION ONGOING - to be discussed at next C&C subgroup meeting in the new year	
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**SENTENCING COUNCIL MEETING 19 October 2018**

5	Firearms	Sophie to circulate draft guidance on the approach to minimum terms in firearms cases to Council members for comment, prior to consideration at the December Council meeting	Sophie Klinger/ Council members	ACTION ONGOING – draft circulated, comments due by 19 November	
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**Sentencing Council meeting:**  
**Paper number:**  
**Lead Council member:**  
**Lead official:**

**16 November 2018**  
**SC(18)NOV03 – Mental Health**  
**Rosa Dean**  
**Mandy Banks**  
**0207 071 5785**

## **1 ISSUE**

1.1 At the last meeting the Council considered a substantially revised version of the draft guideline, and agreed that the draft was now moving in the right direction. The Council asked for some rewording and amendments to be made to the draft, these have been done and can be seen highlighted in red in the attached draft at **Annex A**.

1.2 Given the very specialised nature of this guideline, and so to make it as thoroughly researched as possible ahead of a public consultation, the draft was sent to a small number of experts for comment (independently of one another). The group included four academics, two charities, one specialising in mental health (Rethink) and one in brain injuries (Headway), and a member of the Royal College of Psychiatrists. The Council will be reassured to note that the feedback on the proposed draft was very positive from all the different experts. In addition, they have provided helpful and insightful comments on the draft, with some suggestions for amendments, which will be discussed in the body of the paper.

1.3 There are two further scheduled meetings to discuss this guideline, with consultation scheduled for spring next year. If the work continues to progress well however it may be possible to sign this guideline off for consultation with one further meeting.

## **2 RECOMMENDATION**

2.1 At this meeting the Council are asked to note the revised draft and in particular:

- To note the changes that have been made to the wording following the last Council meeting
- To note the proposed changes to the draft suggested by the group of experts since the last meeting
- To consider whether to include wording to deal with issues around privately funded patients and their treatment

- To note the proposal that the guideline is only for offenders aged 18 and over

### 3 CONSIDERATION

#### Section 1: General approach

3.1 Starting at paragraph 1 on page 4 of **Annex A**, at the last meeting the Council asked that the reference to 'defence advocate' at the very end of the paragraph be deleted. This meant that the remaining sentences read: *'The mere fact that an offender has such a condition or disorder does not necessarily mean that it will have an impact on sentencing. Where it does, it is likely that it will have been raised as a significant issue.'* However, this revised wording of the sentence prompted some of the experts who saw the draft to query, *'raised by whom?'*. Professor Jill Peay also commented that even with the new L&D services she remains concerned that many offenders' mental health issues go unnoticed by the courts, particularly when they plead guilty and/or in the magistrates' courts, and for certain types of disorders such as personality disorders where there may have been little previous contact with mental health services. She also noted that this sentence in para 1 contradicts the first bullet point under para 2 *'care should be taken to avoid making assumptions, as unlike some physical conditions, many mental health conditions or learning disabilities are not easily visible.'*

3.2 It is recommended therefore that this last sentence in para 1, *'where it does, it is likely that it will have been raised as a significant issue'* is deleted in its entirety. This allows the point still to be made in para 1 that just because an offender has a mental health condition/disorder, it does not necessarily mean it will have an impact on sentencing, but does not preclude the situation where for the reasons outlined in para 2, a condition may be raised for the first time during court proceedings.

3.3 The new last bullet point in para 2 has been inserted as requested by the Council, following a discussion at the last meeting regarding the basis on which an offender is diagnosed.

3.4 At the last meeting the Council discussed the basis on which reports are sent to the prison, (para 4) the Council having noted the new CrimPR and CrimPD regarding psychiatric and related reports coming in to force. The Council asked that the new Rules and PD be checked to see what the obligation on the sentencer is in this regard. The Rules/PD have been checked and they are silent on this point. This has been raised with the CrimPR Committee secretariat, who suggested that such a requirement for sentencers to ensure that reports are sent with an offender to custody could be made by way of rules, by analogy with rule 28.9. They suggest that if the Council were so minded to, they could recommend this action to the Rule Committee, who would act on the recommendation promptly.

**Question 1: Does the Council wish to make this recommendation to the Rule Committee? Is the Council content with the rest of the changes in section 1?**

3.5 Para 6 is new suggested guidance which has followed on from a letter that was sent to the LCJ by Kingston Local Authority, following a Local Learning Lessons Case Review after the death of two children. The report produced a number of recommendations, some of which pertain to the sentencing of offenders who have private healthcare and select their own treating hospital. The PQBD replied to Kingston saying that he would refer the issues raised to the Council to consider as part of the work on the new mental health guideline, although he stressed that it was entirely up to the Council how to, or whether to, act on the issues raised. He added that if the Council after consideration felt that it was not appropriate to offer guidance, he would refer the matter to Judicial College. The findings of the review that are relevant are:

- 1) The ability of a defendant to select their own private healthcare jeopardises parity of treatment within the criminal system and potentially impacts on the provision of appropriate treatment of offenders and consequently the safeguarding of children
- 2) The terms used to describe the level of security within mental health provision are open to misunderstanding in court, in relation to the meaning of a 'locked', low secure and medium secure ward. This could risk patients being sent to a different hospital setting than that intended by Judges.
- 3) Psychiatric assessment and treatment needs to take account of information from other professionals and agencies in situations where serious crimes have been committed.

3.6 The brief facts of the case that gave rise to this are as follows. The offender killed her two severely disabled children. She has one remaining child. She was found guilty of manslaughter on the grounds of diminished responsibility and was placed on a s.37 hospital order without restrictions. She was described as mildly depressed, with no evidence of severe mental illness, and that it was a 'unique case' as she did not represent a risk to others. After eight days in prison, she was transferred to a private hospital, as recommended by her private psychiatrist, which she then remained at before, and after trial. This was all paid for via her private health insurance. This private hospital was described in court as medium secure. However it later transpired that it was not medium or even low secure, visitors and patients were able to leave without any restriction. She had home leave to visit her remaining child, and to stay over in the family home, 10 months after the offence. She was discharged from the s.37 order 13 months after the offence.

3.7 The hospital did not offer a forensic service (one with specialist staff able both to address an offender's mental health needs as well as the serious or violent nature of offending behaviour), which gave rise to concerns that although she was treated for depression, her offending behaviour was not addressed in any way. The hospital did not generally take NHS patients or transfers from prison, staff evidently were amazed when she arrived in handcuffs. In addition, due to her being in a private rather a forensic setting, which would be more usual following serious offences, there did not appear to be any risk assessments conducted before home leave, to ensure her safety, and the safety of the remaining child.

3.8 It could be that this case represents a unique set of circumstances, so the concerns that have followed are perhaps unlikely to happen again. However, in discussion with Rosa on these issues, she noted that in Harrow she is aware of a number of wealthy defendants with their own psychiatrists and treatment plans. Accordingly, in consultation with Rosa some guidance to address these points has been developed at paragraph 6.

***Question 2: Does the Council wish to offer some guidance to address the issues raised? If so, is the Council content with the proposed wording in paragraph 6?***

*Section 2: Assessing culpability*

3.9 There are some minor amendments to wording in para 8, suggested by Headway and Rethink. Rethink suggested the additional wording at the end of para 8, to clarify when expert opinion might be overruled. Professor Ronnie MacKay suggested some minor changes to the wording in bullet points 1 and 3.

***Question 3: Is the Council content with the minor changes within section 2?***

*Section 3: Determining the sentence*

3.10 Professor Jill Peay commented that s.142(2)(d) of the Criminal Justice Act 2003 specifically disapplies s.142(1) the purposes of sentencing, when making a hospital order, a hospital order with restrictions or a hospital and limitation direction under the MHA 1983. Accordingly, new wording has been added at the end of para 10 to clarify this.

3.11 In para 12 the insertion of the words '*length or nature*', as agreed by Council at the last meeting have been added. Professor Peay also suggested adding '*or whether a disposal under the Mental Health Act is appropriate*' in this paragraph.

3.12 Rethink suggested the new second bullet point in this list, to reflect the fact that by the sentencing stage, offenders may have spent substantial time on remand in prison, which can lead to a deterioration in their condition. This can then mean that the offender's mental health may not be the same at trial or sentencing as it was at the time of the offence. They

suggest that the court may then wish to consider whether the offender's mental health appears to fluctuate significantly based on their environment, thus indicating that a custodial sentence may significantly worsen their mental health.

3.13 The fourth bullet point in this list within para 12 has been deleted, as agreed by Council, as it repeats the point in the first bullet point. Paras 13 and 14 have been deleted in their entirety, as agreed by Council at the last meeting. Para 15 contains new wording, to reflect the point that the Council discussed at the last meeting, that the draft should make clear that courts must not assume that one hospital order is better than another, or offers greater public protection than another.

3.14 There is only one minor change to section 4, the addition of the words '*this is not an exhaustive list*' underneath the list of disposals. This is in response to a query from one of the experts that the list does not contain all the disposals available to a court, discharge, fine etc, as the list had been provided of just the pertinent mental health disposals/guidance.

***Question 4: Is the Council content with the proposed changes to section 3 and 4?***

*Annex A*

3.15 Annex A remains broadly unchanged since the Council saw this last time. One of the experts who has seen the draft, Professor Pamela Taylor of the Royal College of Psychiatrists, has offered to review this section in depth, but due to other commitments will need a couple of more weeks in order to do so. Accordingly this should be done by the time the Council next considers the guideline. The one substantive amendment in this annex comes under the learning disability heading on page 12. This wording was suggested by Miranda Bevan (who worked at the Law Commission on the fitness to plead project), who commented that it might be helpful to remind courts that someone with a learning disability would only be eligible for an MHA 1983 disposal if they satisfy s.1(2A) MHA 1983 (that their learning disability is 'associated with abnormally aggressive or seriously irresponsible conduct')

***Question 5: Is the Council content with the new information within Annex A?***

*Annex B - reports*

3.16 The rewording of the start of the first paragraph as suggested by the Council at the last meeting has been done, and can be seen on page 15. There is also a new bullet point (fourth from the bottom of the list) which the Council also requested at the last meeting should be included.

3.17 The section regarding s.38 orders has also been reworded as requested by Council, this is the insertion of the wording '*before ordering a s.38 the court will have to be satisfied a*

*bed is available, and that a s.38 order is necessary in the circumstances of the case*'. Jill Peay queried the last sentence of this paragraph: *'However, although such an order may enable a better assessment to be made than in a prison environment, courts should consider carefully the acute pressure on the availability of secure beds*'. She asked why the courts are being asked to consider the acute pressure on beds, when the offer of a bed has already, of necessity under s.38 (4) been made. She wondered if the Council was encouraging courts to trump a medical assessment of need. The Council was reflecting the reference in *Vowles* in this wording, however it is suggested that the last sentence of this paragraph is removed. The reference to assessments also being conducted in the community, as discussed at the last meeting, has been included.

3.18 Miranda Bevan also suggested that the paragraph should make it clear that s38 MHA orders are available in the summary courts, but only for imprisonable matters. To reflect this point, new wording has been inserted in the first line *'for offences punishable with imprisonment'*.

**Question 6: Is the Council content with the changes to the wording within Annex B?**

*Annex C – sentencing disposals*

3.19 Miranda Bevan suggested that the wording relating to MHTRs be checked within the box at the start of Annex C on page 18, as the defendant need not have a 'medical condition' susceptible to treatment, rather it need only be the case that his or her 'mental condition' is susceptible to treatment. There have been some changes to wording to rectify this. A new bullet point has been added under the box on MHTR's at Annex C, also at the suggestion of Miranda Bevan, who commented that it may be helpful to remind courts that MHTRs offer them an option to require treatment for offenders who fall outside the MHA mental disorder bracket. The fourth bullet point has had the wording added that the Council discussed at the last meeting *'where the offence is not serious enough to cross the custody threshold'*. The fifth bullet point is a new suggestion, and partly echoes wording used in the theft guideline, that MHTRs may be a proper alternative to a short or moderate custodial sentence.

3.20 The text underneath the table on s.37 orders has been revised and made clearer, following the discussion at the last Council meeting.

**Question 7: Is the Council content with the changes made to Annex C?**

*Age applicability of the guideline*

3.21 The Council may recall that in one of the earlier meetings the question of whether the guideline should apply to all offenders, or only those over 18 was discussed. During this



discussion Rob Butler suggested that young offenders may have different, specific needs compared to adult offenders, and that it may be difficult to accommodate these within an all age guideline. He suggested contacting an expert in this area, Professor Dame Sue Bailey, to ask her opinion. Professor Bailey has given some thought to this question and she concurred with Rob, that considerations for adolescent offenders with mental health conditions are different from those for adult offenders, so it would be difficult and probably inappropriate to try to produce a robust guideline that could be applicable for all ages.

3.22 It is recommended that this guideline only applies to over 18s, and that additional guidance on issues of immaturity relating to young adults is considered as part of the work on providing expanded explanations in offence specific guidelines.

**Question 8: Does the Council agree that this guideline should only apply to the over 18s?**

3.23 At the last meeting the Council agreed on a revised title '*Overarching Principles: Sentencing Offenders with mental health or similar conditions.*' A number of the experts however found the title confusing or unhelpful. Most of the comments suggested that 'similar conditions', as a catch all, doesn't work. Jill Peay queried, '*does it mean similar in effect, as in intoxication? Or similar in origin? Which could include a series of physical conditions....as mental disorder is so widely defined in the MHA one might ask if any further qualification is necessary?*' Others felt that the title needed to list all the conditions the guideline referred to, Miranda Bevan suggested that it should read '*mental health conditions, learning disability and developmental disorders*' and Headway felt that '*neurological impairments*' should be added to the title.

3.24 Sensitivity around language in these areas is something it is suggested the Council should be mindful of. For example, Headway had commented that although brain injury was included within Annex A, and so was covered by the guideline, there was no mention of it within the guidance, only references to mental health. They also added that there is general confusion between mental health and neurological conditions, so it would be helpful for the guidance to specifically refer to mental health and neurological conditions, as well as development disorders such as autism. The text within the guidance has been amended to add references to neurological impairments. And, it is suggested that it may be appropriate to have a fuller title, so '*Overarching Principles: Sentencing Offenders with mental health conditions, learning disability, developmental disorders or neurological impairments*', is proposed.

**Question 9: Does the Council agree to the suggestion regarding the revised title?**

**4 IMPACT/RISK**

4.1 In terms of the impact of the guideline, the CPD data, which we would usually draw upon to help develop guidelines, does not include information about whether the offender had a mental health disorder or learning difficulty. The A&R team is continuing to explore what other data is available in this area, including looking at the CCSS, to see if it contains any data on the volumes and sentences involved and to try and assess what the impact of the guideline might be. A lack of data could make the draft resource assessment problematic, in terms of accurately assessing the impact of the draft guideline.

4.2 Officials are also maintaining close links with officials in the MOJ and other Government departments to keep up to speed with developments on the various related initiatives in this area, the L&D scheme, review of the MHA, and so on.

***Question 10: Is the Council content that the impact/risks have been sufficiently considered at this stage?***

# Sentencing Council

Overarching Principles:

Sentencing offenders with Mental  
Health or similar conditions

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### **Applicability of guidelines**

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders aged ~~18~~ and older, who are sentenced on or after xxxx, regardless of the date of the offence.

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

“Every court -

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

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.”

This guideline applies only to the sentencing of convicted offenders: it does not address issues of fitness to plead or disposals for those found unfit to plead.

## **Section one: General approach**

4. The guidance given in this guideline will assist sentencers when sentencing offenders who have any of the conditions or disorders outlined in **Annex A**. The mere fact that an offender has such a condition or disorder does not necessarily mean that it will have an impact on sentencing. Where it does, it is likely that it will have been raised as a significant issue ~~by the defence advocate~~.
  
2. There are a wide range of mental health conditions, neurological impairments and developmental disorders, and the level of any impairment will vary between individuals. Accordingly, in assessing whether the condition or disorder has any impact on sentencing, the approach to sentencing should be individualistic and focused on the particular issues relevant in the case concerned. In particular:
  - care should be taken to avoid making assumptions, as unlike some physical conditions, many mental health conditions, neurological impairments or learning disabilities are not easily visible
  - no inference should necessarily be drawn if an offender had not previously been formally diagnosed, or had not previously declared a condition (possibly due to a fear of stigmatisation or because they are unaware they have a condition)
  - it is not uncommon for people to have a number of different conditions, ‘co-morbidity’, and for drug and/or alcohol dependence to be a factor, ‘dual diagnosis’<sup>1</sup>
  - difficulties of definition and classification in this field are common, there may be differences of expert opinion and diagnosis in relation to the offender, or it may be that no specific condition can be identified
  - sentencing should be conducted on the basis on which a condition or disorder has been diagnosed by an expert (as opposed to self-diagnosis by an offender)
  
3. In any case where the offender is or appears to be mentally disordered, the court must obtain and consider a medical report before passing a custodial sentence other than one fixed by law, unless, in the circumstances of the case, the court is of the opinion that it is

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<sup>1</sup> There is more information on co-morbidity and dual diagnosis in Annex A

unnecessary (s.157 Criminal Justice Act 2003)<sup>2</sup>. It may be unnecessary if existing sources of information can be used, such as from probation, defence representatives, prison, police or court mental health teams, or family members. In addition, s.39 of the Mental Health Act (MHA)1983 provides that a court may request information about a patient from local health services if considering making a hospital or interim hospital order. Further information about requests for reports can be found at **Annex B** of this document.

4. Where a custodial sentence is passed the court should forward psychiatric, [medical](#) and pre-sentence reports to the prison, to ensure that the prison has appropriate information about the offender's condition and can ensure their welfare.
5. Courts should always be alive to the impact of a condition on an offender's ability to understand and participate in proceedings. To avoid misunderstandings, which could lead to further offences, it is important to ensure that offenders understand their sentence and what will happen if they reoffend and or breach the terms of their licence or supervision. Courts should therefore consider putting the key points in an accessible way. Further information can be found at Chapter Four of the Equal Treatment Bench Book:

<https://www.judiciary.uk/publications/new-edition-of-the-equal-treatment-bench-book-launched/>

6. [Where a defendant is proposing to commission or has had commissioned on their behalf a privately funded report with a view to a bed at a private hospital, or to a privately managed Mental Health Treatment Disposal, the court should require additional information to ensure that the proposals are rigorous and that the level of security or treatment is suitable. Courts should also consider whether a restraining order or any other ancillary order would be appropriate.](#)

### **Section two: assessing culpability**

7. Courts should refer to offence specific guidelines to assess culpability, in conjunction with this guideline. If an offender has any of the conditions or disorders listed in **Annex A**, it is possible that it may affect their level of responsibility for an offence. The relevance of any condition will depend on the nature, extent and effect of the condition on an individual and whether there is a causal connection between the condition and the offence. It is for sentencers

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<sup>2</sup> There is more information on s.157 of the Criminal Justice Act in Annex B.

to decide how much responsibility the offender retains for the offence, given the particular disorder or condition and the specific facts of the case at hand.

8. In some cases the condition may mean that culpability is significantly reduced, in others, the condition may have no relevance to culpability. Assessments of culpability will vary between cases due to the differences in the nature and severity of conditions, [and the fluctuation of some conditions](#); it is not possible to be prescriptive in this regard. Careful analysis of the evidence is required to make this assessment, which the sentencer, who will be in possession of all the relevant information, is best placed to make. Expert evidence, where offered and relevant, should be taken into account, but sentencers must make their own decisions and should not feel bound to follow [expert psychiatric opinion](#). [This may be appropriate if there is conflicting expert advice or](#) where [experts suggest a diagnosis without a clear indication of how it impacts culpability](#).

9. Courts may find the following list of questions to consider helpful, to assist in deciding the level of culpability:

- Did the offender's condition mean [it impaired their ability to](#)~~they were unable to~~ exercise appropriate judgement?
- Did the offender's condition impair their ability to make rational choices, or to think clearly?
- Did the offender's condition impair their ability to understand the [nature and](#) consequences of their actions?
- Did the offender's condition have the effect of making them disinhibited?
- Were there any elements of premeditation or pre-planning in the offence, that might indicate a higher degree of culpability?
- Were there attempts to minimise their wrongdoing or to conceal their actions, that might indicate a higher degree of culpability?
- Did the offender have any insight into their illness, or did they lack insight?
- Did the offender seek help, but failed to receive appropriate treatment or care?
- If there was a lack of compliance in taking medication or following medical advice, was this influenced by the condition or not?
- If the offender exacerbated their condition by drinking/taking drugs, were they aware of the potential effects of doing so?

**This is not an exhaustive list.**



### **Section three: determining the sentence**

10. Courts should consider all the purposes of sentencing during the sentencing exercise: the punishment of offenders, reduction of crime, rehabilitation of offenders, protection of the public, and reparation. Just because an offender has a mental health condition, neurological impairment or disability, it does not mean they should not be punished, and in the case of serious offences protection of the public may be paramount. For offenders whose condition has contributed to their offending the effective treatment of their condition should in turn reduce further offending and protect the public. [However, in relation to the making of a hospital order, a hospital order with restrictions or a hospital and limitation direction, the statutory requirement to have regard to the purposes of sentencing does not apply.](#)
11. Decisions will need to be made on a case by case basis. For example, in a case where an offender's culpability was high, the sentence **may** be more weighted to punishment. In a case where an offender's culpability was low, the sentence **may** be more weighted to rehabilitation.
12. An offender's condition at the point of sentence could have a bearing on the type, [length or nature](#) of sentence that is imposed, [or whether a disposal under the Mental Health Act is appropriate](#). Some points to consider are:
- [The existence of a condition at the date of sentencing, or its foreseeable recurrence, could mean that a given sentence could weigh more heavily on the offender than it would on an offender without that particular condition](#)
  - [By the time of sentence, some offenders may have spent substantial time on remand, which may have led to a deterioration in their condition. If this is the case, in deciding sentence the court may wish to consider whether imprisonment may significantly worsen an offender's condition](#)
  - Imprisonment can exacerbate poor mental health and in some cases increase the risk of self-harm
  - ~~[For some prisoners their condition may mean a custodial sentence may have a greater punitive effect than it would for a prisoner without the condition](#)~~
  - Some requirements of community orders may be impractical, consideration should be given to tailoring the requirements of orders, as necessary in individual cases. An offender should not receive a more severe sentence, such as custody, because they would be unable to do unpaid work as part of a community order, for example

~~13. If there is a serious risk of imprisonment having a gravely adverse effect on the offender's condition, courts will need to consider this risk very carefully, in exceptional cases looking at alternatives to custody, and potentially sentencing outside the range indicated by the offence guideline. Where the offence is very serious and retained culpability high, custody may be inevitable but the condition may still properly impact on sentence length. Courts should refer to any medical evidence or expert reports on this point to assist them.~~

~~14. However, although consideration of the impact of imprisonment on an offender is a legitimate one, any consideration should be balanced against the gravity of the offending, including the harm done to the victim(s), and the public interest in appropriate sentences being set.~~

15. In deciding on a sentence, courts should also carefully consider the criteria for, and regime on release. It should not be assumed that one order is better than another, or that one order offers greater protection to the public than another, careful analysis of all the facts is required in each case, including what is practically available, before deciding on the appropriate disposal.

The graver the offence and the greater risk to the public on release of the offender, the greater emphasis the court must place upon the protection of the public and the release regime.

Further details are given at **Annex C**, but in summary:

- A **s37 hospital order** lasts initially for six months but can be renewed for a further six months and then for a year at a time. Discharge from a hospital order can be made by the responsible clinician (RC) or the hospital at any time. The RC can also make a Community Treatment Order (CTO) which allows for the patient to be treated in the community but provides for recall to hospital if needed to ensure that the patient receives the treatment needed. The patient can apply to the tribunal<sup>3</sup> for discharge after six months and annually thereafter.
- A **restriction order under s41** lasts indefinitely and does not need to be renewed. The Secretary of State for Justice (SoS) can lift the restriction order at any time if satisfied that it is no longer necessary to protect the public from serious harm. A patient who is still in hospital when the restriction order is lifted is treated as if admitted under a hospital order on the day the restriction order ended.
- A **limitation direction under s45A** ends automatically on the patient's 'release date'. The effect of this is that the limitation direction will end at the halfway point of a determinate sentence. If the patient is serving a life sentence, or an indeterminate sentence, the release date is the date (if any) on which the person's release is ordered by the parole board. Although the limitation direction ends on the release date, the hospital direction does not. So a patient who is still detained in hospital on the basis of the hospital direction on their release date, remains liable to be detained in hospital from then on as an unrestricted hospital order patient. While the limitation direction remains in effect, if the patient no longer requires treatment in hospital for a mental disorder, the SoS

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<sup>3</sup> First Tier Tribunal (Mental Health) in England and the Mental Health Review Tribunal in Wales

may direct that the patient be removed to prison (or equivalent) to serve the remainder of their sentence, or else release them on licence.

#### **Section four: sentencing disposals**

16. The following is a list of available mental health disposals/orders and relevant guidance (further details on each are at **Annex C**).

#### **Magistrates' courts**

- Community Order with a Mental Health Treatment Requirement (MHTR)
- Section 37 Hospital order
- Section 37 Guardianship order
- Section 43 Committal to the Crown Court (with a view to a restriction order)

#### **Crown Court**

- Community Order with a Mental Health Treatment Requirement (MHTR)
- Section 37 Hospital order
- Section 37 Guardianship order
- Section 41 Restriction order
- Section 45A Hospital and limitation direction

**[This is not an exhaustive list](#)**

**The following guidance applies in the Crown Court only:**

Where:

- (i) the evidence of medical practitioners suggests that the offender is currently suffering from a mental disorder,
- (ii) treatment is available, and
- (iii) the court considers that a hospital order (with or without a restriction) may be an appropriate way of dealing with the case,

the court should consider **all sentencing options** including a section 45A direction and consider the importance of a penal element in the sentence taking into account the level of culpability assessed at section two above.

### **Section 45A hospital and limitation direction**

- a. Before a hospital order is made under s.37 MHA (with or without a restriction order under s.41), consider whether the mental disorder can appropriately be dealt with by custody with a hospital and limitation direction under s.45A MHA. In deciding whether a s.45A direction is appropriate the court should bear in mind that the limitation direction will cease to have effect at the automatic release date of a determinate sentence.
- b. If a penal element is appropriate and the mental disorder can appropriately be dealt with by a direction under s.45A MHA, then the judge should make such a direction. (Not available for a person under the age of 21 at the time of conviction).

### **Section 37 hospital order and s41 restriction order**

If a s.45A direction is not appropriate the court must then consider whether, (assuming the conditions in s.37(2) (a) are satisfied), the matters referred to in s. 37(2)(b) would make a hospital order (with or without a restriction order under s.41) the most suitable disposal. The court should explain why a penal element is not appropriate.

### **Annex A**

The following information provides brief detail on common mental health disorders, [neurological impairments](#) and developmental conditions, listing the main features that may be relevant in understanding how the condition may affect people ~~with the condition~~.

**Mental disorders** – such as (but not limited to) depression, anxiety, schizophrenia, bipolar disorder, post-traumatic stress disorder (PTSD), or personality disorders (particularly associated within the criminal context are anti- social, borderline, narcissistic and paranoid personality disorders). These conditions can affect thought, feelings and behaviour, [including the capacity to make decisions, or make them consistently](#). Conditions can be short or long term, some conditions can fluctuate, and a range of symptoms can be experienced. The main features that may be relevant for each of the conditions are:

#### **Depression/Anxiety**

- difficulties in concentrating and making decisions
- poor memory

- irritability, anger, anxiety, agitation, restlessness, being distressed
- avoiding/leaving situations in order to relieve uncomfortable feelings
- on occasions depression may be accompanied by delusions and hallucinations

### **Schizophrenia**

- hallucinations-experiencing something that isn't really there- most commonly hearing voices
- delusions-strongly holding beliefs that others do not share and have no basis in reality and which may exhibit paranoid thinking
- acting strangely or dangerously as a result of delusional beliefs or ideas
- muddled thinking and speech
- difficulty in relating to others
- apathy, disorganised thinking, difficulty in concentration and following instructions

### **Bi-polar disorder ('manic depression')**

- extreme changes of mood, from severe lows (depression) to highs (mania)
- acting irrationally, unpredictable or unexpected behaviour
- overactive/excitable, excessive energy, become angry quickly or irritable
- unusual beliefs/delusions not based in reality
- spend excessive amounts of money/end up with debts

### **PTSD**

- irritability/aggressive behaviour
- intense distress/panic in response to real or symbolic reminders of the trauma
- involuntary re-experiencing of the trauma with flashbacks, intrusive thoughts, nightmare, and images
- difficulty concentrating

### **Personality disorders**

- reckless/impulsive behaviour
- not trusting others/feeling threatened
- irresponsible and anti-social behaviour
- disregards/violates the rights of others
- easily frustrated/angered
- unable to feel guilt

- emotionally unstable
- grandiose sense of self importance
- temporary psychotic states
- unfounded suspicion of others and bearing grudges

**Psychosis**- also called a psychotic experience or psychotic episode, is when people perceive or interpret reality in a very different way from others. Psychosis is a symptom of some mental health problems, and not a diagnosis in itself. Most common types of psychosis are hallucinations and delusions, some may also experience disorganised thinking and speech. The word is usually used to refer to an experience. Psychosis affects people in different ways, with some having only one experience, some having short episodes, and other people living with it most of the time.

**Learning disabilities** – a life-long condition which includes significant impairment of intelligence (an IQ of less than 70) and social functioning (a reduced ability to cope independently and adapt to the daily demands of a normal social environment). A learning disability can range from mild, moderate to severe. The main features that may be relevant are:

- limited comprehension and communication skills
- being acquiescent and suggestible
- having difficulty understanding social norms.

[\\*In general a learning disability is a mental disorder but for the purposes of detention in hospital by the courts and transfer to hospital from prison it can only be considered a mental disorder if associated with abnormally aggressive or seriously irresponsible conduct \(Mental Health Act 1983 s1\(2A\)\).](#)

**Learning difficulties** – such as dyslexia, Attention Deficit Hyperactivity Disorder (ADHD), or Attention Deficit Disorder (ADD). A learning difficulty is different to a learning disability as it is unrelated to intelligence. The main features that may be relevant for **ADHD/ADD** are:

- impulsiveness
- inattentiveness
- extreme impatience
- inability to relate to others in socially acceptable ways
- inability to express feelings and emotions in an appropriate way
- inability to deal with stress or to be able to think clearly.

People with **dyslexia** may have difficulties with reading, spelling, personal organisation and sequencing, getting dates, times or events in the wrong order.

**Autism Spectrum Disorder** – (including Asperger's syndrome) a lifelong developmental disability that affects how people communicate and relate to others, and make sense of the world. The main features that may be relevant are:

- social naivety, potentially leading to being unknowingly being involved in crimes
- may develop highly specific interests in a subject or activity
- difficulty with change or unexpected events
- rigid adherence to rules
- being unaware of the consequences of their actions, due to an inability to link cause and effect
- lack of insight into behaviour
- lack of empathy or a limited ability to express emotion.

**Acquired brain injury** – an injury caused to the brain since birth. Injuries can range from mild to severe and may cause complex long-term problems. The effects may vary widely, are often hidden, and often fluctuate, but may include:

- impaired reasoning, affecting the ability to understand rules
- impaired insight into own behaviour and that of others
- loss of control over behaviour and inappropriate behaviour
- rapid mood changes, aggression, impulsivity, irritability and egocentricity
- changes in personality
- memory loss
- disinhibition
- reduced capacity to concentrate, reduced capacity to process information

**Dementia** – a syndrome associated with an ongoing decline of brain functioning, such as Alzheimer's disease or vascular dementia. The main features that may be relevant are:

- difficulty in controlling emotions, mood swings, aggression
- loss of empathy with others
- difficulty with social interaction

- problems with memory
- in some cases, experiencing hallucinations.
- problems with concentration and reduced ability to focus and pay attention
- reduced ability to reason and make judgements
- problems with speech and language

**Dependence syndrome** – a cluster of behavioural, cognitive and physiological phenomena that develop after repeated substance abuse and that typically includes a strong desire to take the substance, difficulties in controlling its use, persisting in its use despite harmful consequences, and a higher priority given to using it than to other activities and obligations. The dependence syndrome may be present for a specific substance e.g alcohol, for a class of substances, e.g opioid drugs, or for a wider range of different psychoactive substances. The main features that may be relevant are:

- violent or anti-social behaviour
- reckless behaviour
- chaotic lifestyle
- strong desire or compulsion to consume the substance above all else
- psychotic states
- disinhibition

### **Co-morbidity**

This is the term used to describe people who experience more than one condition, which is common amongst offenders, for example someone may have a mental health condition and a learning disability. Some people with mental health conditions or learning disabilities also may have communication difficulties.

### **Dual diagnosis**

This is the term used to describe people with mental health and substance abuse problems. Many people with mental health conditions use drugs or alcohol to help them deal with their conditions.



## **Annex B**

Where the court regards a report as necessary it should make the request specific. Requests for psychiatric reports should only be necessary in a limited amount of cases, as outlined in paragraph three. If asking for a report courts should make the request sufficiently specific so that the report writer is clear as to **what** is required, and **when** the report is required by.

Examples of information that might be requested are:

- background/history of the condition
- diagnosis, symptoms, treatment of the condition
- the level of impairment due to the condition
- how the condition relates to the offences committed
- dangerousness
- risk to self and others
- if there has been a failure of compliance (e.g not attending appointments, failing to take prescribed medication) what is thought to be driving that behaviour
- the suitability of the available disposals in a case
- if a particular disposal is recommended, the expected length of time that might be required for treatment, and details of the regime on release/post release supervision
- the impact of any such disposals on the offender
- any communication difficulties and/or requirement for an intermediary
- and any other information the court considers relevant.

Further information on requests for reports can be found within the Criminal Procedure Rules, which can be found here:

[https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015#Anchor8.](https://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015#Anchor8)

When requested by clinicians wanting to undertake an inpatient assessment, for offences punishable with imprisonment, courts may wish to consider making an interim hospital order (s.38 MHA). Before ordering a s.38 order the court will have to be satisfied a bed is available, and that a s.38 order is necessary in the circumstances of the case. ~~However, although such an order may enable a better assessment to be made than in a prison environment, courts should consider carefully the acute pressure on the availability of secure beds.~~

Where appropriate, assessments can also be made in the community.

### **Power to order reports- magistrates courts**

There are limited powers to order reports in the magistrates' courts. s.11 Powers of Criminal Courts (Sentencing) Act 2000<sup>4</sup> provides for the ordering a report, but it is only post- conviction or a finding under s.37 (3) Mental Health Act 1983 that the defendant did the act or made the omission charged. However, the court can request a report and a duly qualified medical practitioner who provides such a report can be paid out of central funds, using s.19 Prosecution of Offences Act 1985<sup>5</sup> plus Regulation 25(1) Costs in Criminal Cases (General) Regulations 1986<sup>6</sup>.

### **Additional requirements in case of mentally disordered offender (s.157 Criminal Justice Act 2003)**

(1) Subject to subsection (2), in any case where the offender is or appears to be mentally disordered, the court must obtain and consider a medical report before passing a custodial sentence other than one fixed by law.

(2) Subsection (1) does not apply if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a medical report.

(3) Before passing a custodial sentence other than one fixed by law on an offender who is or appears to be mentally disordered, a court must consider—

(a) any information before it which relates to his mental condition (whether given in a medical report, a pre-sentence report or otherwise), and

(b) the likely effect of such a sentence on that condition and on any treatment which may be available for it.

(4) No custodial sentence which is passed in a case to which subsection (1) applies is invalidated by the failure of a court to comply with that subsection, but any court on an appeal against such a sentence—

(a) must obtain a medical report if none was obtained by the court below, and

(b) must consider any such report obtained by it or by that court.

(5) In this section “mentally disordered”, in relation to any person, means suffering from a mental disorder within the meaning of the [Mental Health Act 1983 \(c. 20\)](#).

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<sup>4</sup> <https://www.legislation.gov.uk/ukpga/2000/6/section/11>

<sup>5</sup> <https://www.legislation.gov.uk/ukpga/1985/23/section/19>

<sup>6</sup> <https://www.legislation.gov.uk/uksi/1986/1335/regulation/25/made>

(6) In this section “medical report” means a report as to an offender's mental condition made or submitted orally or in writing by a registered medical practitioner who is approved for the purposes of [section 12](#) of the [Mental Health Act 1983](#) by the Secretary of State [ or by another person by virtue of [section 12ZA or 12ZB](#) of that Act] <sup>1</sup> as having special experience in the diagnosis or treatment of mental disorder.

(7) Nothing in this section is to be taken to limit the generality of [section 156](#).

## Annex C

<b>Mental Health Treatment Requirement (section 207 CJA 2003)</b>	
<b>May be made by:</b>	A magistrates' court or Crown Court
<b>In respect of an offender who is:</b>	Convicted of an offence punishable with imprisonment
<b>If the court is of the opinion</b>	<p><u>That the mental condition of the offender is such that it requires and offender suffers from a medical</u> is susceptible to treatment but does not warrant detention under a hospital order.</p> <p>The treatment required must be such one of the following kinds of treatment as may be specified in the relevant order—</p> <p>(a) treatment as a resident patient in a care home an independent hospital or a hospital within the meaning of the Mental Health Act 1983, but not in hospital premises where high security psychiatric services within the meaning of that Act are provided;</p> <p>(b) treatment as a non-resident patient at such institution or place as may be specified in the order;</p> <p>(c) treatment by or under the direction of such registered medical practitioner or registered psychologist (or both) as may be so specified;</p> <p>but the nature of the treatment is not to be specified in the order except as mentioned in paragraph (a), (b) or (c).</p>
<b>And the court is satisfied</b>	That arrangements have been or can be made for the treatment to be specified in the order and that the offender has expressed a willingness to comply with the requirement.

- MHTRs provide a useful option for offenders to receive treatment who would otherwise not qualify for treatment under the Mental Health Act 1983
- Use of MHTRs attached to court orders for those offenders with identified mental health issues may result in reductions in reoffending, compared to the use of short term custodial sentences.
- Courts may also wish to consider a drug rehabilitation requirement and/or an alcohol treatment requirement in appropriate cases.
- A community order with a MHTR may be appropriate where the offence is not serious enough to cross the custody threshold, and the defendant's culpability is substantially reduced by their mental state at the time of the commission of the offence, and where the public interest is served by ensuring they continue to receive treatment.
- Even when the custody threshold is crossed, a community order with a MHTR may be a proper alternative to a short or moderate custodial sentence
- A MHTR is not usually suitable for an offender who is unlikely to comply with the treatment or who has a chaotic lifestyle.

<b>Hospital order (section 37 Mental Health Act 1983)</b>		
<b>May be made by:</b>	A magistrates' court or Crown Court	
<b>In respect of a defendant who is:</b>	<i>Where made by a magistrates' court:</i>	<i>Where made by the Crown Court:</i>
	Convicted by that court of an offence punishable on summary conviction with imprisonment, or Charged before that court with such an offence but who has not been convicted or whose case has not proceeded to trial, if the court is satisfied that the person did the act or made the omission charged	Convicted before that court for an offence punishable with imprisonment (other than murder)
<b>If the court is satisfied</b>	On the written or oral evidence of two doctors, at least one of whom must be approved under section 12, that <ul style="list-style-type: none"> <li>• the offender is suffering from mental disorder of a nature or degree which makes it appropriate for the offender to be detained in a hospital for medical treatment, and</li> <li>• appropriate medical treatment is available.</li> </ul>	
<b>And the court is of the opinion</b>	Having regard to all the circumstances, including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with the offender, that a hospital order is the most suitable method of dealing with the case	
<b>And it is also satisfied</b>	On the written or oral evidence of the approved clinician who would have overall responsibility for the offender's case, or of some other person representing the managers of the relevant hospital, that arrangements have been made for the offender to be admitted to that hospital within the period of 28 days starting with the day of the order.	

A hospital order is, [essentially](#), an alternative to punishment. The court may not, at the same time as making a hospital order in respect of an offender, pass a sentence of imprisonment, impose a fine or make a community order, a youth rehabilitation order, or a referral order. Nor can the court make an order for a young offender's parent or guardian to enter into a recognizance to take proper care of and exercise proper control over the offender. The court may make any other order which it has the power to make, eg a compensation order.

A hospital order made **under s37** (without a restriction order) [authorises the detention of the patient in hospital for medical treatment](#)

- Discharge from the order can be made by the responsible clinician (RC) or the hospital at any time. [The order initially lasts for six months but can be renewed by the hospital for a further six months and then for a year at a time if the conditions for making the order are still satisfied. There is no limit to the number of times that the order can be renewed.](#)
- The patient can apply to the tribunal<sup>7</sup> for discharge after six months and annually thereafter.

<sup>7</sup> First Tier Tribunal (Mental Health) in England and the Mental Health Review Tribunal in Wales

- The RC can authorise a leave of absence for a limited period or indefinitely; such leave can be subject to conditions and the patient can be recalled at any time if the RC considers it necessary in the interests of the patient's health or safety or for the protection of other people (the order can be renewed during a period of absence if hospital treatment remains necessary).
- The RC can make a Community Treatment Order (CTO) which allows for the patient to be treated in the community but provides for recall to hospital if needed to ensure that the patient receives the treatment needed. ~~The hospital order is in effect suspended while the CTO is in force so it does not need to be renewed.~~ The CTO lasts for an initial six months and can be extended for a further six months and annually thereafter.

<b>Restriction Order (section 41 Mental Health Act 1983)</b>	
<b>A restriction order (section 41) may be imposed by the Crown Court where a hospital order has been made and:</b>	
<b>If</b>	At least one of the doctors whose evidence is taken into account by the Court before deciding to give the hospital order has given evidence orally
<b>And, having regard to</b>	<ul style="list-style-type: none"> <li>• the nature of the offence</li> <li>• the antecedents of the offender, and</li> <li>• the risk of the offender committing further offences if set at large</li> </ul>
<b>The Court thinks</b>	It necessary for the protection of the public from serious harm for the person to be subject to the special restrictions which flow from a restriction order

A restriction order lasts until it is lifted by the Secretary of State under section 42, or the patient is absolutely discharged from detention by the responsible clinician or hospital managers with the Secretary of State's consent under section 23 or by the Tribunal under section 73.

While the restriction order remains in force, the hospital order also remains in force and does not have to be renewed.

- The Secretary of State for Justice (SoS) can lift the restriction order at any time if satisfied that it is no longer necessary to protect the public from serious harm. A patient who is still in hospital when the restriction order is lifted is treated as if admitted under a hospital order on the day the restriction order ended. A patient who has been conditionally discharged from hospital will be automatically discharged absolutely on that date.
- A restricted patient may not be discharged, transferred to another hospital or given leave of absence by the responsible clinician (RC) or hospital without the SoS's consent. Either the RC or the SoS can recall a patient from leave.
- The SoS has the power to discharge the patient conditionally or absolutely.
- The Tribunal has no general discretion to discharge restricted patients but must discharge patients who are subject to a restriction order (other than patients who have been conditionally discharged and not recalled to hospital) if it is not satisfied that the criteria for continued detention for treatment under a hospital order are met.

- The discharge must be conditional, unless the Tribunal is satisfied that it is not appropriate for the patient to remain liable to be recalled to hospital for further treatment, i.e. to be made subject to conditional discharge.
- Where the Tribunal is required to discharge a restricted patient conditionally it may, but does not have to, impose conditions with which the patient is to comply. The SoS may impose conditions and vary those imposed by the Tribunal.

<b>Hospital and limitation directions (section 45A Mental Health Act 1983)</b>	
<b>May be given by:</b>	Crown Court
<b>In respect of a person who is</b>	Aged 21 or over and convicted before that court of an offence punishable with imprisonment (other than murder)
<b>If the court is satisfied</b>	On the written or oral evidence of two doctors, at least one of whom must be approved under section 12, and at least one of whom must have given evidence orally, that: <ul style="list-style-type: none"> <li>• the offender is suffering from mental disorder of a nature or degree which makes it appropriate for the offender to be detained in a hospital for medical treatment, and</li> <li>• appropriate medical treatment is available</li> </ul>
<b>And the Court</b>	Has first considered making a hospital order under section 37, but has decided instead to impose a sentence of imprisonment
<b>And it is also satisfied</b>	On the written or oral evidence of the approved clinician who would have overall responsibility for the offender's case or of some other person representing the managers of the relevant hospital, that arrangements have been made for the offender to be admitted to that hospital within the 28 days starting with the day of the order.

This so-called 'hybrid order' enables the court to combine a hospital order with restrictions with a prison sentence. A hospital direction is a direction for a person's detention in hospital. A limitation direction is a direction that they be subject to the special restrictions in section 41 of the Act which also apply to people given restriction orders. A hospital direction may not be given without an accompanying limitation direction (although, as described below, a hospital direction may remain in force after the limitation direction has expired).

- A limitation direction ends automatically on the patient's 'release date'. The patient's release date is the day that the patient would have been entitled to be released from custody had the patient not been detained in hospital. Discretionary early release such as home detention curfew is not taken into account. For these purposes, any prison sentence which the patient was already serving when the hospital direction was given is taken into account as well as the sentence(s) passed at the same time as the direction was given. The effect of this is that the limitation direction will end at the halfway point of a determinate sentence.
- If the patient is serving a life sentence, or an indeterminate sentence, the release date is the date (if any) on which the person's release is ordered by the parole board.
- Although the limitation direction ends on the release date, the hospital direction does not. So if patients are still detained in hospital on the basis of the hospital direction on their release date, they remain liable to be detained in hospital from then on like unrestricted hospital order patients. This includes patients who are on leave of absence from hospital on their release date, but not those who have been conditionally discharged and who have not been recalled to hospital.
- Unlike hospital order patients, hospital and limitation direction patients are detained primarily on the basis of a prison sentence. While the limitation direction remains in

effect, the Secretary of State may direct that they be removed to prison (or equivalent) to serve the remainder of their sentence, or else release them on licence. This is only possible where the SoS is notified by the offender's responsible clinician, any other approved clinician, or by the Tribunal, that:

- the offender no longer requires treatment in hospital for mental disorder, or
- no effective treatment for the disorder can be given in the hospital in which the offender is detained.
- When notified in this way by the responsible clinician, or any other approved clinician, the SoS may:
  - direct the offender's removal to a prison (or another penal institution) where the offender could have been detained if not in hospital, or
  - discharge the offender from the hospital on the same terms on which the offender could be released from prison.
- If the Tribunal thinks that a patient subject to a restriction order would be entitled to be discharged, but the SoS does not consent, the patient will be removed to prison. That is because the Tribunal has decided that the patient should not be detained in hospital, but the prison sentence remains in force until the patient's release date.

<b>Committal to the Crown court (section 43 Mental Health Act 1983)</b>	
<b>A magistrates' court may commit a person to the Crown Court with a view to a restriction order if (s43(1))</b>	
<b>The person</b>	Is aged 14 or over, and Has been <b>convicted*</b> by the court of an offence punishable on summary conviction by imprisonment
<b>And</b>	The court could make a hospital order under section 37
<b>But having regard to</b>	The nature of the offence The antecedents of the offender, and The risk of the offender committing further offences if set at large
<b>The court thinks</b>	That if a hospital order is made, a restriction order should also be made.

\*Note: there is no power to commit to the Crown Court for a restriction order where a magistrates' court has made a finding that a defendant has done the act/made the omission charged under s 37(3) MHA.

The Crown Court is required to inquire into the circumstances of the patient's case and either:

- make a hospital order (with or without a restriction order), as if the offender had been convicted before the Crown Court, rather than by the magistrates' court, or
- deal with the offender in some other way the magistrates' court would have been able to originally.

<b>Guardianship order (section 37 Mental Health Act 1983)</b>		
<b>May be made by</b>	a magistrates' court or the Crown Court	
	where made by a magistrates' court	where made by the Crown Court



<b>In respect of a person who is aged 16 or over and who is</b>	convicted by that court of an offence punishable (in the case of an adult) on summary conviction with custody or charged before (but not convicted by) that court with such an offence, if the court is satisfied that the person did the act or made the omission charged	convicted before that court for an offence punishable with imprisonment (other than murder)
<b>if the court is satisfied</b>	on the written or oral evidence of two doctors, at least one of whom must be approved under section 12, that the offender is 16 or over, and is suffering from mental disorder of a nature or degree which warrants the offender's reception into guardianship under the Act	
<b>and the court is of the opinion</b>	having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with the offender, that a guardianship order is the most suitable method of dealing with the case	
<b>and it is also satisfied</b>	that the local authority or proposed private guardian is willing to receive the offender into guardianship	

Guardianship enables patients to receive care outside hospital where it cannot be provided without the use of compulsory powers. The Act allows for people ('patients') to be placed under the guardianship of a guardian. The guardian may be a local authority, or an individual ('a private guardian'), such as a relative of the patient, who is approved by a local authority. Guardians have three specific powers: residence, attendance and access.

- The *residence power* allows guardians to require patients to live at a specified place.
- The *attendance power* lets guardians require the patient to attend specified places at specified times for medical treatment, occupation, education or training. This might include a day centre, or a hospital, surgery or clinic.
- The *access power* means guardians may require access to the patient to be given at the place where the patient is living, to any doctor, approved mental health professional, or other specified person. This power could be used, for example, to ensure that patients do not neglect themselves.

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**Sentencing Council meeting:** 16 November 2018  
**Paper number:** SC(18)NOV04 – Assault  
**Lead Council member:** Julian Goose & Rob Butler  
**Lead officials:** Lisa Frost & Caroline Nauth-Misir  
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## **1 ISSUE**

1.1 This paper includes feedback and findings from the recent road testing on harm models for ABH and GBH which were agreed for testing at the September meeting. The evaluation findings for GBH sentences will be discussed, and revised culpability factors and sentence levels proposed for GBH s20 and ABH offences.

## **2 RECOMMENDATION**

That the Council:

- considers the findings from the recent road testing of harm models for ABH and GBH;
- considers the evaluation findings for the existing GBH guideline;
- considers culpability factors for GBH s20 and whether these should be the same for ABH; and
- considers and agrees sentence levels for ABH and GBH s20.

## **3 CONSIDERATION**

3.1 At the September meeting the Council considered and agreed factors for a revised guideline for the offence of actual bodily harm (ABH). It was agreed that harm models would be tested with Crown Court judges along with two GBH (grievous bodily harm) harm models to see which achieved the greatest consistency of categorisation of injuries. Findings are included at Annex A.

3.2 This paper will then consider the evaluation findings for GBH offences. Based on these, revised culpability factors for GBH are proposed, which it will also be proposed are included as ABH culpability factors. Factors are based on the evaluation findings and informed by extensive transcript analysis and research into current sentencing practice and application of factors.

3.3 Finally, sentence levels for ABH and GBH s20 will be proposed. These are informed by the evaluation findings and research into current sentencing practice, and are intended to achieve proportionate and relative sentences.

#### Harm models – ABH & GBH

3.4 At the September meeting options were discussed for ABH and GBH harm models, to identify the most appropriate factors for assessing harm. Findings from road testing of alternative models with magistrates were discussed, and based on this it was proposed that for ABH a 'high', 'medium' 'low' model with explanatory text be tested with Crown Court judges along with an alternative model with factors included to provide a 'benchmark' for injuries in an ABH. For GBH it was agreed that two models should also be tested, including a model containing descriptive factors and a high, medium and low model with explanatory text.

3.5 The road testing findings are included at Annex A. In summary, it was found that sentencers preferred the models including descriptions of harm and that these resulted in greater consistency of categorisation of harm for GBH offences in particular.

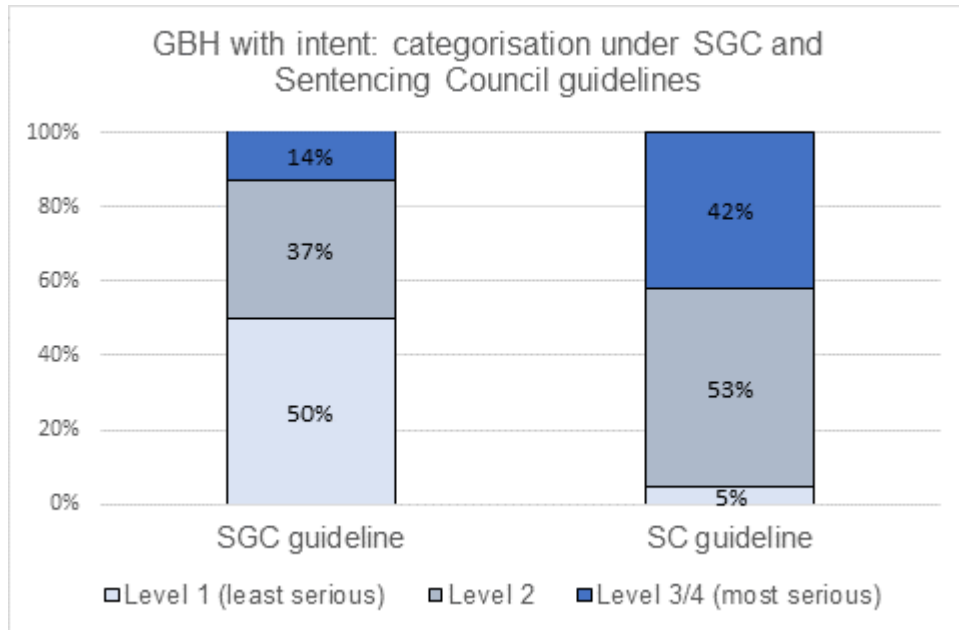
**Question 1: Does the Council agree that the descriptive factor harm models for ABH and GBH should be included in the revised guidelines?**

#### GBH – Evaluation findings

3.6 A summary of the evaluation findings highlighted the same issues with problematic factors found across the assault guidelines. In relation to sentences there was an unanticipated impact of the s18 guideline with sentences significantly increasing. Sentences for s20 also increased, but within the range of forecasted severity.

3.7 A review of transcripts has identified that factors and the structure of the guideline could be a significant contributor to sentence increases, with a vast range

of offences falling within the 'greater' harm and culpability categories. For s.18 cases where the biggest increase in sentences occurred, the shift in seriousness categorisations between the previous SGC guideline and the existing guideline is illustrated by the diagram below. This demonstrates that with the introduction of the existing guideline lower seriousness categorisations shifted from 50% to 5%, while cases falling within the top end of seriousness expanded from 14% to 42%;



While it has already been noted that the 'in the context' harm factor may be contributing to a greater harm categorisation of a high proportion of GBH cases, analysis of transcripts has identified that the phrasing and placement of the culpability factors 'sustained and repeated assault' and 'use of weapon or weapon equivalent' may also have contributed to sentence increases.

### GBH Culpability factors

3.8 Although there are two separate GBH offences, s18 and s20, the existing guideline includes exactly the same factors for both. The distinction between offences is that the s18 offence requires proof of intent to cause GBH, while for a s20 offence there is no need to demonstrate the offender intended to inflict the harm caused; just that the offender was reckless or intended some harm. As s20 requires only intention of some harm or recklessness that GBH would be caused, an offender can be found guilty of ABH if bodily harm not amounting to GBH is found.

3.9 While the evaluation highlighted that the increase in s18 GBH sentences was likely to be attributable to the harm factors in the existing guideline (which analysis of transcripts confirm are problematic), analysis of cases and examination of application

of culpability factors has identified these have also had an inflationary effect on sentences.

3.10 It is proposed culpability and harm factors are addressed in the same way as factors for lower level offences; namely removing factors which have proved problematic and moving others to step two. There are also a number of specific issues that require consideration as part of revising GBH factors, and which have informed the proposed culpability factors at Annex B. Modification or qualification of some factors is proposed, the rationale for which is provided below.

### Higher culpability

#### *Significant degree of planning or premeditation*

A factor included in the existing guideline is 'a significant degree of premeditation'. In analysis of CCSS data<sup>1</sup> this factor was present in 9% of s20 cases and 21% of s18 cases. This factor was not retained at culpability in the revised common assault and ABH guidelines but was included as an aggravating factor. However, cases illustrated that it is a particularly relevant factor in GBH cases and it is proposed it should be retained at high culpability. Analysis of GBH cases identified that this factor does increase the seriousness of the offence, and incidents where it was present included revenge attacks, kidnapping and torture of victims, and domestic violence incidents where perpetrators planned and lay in wait to carry out an attack on an ex-partner.

#### *Victim particularly vulnerable*

In the existing guideline a high culpability factor included is 'deliberate targeting of vulnerable victim'. The GBH CCSS analysis identified that this factor was present in 4% of s20 cases and 8% of s18 cases. This factor is particularly relevant in 'baby shaking' cases which are often charged as s20 offences, and it is thought it should be retained at high culpability. However, rephrasing of the factor is proposed for ABH and GBH to avoid too high a threshold of application where a victim cannot necessarily be described as targeted, such as in a shaken baby case. Proposed wording of the factor is 'victim obviously vulnerable by personal characteristics or circumstances'. This would then capture the offender's awareness that a victim was vulnerable yet they still assault them.

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<sup>1</sup> Figures quoted in this paper from the CCSS relate to the most recent period of data available (January to March 2015).

### *Use of weapon*

In the existing guideline there is one 'weapons' factor of 'use of weapon or weapon equivalent.' Analysis of CCSS data identified this factor was present in 44% of s20 cases, and in 78% of s18 cases. Analysis of cases identified that the phrasing and placement of the factor in the existing guideline is leading to less serious weapons resulting in high sentences which may not reflect the seriousness of the weapon used. Weapons used in transcripts analysed range from guns and knives to shod feet and chairs. It is thought that to achieve proportionate sentences the guideline should make a distinction between highly dangerous weapons and other weapons or weapon equivalents. It is proposed that a high culpability factor be included of; 'use of a highly dangerous weapon or weapon equivalent.'

The wording has been largely replicated from the bladed articles guideline where a distinction between weapons is also made. It is anticipated that this would capture, among others, knives, firearms and acid. This factor would also need to capture fire as some cases involved attempts to set victims alight or 'branding'. It is also intended to provide flexibility for sentencers in assessing whether a weapon or equivalent is highly dangerous, for example where teeth are used to bite off a bodily part, such as an ear.

Medium culpability could then capture other weapons, and lesser culpability cases involving no weapons. This would provide for more proportionate sentences and for culpability in using highly dangerous weapons or equivalents to be appropriately reflected.

### *Leading role in group activity*

This factor is retained from the existing guideline. It was found to be present in 4% of s20 cases and 11% of s18. In the existing guideline there are only two culpability categories and 'subordinate role in group or gang' is included at lesser culpability. It is proposed that lesser role be captured in medium culpability rather than the lowest of the three categories in the revised guideline, as a lesser role in a group attack would still be more serious than the other factors reflecting the lowest level of culpability in a GBH offence.

### *Sustained and repeated assault*

A factor included in the existing guideline at greater harm is 'sustained and repeated assault on same victim'. This is present in 22% of s20 and 43% of s18 cases.

Interpretation of this factor was highlighted as an issue in discussions with sentencers, and for common assault and ABH it was agreed that 'prolonged assault' should be included at high culpability rather than 'sustained and repeated'. Analysis of cases did highlight inconsistency in the application of the factor 'sustained and repeated'. Application of the factor 'prolonged assault' will be tested in pre consultation road testing to identify any issues with interpretation and application.

**Question 2: Does the Council agree with the proposed high culpability factors?**

Medium culpability

3.11 Medium culpability factors proposed are:

- Use of a weapon other than a highly dangerous weapon
- Lesser role in group activity
- Cases falling between Category A or C

The 'catch all' factor of cases falling between category A or C has additional wording included as was agreed for the child cruelty and manslaughter guidelines. This has been qualified with additional wording in the culpability assessment to highlight the importance of attributing appropriate weight to relevant factors in undertaking the culpability assessment. This is to avoid the presence of a lesser culpability factor automatically reducing culpability where this may not be appropriate, such as in a case where a vulnerable victim is severely beaten but no weapon is used.

**Question 3: Does the Council agree with the proposed medium culpability factors?**

Lesser culpability

3.12 Proposed lesser culpability factors are as follows:

- No weapon used
- Excessive self defence
- Mental disorder or learning disability, where linked to the commission of the offence

3.13 These are all present at lesser culpability in the existing guideline. Another factor included at lesser culpability in the existing guideline is 'greater degree of provocation'. Analysis of factors identified that this is present in 7% of s20 cases and



9% of s18. The Council has previously not included this at culpability in other guidelines preferring to include 'significant degree of provocation' as a mitigating factor. The benefit of this is also that it can apply to any category of case where it is relevant.

**Question 4: Does the Council agree with the proposed lower culpability factors?**

**Question 5: Does the Council agree that 'significant degree of provocation' should be included as a mitigating factor and not retained at lower culpability?**

3.14 As already noted, in the existing assault guideline factors across the guidelines are the same. ABH culpability factors were agreed at the last meeting, and were in line with factors agreed for common assault which can be seen at Annex D.

3.15 Analysis of cases has illustrated that proposed GBH factors would be more suitable for ABH offences than common assault factors. Highly dangerous weapons can still be used in ABH offences, although harm may not amount to a GBH level, so the additional category would be preferable. Other high culpability factors are as agreed for ABH previously, with the exception of premeditation. Statistics illustrate this premeditation is present in 6% of ABH cases, so is still a relevant factor which would be appropriately captured at high culpability.

3.16 In considering the relationship between ABH and GBH s20 offences, and the potential for a GBH offence to be sentenced as an ABH where GBH harm is not found, it is considered that it would be appropriate to have the same culpability factors for ABH and GBH offences. This would ensure appropriate categorisation and provide for relative sentences to be achieved across ABH and GBH offences.

3.17 The draft ABH guideline including GBH culpability factors is included at Annex C.

**Question 6: Does the Council agree that ABH culpability factors should be the same as agreed for GBH s20 offences?**

#### ABH sentences

3.18 While ABH sentences were briefly considered at the last meeting, it was agreed that approval of these sentences should be subject to further consideration of

relativity with s20 GBH sentences, and should be tested prior to consultation with the findings considered prior to the sign off of the draft revised guideline. This testing will be undertaken in January, and it is proposed that GBH s18 and s20 sentence levels be tested at the same time. Annex D includes the proposed ABH sentences for reference. These have been developed in anticipation that the Council will agree that there should be three categories of culpability which will provide for sentences to be distributed across nine categories of seriousness.

3.19 Existing ABH sentences are as follows:

Offence Category	Starting Point <i>(Applicable to all offenders)</i>	Category Range <i>(Applicable to all offenders)</i>
Category 1	1 year 6 months' custody	1 – 3 years' custody
Category 2	26 weeks' custody	Low level community order – 51 weeks' custody
Category 3	Medium level community order	Band A fine – High level community order

The evaluation indicated, and some discussion took place at the last meeting, that the category 1 starting point is too low. It was suggested this should be considered in light of revisions made to factors which provide for a highest category offence to involve harm falling just short of really serious harm. As was reported at the last meeting, the evaluation of the guideline also identified that sentencers perceived the ranges in the guideline as too low, noting:

*“perceptions of the sentencers who were interviewed was that sentences had decreased, particularly for the lower level ABH offences. This view may reflect participants’ awareness that the sentencing range had decreased; many felt these were now too low and in interviews, several Crown Court judges said that they often go outside the category range to increase a sentence for an actual bodily harm offence”.*

3.20 Data considered at the last meeting also highlighted a marked trend of higher sentences above the category range in the lowest category of ABH seriousness which may also be sentenced in magistrates’ courts, with a high proportion (around 40%) of custodial sentences being imposed in this category, which does not even provide for a custodial sentence to be imposed. Revisions to factors agreed at the last meeting should address this, as the lowest category of ABH will provide for injuries just above a common assault. Given that the highest seriousness category will provide for injuries just short of really serious harm and to achieve relativity with s20 sentences, consideration of the category range at the highest level is required. However, it is important to consider the anticipated impact of the existing guideline which reduced sentences for ABH.

3.21 The previous SGC guideline starting points and ranges for ABH were as follows:

Type/nature of activity	Starting point	Sentencing range
Pre-meditated assault <b>EITHER</b> resulting in injuries just falling short of GBH <b>OR</b> involving the use of a weapon	<b>30 months custody</b>	<b>2 – 4 years custody</b>
Pre-meditated assault resulting in relatively serious injury	<b>12 months custody</b>	<b>36 weeks – 2 years custody</b>
Pre-meditated assault resulting in minor, non-permanent injury	<b>24 weeks custody</b>	<b>12 – 36 weeks custody</b>
Other assault resulting in minor, non-permanent injury	<b>Community Order (HIGH)</b>	<b>Community Order (MEDIUM) – 26 weeks custody</b>

3.22 The sentences in the revised guideline represented a significant reduction from the SGC sentences. The evaluation of the guideline noted this, and it is important to note the distinction between the guideline being responsible for increasing sentences, as opposed to not being effective in reducing sentences as anticipated; it is the latter which is true and which requires consideration.

3.23 Given the decreased sentences in the existing guideline, the resource assessment envisaged a drop in the severity of sentencing, which was estimated to be between 400 and 900 fewer custodial sentences and 400 to 1,000 community orders becoming fines. However, this did not occur, and analysis showed an increase in the use of custodial sentences and a corresponding decrease in the use of community orders. The distribution of sentence lengths for immediate custody also changed, with relatively fewer shorter sentences (half a year or less) and an increase in the proportion in the range 0.5 to two years. A regression analysis using CCSS data identified that the greater harm factor 'injury which is serious in the context of the offence' was the biggest contributory factor, and added 26 per cent (0.2 years) to the length of immediate custodial sentences.

3.24 As the findings from sentencer discussions noted, many sentencers believed the sentences in the guideline to be too low, and given the statistics quoted it is likely that many sentenced outside of the guideline category range (as evidenced by 40% of category 3 sentences imposed being custodial).

3.25 The intention to decrease sentences in the existing guideline from the SGC guideline may explain perceptions that sentences are too low, and the phrasing and format of harm factors in the revised guideline will provide for sentences at the lower end of seriousness to be considered proportionate. Consideration therefore needs to be given to whether with the revised harm model providing for injuries just short of GBH, adjustment is required to the higher end of sentences to be more in line with the previous SGC guideline.

3.26 Statistics relating to sentences currently imposed are included below.<sup>2</sup> These illustrate sentences imposed are more in line with the SGC guideline ranges, with only 15% of sentences imposed being community orders;

<b>Outcome</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Absolute and conditional discharge	2%	2%	1%	1%	1%	1%	1%
Fine	2%	2%	1%	1%	1%	1%	1%
Community sentence	30%	23%	20%	17%	16%	15%	15%
Suspended sentence	31%	34%	36%	38%	41%	39%	38%
Immediate custody	34%	38%	40%	41%	39%	40%	42%
Otherwise dealt with	2%	1%	2%	2%	2%	2%	2%

The table below illustrates the distribution of estimated pre guilty plea (before discount) custodial sentences, for offenders sentenced to immediate custody.

<b>Sentence length band</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
1 year or less	46%	43%	38%	38%	37%	37%	37%
Between 1 and 2 years	38%	40%	43%	42%	42%	42%	38%
Between 2 and 3 years	12%	13%	15%	15%	17%	15%	19%
Between 3 and 4 years	2%	3%	4%	4%	4%	5%	5%
Between 4 and 5 years	1%	1%	1%	2%	1%	1%	1%

3.27 The Council is asked to consider if the revised guideline should seek to maintain current sentencing practice in line with the statistical evidence provided. Sentence levels have been developed in anticipation that this is the preferred approach and are included in the ABH guideline at Annex C. These have been developed with relativity to both common assault and s20 GBH offences, and at the top end are more in line with the previous SGC guidelines where less of a 'gap' between sentences for these offences is apparent.

3.28 The sentence levels have been developed by considering current sentencing practice and the evaluation findings which indicate the existing guideline

<sup>2</sup> Source: Court Proceedings Database, Ministry of Justice.

does not adequately address the seriousness of offences. The revised guideline factors provide for a clearer assessment of the level of harm involved in an offence and more closely reflect current sentencing practice and appropriate sentences. The sentences will be road tested with Crown Court judges and findings reported back before sign off of the guideline.

**Question 7: Does the Council agree with the proposed ABH sentences, which will be road tested prior to sign off of the revised guideline?**

GBH s20

The s20 GBH sentences in the existing guideline are as follows;

Offence Category	Starting Point <i>(Applicable to all offenders)</i>	Category Range <i>(Applicable to all offenders)</i>
Category 1	3 years' custody	2 years 6 months' – 4 years' custody
Category 2	1 year 6 months' custody	1 – 3 years' custody
Category 3	High level community order	Low level community order – 51 weeks' custody

The SGC sentences for s20 offences were as follows;

Type/nature of activity	Starting point	Sentencing range
Particularly grave injury or disfigurement results from a pre-meditated assault where a weapon has been used	<b>3 years custody</b>	<b>2 – 4 years custody</b>
Pre-meditated assault where a weapon has been used <b>OR</b> Other assault where particularly grave injury results or a weapon has been used	<b>18 months custody</b>	<b>12 months – 3 years custody</b>
Pre-meditated assault where no weapon has been used	<b>36 weeks custody</b>	<b>24 weeks – 18 months custody</b>
Other assault where no weapon has been used	<b>24 weeks custody</b>	<b>Community Order (High) – 36 weeks custody</b>

3.29 Sentences in the existing guideline were more in line with the previous SGC guideline, and notably the evaluation identified no significant issues with s20 sentences following the introduction of the definitive guideline. The evaluation noted the following;

*There was a small increase in adjusted ACSLs, from 2.1 years in the 12 months before June 2011 to 2.3 years in the 12 months after June 2011. There was also a 2.7 per cent increase in the use of immediate custody, alongside a decrease in the use of community orders and suspended sentences. Sentence severity also*

*increased, but this was well within the bounds of historic fluctuations in sentencing levels (the “forecasted severity region”) as shown in figure 2. Therefore there is no strong statistical evidence that the guideline caused a change in sentencing practice for GBH. Analysis also indicated that the consultation period did not appear to have a statistically significant effect on sentencing. This is broadly consistent with the minor changes to sentencing practice anticipated in the resource assessment which estimated increases in ACSLs of 3 per cent, (the result of rises in sentences at the most severe end of the sentencing scale) and a requirement for between 10 and 20 additional prison places.*

3.30 Statistics for s20 GBH offences are included at Annex E. These illustrate that the sentence distribution for this offence is mostly custodial, immediate and suspended, with 4% of sentences being Community Orders. Annex B includes a draft guideline and proposed sentences for GBH s20.

3.31 The proposed sentences are intended to be relative to ABH sentences and in line with current sentencing practice. All but the lowest seriousness category have custodial starting points, with the lowest seriousness category providing for a starting point of a high level community order. This reflects the current sentence distribution where 33% of category 3 offences attract community orders. Annex E illustrates sentence lengths received by offenders and the distribution of sentences across seriousness categories, which vary in proportions of immediate and suspended sentences. A case list is also provided at Annex F to provide context to proposed sentences.

#### **Question 8: Does the Council agree with the proposed S20 sentences?**

##### Aggravating and mitigating factors

3.32 Aggravating and mitigating factors are as for common assault, but a number of others are proposed in light of potential situations in which an ABH or GBH offence may take place.

3.33 In the baby shaking cases analysed, nearly all offenders sought to conceal what they had done and prevented the victim from obtaining appropriate and early treatment. To capture such cases, an additional aggravating factor is proposed of ‘steps taken to prevent the victim from seeking or receiving medical assistance’.

3.34 The potential for ABH and GBH to be committed in a domestic context has also been considered, and it is thought it would be appropriate to include the loss of control manslaughter aggravating and mitigating factors of “history of violence or

abuse towards victim by offender' and 'history of significant violence or abuse towards the offender by the victim'. While the factor 'significant degree of provocation' may capture the mitigating factor, provocation is likely to be given a high threshold and may not capture cases where a victim of domestic abuse snaps and assaults their abuser.

3.35 Finally, two additional aggravating factors are proposed of;

- Victim vulnerable (where not taken into account at step one)
- Revenge attack.

Both were relevant in some cases analysed.

**Question 9: Does the Council agree with the proposed aggravating and mitigating factors?**

**4 IMPACT /RISKS**

4.1 It will be important reputationally to ensure decisions made in revising the guideline are based on evidence of issues identified in the evaluation, to ensure the Council is seen to be responsive to issues with the guideline. Revision proposals seek to address inflationary issues by revising factors rather than sentences where appropriate. It is also important to note that sentences have been developed in line with evidence of current sentencing practice.

4.2 Early testing of the guidelines with sentencers will continue to be undertaken to identify potential issues and impact prior to sign off and consultation on the revised guidelines.

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## ABH and GBH (s18 and s20) Harm Model Testing with Crown Court Judges

### **Introduction**

An online research exercise was conducted with Crown Court judges to test two draft ABH harm models and two draft GBH (s18 and s20) harm models. We particularly wanted to know which, if any, harm model would be interpreted most consistently by judges and whether either model would result in categorisations of various injuries that were in line with our expectations. In total 32 judges took part in this research; 15 judges participated in the ABH exercise and 17 judges participated in the GBH exercise. In both exercises they were asked to categorise a series of injuries<sup>1</sup> using one of the harm models. Once this had been completed they were shown both harm models and asked if they had a preference. Given the small sample sizes the research findings presented below should be regarded as indicative only and not conclusive.

### **Findings**

#### GBH

- A clear majority of judges preferred the more detailed GBH harm model, ('GBH harm model one') at the end of this paper. Phrases such as, "likely to produce far greater consistency", "helpful and focussed" and "easier to apply" were used by multiple judges to describe this harm model.
- The two judges who preferred the less detailed harm model ('GBH harm model two' at the end of this paper) did so because they felt it "gives far greater judicial discretion" and "it provides the sentencing court with greater flexibility".
- As well as being preferred by most judges, harm model one also led to greater consistency when categorising the GBH injuries. Six out of fifteen injuries (see Table 1) were categorised more consistently by judges using harm model one compared to judges categorising the injuries using harm model two. There were only two injuries which were categorised more consistently using harm model two. The remaining seven injuries were either categorised consistently (one injury) or inconsistently (six injuries) under both harm models, highlighting that even though harm model one led to greater consistency compared with harm model two there was still some variation between judges when using the preferred harm model.
- Finally, in 10 out of the 15 injuries tested, those judges using harm model two tended to categorise the injuries at a higher level than using harm model one (see Table 1). This suggests that harm model two could lead to higher sentencing than harm model one.

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<sup>1</sup> Ten injuries if judges were completing the ABH exercise and fifteen injuries if they were completing the GBH exercise.

ABH

- Most judges preferred the harm model with less text ('ABH harm model one' at the end of this paper). Judges felt that this harm model was "clearer", "more straightforward" and "easier to understand".
- Some judges preferred the second harm model ('ABH harm model two' at the end of this paper). Reasons such as "more flexibility" and "simplicity" were given for preferring this model.
- In terms of sentencing practice, the ABH injuries were generally categorised the same when comparing judges using harm model one with judges using harm model two, although harm model two appeared to lead to slightly higher categorisation (see Table 2). For most injuries there was some variation over their categorisation, but in general, there was a majority view in each case.

Table 1. GBH injuries - categorisation

GBH Harm Model One	GBH Harm Model Two		
Injury		Most consistent categorisation of harm	Most judges placing the injury in a higher harm category
Q1.1. Gunshot wound to the upper left abdomen and another to the shoulder. Had to have part of liver removed, repair of a gastric perforation and the removal of bottom half of pancreas. An operation on his shoulder a week later showed splintering and fragmentation of bone which needed a shortening of the arm and fusing of the damage by the attachment of a metal plate and the removal of dead tissue.		Model Two (9/9 judges placed in the injury in category one)	Model two
Q1.2. A significant and serious deep wound to arm requiring several stitches and several other less serious wounds to body.		Model one (8/8 in category three)	Model two
Q1.3. Wound was small but surgeons had to slice open the whole front of the victim's stomach to repair the internal organs, including the kidney. Victim is now physically recovered, but suffers severe depression and has severe scarring to abdomen.		No difference	Model two
Q1.4. Over 50 bruises on his body, including 37 to his front, 16 to his back. Bite mark on abdomen, cigarette burns to his skin. Victim continues to suffer physical difficulties including, problems with his leg, difficulties with walking, cannot use his left arm to hold things and his peripheral vision has been affected. Psychological damage: scared of going upstairs, does not like dark places and finds loud voices distressing.		Model one (8/8 in category one)	Model one
Q1.5. Small puncture wound in left shoulder and penetrating wound to abdomen causing some internal organs to start falling out. Operated on to close the wound. Full recovery.		No difference	Model two
Q1.6. Fractured eye socket and fractured left arm.		Model one (8/8 in category three)	Model two
Q1.7. Victim had to have an operation, had metal plates put into his jaw and "is still suffering".		Model one (3/8 in category two and 5/8 in category three)	Model two
Q1.8. Bruising to face, lips, eyes and all over legs. 10in wound to back of shin which required 8 stitches.		Model one (8/8 in category three)	Model two
Q1.9. Serious injuries to face, fractures to nose and facial bones and fractures to ribs and wounds to scalp.		No difference	Model two
Q1.10. Victim left with permanent and highly visible scarring to face and neck. Rarely goes out as is depressed at appearance.		No difference	No difference
Q1.11. Multiple fractures to nose, bruising and swelling across face. Victim still has problems with taste, smell and vision, and suffers severe anxiety.		No difference	No difference
Q1.12. Subarachnoid haemorrhages. Injury not likely to be permanent but after almost a year victim suffers headaches and is not able to drive.		Model two (3/9 in category one and 6/9 in category two)	Model two
Q1.13. Two fractures to victim's jaw, had to have his jaws wired and to eat and drink using a straw for a considerable period. Victim also had a sizeable section of his ear bitten off and may have to undergo plastic surgery for reconstruction.		Model one (7/8 in category two)	Model two
Q1.14. Fractured skull and brain damage and surgery required to reduce the inter-cranial pressure. Victim left partially sighted, has substantial learning difficulties, and behavioural problems.		No difference	No difference

Q1.15. Serious bruising and cuts to face and head and broken ribs. Character changed post injury, becomes irritable and cannot taste or smell. Short term memory affected. Has lost confidence in driving and has given up. Blurred vision in one eye and used to keep fit at gym and run but no longer can due to effect on balance. Still able to work.	No difference	No difference
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Table 2. ABH injuries - categorisation

Majority view			
Group	No. of categorisations		Most judges placing the injury in a higher harm category
	Harm model 1	Harm model 2	
Q1.1. Knocked out victim's front teeth. Victim had to undergo dental treatment and now feels reluctance to go out/nervous on the street.	Category one - 3	Category one - 5	Model two
	Category two - 5	Category two - 2	
	Category three - 0	Category three - 0	
Q1.2. Spat in victim's face and beat up victim; a sustained assault resulting in a head injury (subarachnoid haemorrhage).	Category one - 4	Category one - 6	Model two
	Category two - 4	Category two - 1	
	Category three - 0	Category three - 0	
Q1.3. Bit victim's arm leaving teeth marks and reddening of skin.	Category one - 0	Category one - 0	No difference
	Category two - 4	Category two - 3	
	Category three - 4	Category three - 4	
Q1.4. Injuries amounted to severe bruising and swelling.	Category one - 0	Category one - 1	No difference
	Category two - 5	Category two - 4	
	Category three - 3	Category three - 2	
Q1.5. Injuries from being hit with a car including weakness to knee, head injury causing blurred vision, and symptoms to the soft tissue of the neck caused discomfort for "quite a period".	Category one - 3	Category one - 2	No difference
	Category two - 4	Category two - 4	
	Category three - 1	Category three - 1	
Q1.6. Deep two inch cut to the back of victim's neck caused by vase and some other small cuts and scratches.	Category one - 3	Category one - 2	No difference
	Category two - 5	Category two - 5	
	Category three - 0	Category three - 0	
Q1.7. Kicked, slapped and punched the victim causing multiple injuries including bruising, black eye, a bleed below the skin of the eye and a haemorrhage in inner ear.	Category one - 7	Category one - 5	Model two
	Category two - 1	Category two - 2	
	Category three - 0	Category three - 0	
Q1.8. Put his hands around victim's throat, dragged her around the room, threw heavy objects at her, grabbed her hair, pushed her face into the ground. Cuts and bruises and victim very distressed and scared to be in house.	Category one - 3	Category one - 5	Model two
	Category two - 5	Category two - 2	
	Category three - 0	Category three - 0	
Q1.9. Dislocated elbow and anaesthetic was required to treat at hospital.	Category one - 5	Category one - 4	No difference
	Category two - 3	Category two - 3	
	Category three - 0	Category three - 0	
Q1.10. Victim was punched three times in the face, causing broken nose, black eyes and a split lip.	Category one - 5	Category one - 3	Model one
	Category two - 3	Category two - 3	
	Category three - 0	Category three - 1	

GBH Harm Model One

<b>Harm</b>	
All cases of GBH will involve 'really serious harm', which can be physical or psychological. The court should assess the level of harm caused with reference to the impact on the victim	
<b>Category 1</b>	<p>Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment</p> <p>Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out normal day to day activities or on their ability to work</p> <p>Particularly grave and/or life-threatening injury caused</p>
<b>Category 2</b>	<p>Offence results in a permanent, irreversible injury or condition but no substantial and long term effect on victim's ability to carry out normal day to day activities or on their ability to work</p> <p>Grave but non life-threatening injury caused</p>
<b>Category 3</b>	All other cases of really serious harm

GBH Harm Model Two

<b>Harm</b>	
<p>All cases of GBH will involve 'really serious harm', which can be physical or psychological. To assess the level of harm caused by the offence, the court must consider;</p> <ul style="list-style-type: none"> <li>• The range of injuries (including physical and psychological injury) that can occur in cases of grievous bodily harm</li> <li>• Where in that range of injuries the injury caused falls</li> </ul>	
<b>Category 1</b>	High level of physical or psychological harm
<b>Category 2</b>	Medium level of physical or psychological harm
<b>Category 3</b>	Cases not in category 1 or 2

ABH Harm Model One

<b>Harm</b> The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
<b>Category 1</b>	High level of physical or psychological harm falling just short of really serious bodily harm
<b>Category 2</b>	Cases falling between categories 1 and 3
<b>Category 3</b>	Low level of physical or psychological harm similar to harm caused in a high level common assault

ABH Harm Model Two

<b>Harm</b> Assault occasioning actual bodily harm causes injury which is more serious than in most cases of common assault, but which falls below the really serious injury in cases of grievous bodily harm.  To assess the level of harm caused by the offence, the court must consider;  <ul style="list-style-type: none"> <li>• The range of injuries (including physical and psychological injury) that can occur in cases of assault occasioning actual bodily harm</li> <li>• Where in that range of injuries the injury caused falls</li> </ul>	
<b>Category 1</b>	High level of physical or psychological harm
<b>Category 2</b>	Medium level of physical or psychological harm
<b>Category 3</b>	Low level of physical or psychological harm

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**STEP ONE****Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of culpability is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics giving appropriate weight to relevant factors to reach a fair assessment of the offender's culpability.**

**Culpability** demonstrated by one or more of the following:**A - High culpability**

- Significant degree of planning or premeditation
- Victim obviously vulnerable by personal characteristics or circumstances
- Use of a highly dangerous weapon or weapon equivalent\*
- Leading role in group activity
- Prolonged assault

**B – Medium culpability**

- Use of a weapon other than a highly dangerous weapon
- Lesser role in group activity
- Cases falling between category A or C because:
  - Factors in both high and lesser categories are present which balance each other out; and/or
  - The offender's culpability falls between the factors as described in high and lesser culpability

**C – Lesser culpability**

- No weapon used
- Excessive self defence
- Mental disorder or learning disability, where linked to the commission of the offence

A highly dangerous weapon is a weapon, including a corrosive substance (such as acid), whose dangerous nature must be substantially above and beyond the legislative definition of an offensive weapon which is; *'any article made or adapted for use for causing injury, or is intended by the person having it with him for such use'*. The court must determine whether the weapon is highly dangerous or equivalent on the facts and circumstances of the case.

<b>Harm</b>	
All cases of GBH will involve 'really serious harm', which can be physical or psychological. The court should assess the level of harm caused with reference to the impact on the victim	
<b>Category 1</b>	<p>Injury results in physical or psychological harm resulting in lifelong dependency on third party care or medical treatment</p> <p>Offence results in a permanent, irreversible injury or condition which has a substantial and long term effect on the victim's ability to carry out normal day to day activities or on their ability to work</p> <p>Particularly grave and/or life-threatening injury caused</p>
<b>Category 2</b>	<p>Offence results in a permanent, irreversible injury or condition but no substantial and long term effect on victim's ability to carry out normal day to day activities or on their ability to work</p> <p>Grave but non life-threatening injury caused</p>
<b>Category 3</b>	All other cases of really serious harm

**STEP TWO**

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

**Where the offence is committed in a domestic context, consideration must be given to the definitive guideline 'Overarching Principles: Domestic Abuse' and any aggravating features appropriately reflected in the sentence.**

HARM	CULPABILITY		
	A	B	C
<b>Harm 1</b>	<b>Starting point</b> 3 years  <b>Category Range</b> 2 years– 4 years	<b>Starting point</b> 2 years  <b>Category Range</b> 1 year – 3 years	<b>Starting point</b> 1 year 6 months  <b>Category Range</b> 36 weeks - 2 years 6 months
<b>Harm 2</b>	<b>Starting point</b> 2 years  <b>Category Range</b> 1 year – 3 years	<b>Starting point</b> 1 year 6 months  <b>Category Range</b> 36 weeks - 2 years 6 months	<b>Starting point</b> 36 weeks  <b>Category Range</b> High Level Community Order – 1 year 6 months
<b>Harm 3</b>	<b>Starting point</b> 1 year 6 months  <b>Category Range</b> 36 weeks - 2 years 6 months	<b>Starting point</b> 36 weeks  <b>Category Range</b> High Level Community Order – 1 year 6 months	<b>Starting point</b> High Level Community Order  <b>Category Range</b> Low Level Community Order – 36 weeks custody

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

### Factors increasing seriousness

#### ***Statutory 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

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

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

#### ***Other aggravating factors:***

Spitting

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

Offence committed in prison

History of violence or abuse towards victim by offender

Presence of children

Gratuitous degradation of victim

Abuse of power and/or position of trust

Threatened with weapon

Victim vulnerable (where not taken into account at step one)

Revenge attack

Steps taken to prevent the victim from seeking or receiving medical assistance,

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Commission of offence whilst under the influence of alcohol/drugs

Other offences taken into consideration (TICs)

Offence committed whilst on licence or subject to post sentence supervision

Failure to comply with current court orders

**Factors reducing seriousness or reflecting personal mitigation**

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Significant degree of provocation

History of significant violence or abuse towards the offender by the victim

Age and/or lack of maturity

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

Sole or primary carer for dependent relative(s)

Determination and/or demonstration of steps taken to address addiction or offending behaviour

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

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**STEP ONE**

**Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of culpability is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics giving appropriate weight to relevant factors to reach a fair assessment of the offender’s culpability.**

**Culpability demonstrated by one or more of the following:**

**A - High culpability:**

- Significant planning or premeditation
- Victim obviously vulnerable by personal characteristics or circumstances
- Use of a highly dangerous weapon or equivalent\*
- Leading role in group activity
- Prolonged assault

**B – Medium culpability**

- Use of a weapon other than a highly dangerous weapon
- Lesser role in group activity
- Cases falling between category A or C because:
  - Factors in both high and lesser categories are present which balance each other out; and/or
  - The offender’s culpability falls between the factors as described in high and lesser culpability

**C – Lesser culpability**

- No weapon used
- Excessive self defence
- Mental disorder or learning disability, where linked to the commission of the offence

A highly dangerous weapon is a weapon, including a corrosive substance (such as acid), whose dangerous nature must be substantially above and beyond the legislative definition of an offensive weapon which is; *‘any article made or adapted for use for causing injury, or is intended by the person having it with him for such use’*. The court must determine whether the weapon is highly dangerous or equivalent on the facts and circumstances of the case.

<b>Harm</b> The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.	
<b>Category 1</b>	High level of physical or psychological harm falling just short of really serious bodily harm
<b>Category 2</b>	Cases falling between categories 1 and 3
<b>Category 3</b>	Low level of physical or psychological harm similar to harm caused in a high level common assault

**STEP TWO**

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

**Where the offence is committed in a domestic context, consideration must be given to the definitive guideline ‘Overarching Principles: Domestic Abuse’ and any aggravating features appropriately reflected in the sentence.**

HARM	CULPABILITY		
	A	B	C
<b>Harm 1</b>	<p><b>Starting point</b> 2 years</p> <p><b>Category Range</b> 1 year– 3 years 6 months</p>	<p><b>Starting point</b> 1 year</p> <p><b>Category Range</b> 26 weeks – 2 years</p>	<p><b>Starting point</b> 26 weeks</p> <p><b>Category Range</b> High Level Community Order - 1 year 6 months</p>
<b>Harm 2</b>	<p><b>Starting point</b> 1 year</p> <p><b>Category Range</b> 26 weeks – 2 years</p>	<p><b>Starting point</b> 26 weeks</p> <p><b>Category Range</b> High Level Community Order - 1 year 6 months</p>	<p><b>Starting point</b> High Level Community Order</p> <p><b>Category Range</b> Low Level Community Order – 26 weeks</p>
<b>Harm 3</b>	<p><b>Starting point</b> 26 weeks</p> <p><b>Category Range</b> High Level Community Order - 1 year 6 months</p>	<p><b>Starting point</b> High Level Community Order</p> <p><b>Category Range</b> Low Level Community Order – 26 weeks</p>	<p><b>Starting point</b> Medium Level Community Order</p> <p><b>Category Range</b> Band B Fine – 16 weeks custody</p>



The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

### Factors increasing seriousness

#### ***Statutory 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

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

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

#### ***Other aggravating factors:***

Spitting

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

Offence committed in prison

History of violence or abuse towards victim by offender

Presence of children

Gratuitous degradation of victim

Abuse of power and/or position of trust

Threatened with weapon

Victim vulnerable (where not taken into account at step one)

Revenge attack

Steps taken to prevent the victim from seeking or receiving medical assistance,

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Commission of offence whilst under the influence of alcohol/drugs

Other offences taken into consideration (TICs)

Offence committed whilst on licence or subject to post sentence supervision

Failure to comply with current court orders

### **Factors reducing seriousness or reflecting personal mitigation**

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Significant degree of provocation

History of significant violence or abuse towards the offender by the victim

Age and/or lack of maturity

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

Sole or primary carer for dependent relative(s)

Determination and/or demonstration of steps taken to address addiction or offending behaviour

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

**STEP ONE****Determining the offence category**

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The level of culpability is determined by weighing up all the factors of the case. **Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.**

**Culpability demonstrated by one or more of the following:****A - High culpability:**

- Targeting of vulnerable victim, where victim vulnerable by personal characteristics or circumstances
- Prolonged assault
- Use of substantial force
- Threatened or actual use of weapon or weapon equivalent\*
- Leading role in group activity

**B – Lesser culpability**

- Lesser role in group activity
- Mental disorder or learning disability, where linked to the commission of the offence
- All other cases not captured by category 1 factors

\*Examples of a weapon equivalent can include but are not limited to: a shod foot, use of acid, use of animal in commission of offence.

**Harm**

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

<b>Category 1</b>	More than minor physical or psychological harm
<b>Category 2</b>	Minor physical or psychological harm
<b>Category 3</b>	No physical injury No/very low level of distress

**STEP TWO**

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

**Where the offence is committed in a domestic context, consideration must be given to the definitive guideline 'Overarching Principles: Domestic Abuse' and any aggravating features appropriately reflected in the sentence.**

HARM	CULPABILITY	
	A	B
Harm 1	<p><b>Starting point</b> High level Community Order</p> <p><b>Category Range</b> Low level Community Order - 26 weeks' custody</p>	<p><b>Starting point</b> Medium level Community Order</p> <p><b>Category Range</b> Low level Community Order - 16 weeks' custody</p>
Harm 2	<p><b>Starting point</b> Medium level Community Order</p> <p><b>Category Range</b> Low level Community Order - 16 weeks' custody</p>	<p><b>Starting point</b> Band B fine</p> <p><b>Category Range</b> Band A Fine - low level Community Order</p>
Harm 3	<p><b>Starting point</b> Band B fine</p> <p><b>Category Range</b> Band A Fine - Low level Community Order</p>	<p><b>Starting point</b> Band A Fine</p> <p><b>Category Range</b> Discharge – Band C Fine</p>

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

### Factors increasing seriousness

#### ***Statutory 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

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

#### ***Other aggravating factors:***

Spitting

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

Offence committed in prison

Presence of children

Gratuitous degradation of victim

Abuse of power and/or position of trust

Any steps taken to prevent the victim reporting an incident, obtaining assistance and/or from assisting or supporting the prosecution

Commission of offence whilst under the influence of alcohol/drugs

Other offences taken into consideration (TICs)

Offence committed whilst on licence or subject to post sentence supervision

History of failure to comply with court orders

**Factors reducing seriousness or reflecting personal mitigation**

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Significant degree of provocation

Age and/or lack of maturity

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

Sole or primary carer for dependent relative(s)

Determination and/or demonstration of steps taken to address addiction or offending behaviour

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

## Sentencing trends for GBH, 2007-2017<sup>1,2</sup>

### Proportion of adult offenders sentenced for GBH, by sentence outcome, all courts, 2007-2017<sup>3</sup>

Outcome	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Absolute and conditional discharge	1%	1%	<0.5%	1%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%
Fine	1%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%	<0.5%
Community sentence	14%	12%	10%	11%	8%	8%	6%	6%	5%	4%	4%
Suspended sentence	31%	32%	30%	32%	32%	34%	38%	40%	40%	40%	40%
Immediate custody	51%	52%	58%	53%	57%	57%	54%	53%	53%	53%	54%
Otherwise dealt with	2%	2%	1%	3%	1%	1%	1%	1%	2%	2%	2%

<sup>1</sup> Source: Court Proceedings Database, Ministry of Justice.

<sup>2</sup> Excludes youths, section 29 offences (racially/religiously aggravated), and custodial sentences of over 5 years for GBH (the statutory maximum sentence for this offence).

<sup>3</sup> Percentages may not add up to 100 per cent, due to rounding.

## GBH sentence lengths

### Post guilty plea sentence length bands received by adult offenders sentenced to immediate custody for GBH, all courts, 2007-2017<sup>4</sup>

Sentence length band	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
1 year or less	30%	32%	33%	35%	29%	21%	23%	22%	22%	19%	19%
Between 1 and 2 years	51%	51%	49%	46%	51%	55%	50%	51%	49%	52%	48%
Between 2 and 3 years	16%	14%	14%	15%	16%	19%	22%	21%	22%	23%	28%
Between 3 and 4 years	3%	3%	3%	3%	4%	3%	4%	5%	5%	5%	4%
Between 4 and 5 years	1%	1%	1%	1%	1%	1%	1%	<0.5%	1%	1%	1%

### Estimated pre guilty plea sentence length bands received by adult offenders sentenced to immediate custody for GBH, all courts, 2007-2017<sup>4</sup>

Sentence length band	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
1 year or less	12%	13%	12%	15%	10%	6%	7%	6%	7%	5%	7%
Between 1 and 2 years	42%	44%	46%	45%	44%	44%	40%	40%	39%	37%	33%
Between 2 and 3 years	32%	29%	29%	26%	31%	32%	31%	33%	31%	34%	34%
Between 3 and 4 years	9%	8%	8%	10%	9%	12%	16%	15%	15%	16%	18%
Between 4 and 5 years	6%	5%	5%	5%	6%	6%	6%	7%	7%	8%	8%

<sup>4</sup> Sentence length bands do not include the lower bound, but do include the upper bound sentence length. For example, the category '1 year or less' includes sentence lengths less than and equal to 1 year, and 'Between 1 and 2 years' includes sentence lengths over 1 year, and up to and including 2 years.



## Crown Court Sentencing Survey data for GBH offences, 2013 - 2015 (Q1)<sup>5,6</sup>

### Proportion of offenders placed in each offence category, Crown Court Sentencing Survey

Offence category	2013	2014	2015 Q1
	(n=2,080)	(n=2,231)	(n=493)
Level 1 (most)	22%	25%	24%
Level 2	68%	66%	65%
Level 3 (least)	10%	9%	11%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>



Around two thirds of offenders sentenced in the Crown Court are placed within the middle category of seriousness, and around a quarter are placed in the highest category.

### Proportion of offenders receiving each sentence outcome: Offence category 1 (most serious), Crown Court Sentencing Survey

Sentence outcome	2013	2014	2015 Q1
	(n=456)	(n=554)	(n=118)
Immediate custody	87%	84%	81%
SSO	11%	15%	17%
CO	0%	0%	1%
Conditional discharge	0%	0%	0%
Other	2%	0%	1%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

<sup>5</sup> Source: Crown Court Sentencing Survey, 2013-2015 (Q1).

<sup>6</sup> Excludes youths, section 29 offences (racially/religiously aggravated), and custodial sentences of over 5 years (the statutory maximum sentence for this offence).

**Proportion of offenders receiving each sentence outcome: Offence category 2 (middle category), Crown Court Sentencing Survey**

Sentence outcome	2013	2014	2015 Q1
	(n=1,415)	(n=1,470)	(n=321)
Immediate custody	50%	50%	49%
SSO	46%	46%	48%
CO	3%	3%	2%
Fine	0%	0%	0%
Conditional discharge	0%	0%	0%
Other	0%	0%	1%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

**Proportion of offenders receiving each sentence outcome: Offence category 3 (least serious), Crown Court Sentencing Survey**

Sentence outcome	2013	2014	2015 Q1
	(n=209)	(n=207)	(n=54)
Immediate custody	22%	13%	15%
SSO	51%	53%	52%
CO	24%	32%	33%
Fine	1%	1%	0%
Conditional discharge	2%	1%	0%
Other	0%	0%	0%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

**Post guilty plea mean ACSLs for offenders sentenced to immediate custody, Crown Court Sentencing Survey**

	ACSL in years		
<b>Offence category</b>	<b>2013</b>	<b>2014</b>	<b>2015 Q1</b>
Level 1 (most)	2.3	2.3	2.3
Level 2	1.5	1.5	1.4
Level 3 (least)	0.9	1.0	1.3

**Estimated pre guilty plea mean ACSLs for offenders sentenced to immediate custody, Crown Court Sentencing Survey**

	ACSL in years		
<b>Offence category</b>	<b>2013</b>	<b>2014</b>	<b>2015 Q1</b>
Level 1 (most)	3.0	2.9	2.9
Level 2	1.9	1.9	1.9
Level 3 (least)	1.2	1.3	1.7

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<b>ABH</b>	
<p><b>Transcript case 8 – 2016</b> Defendant and victim were previously in a relationship and had lived together. Victim went to defendant's house while he was at work and put music on loudly, defendant came home when victim called him; there was an argument and subsequently defendant 'snapped', and kicked, slapped and punched victim, causing multiple injuries including significant bruising to body and face, black eye, a bleed below the skin of the eye and a haemorrhage in inner ear. Multiple references to a history of the defendant controlling the victim through acts of violence (suggesting domestic abuse).</p>	<p>Late G plea. 18 months immediate custody.</p>
<p><b>Transcript case 10 – 2016</b> Defendant was partner of victim, and had two previous convictions for ABH against same victim (and was sent to prison both times). They have two children together. Defendant went to victim's house and beat her up: put his hands around her throat, dragged her around the room, chucked a suitcase at her, grabbed her hair, pushed her face into the ground, and only stopped when she fought back. Later that day, defendant assaulted a police officer (separate offence). No indication that the children were around during the offence, but the judge makes clear the effect that this will have on the children.</p>	<p>Guilty plea – Credit not specified but starting point 3 years custody reduced to 28 months immediate custody (plus 4 month consecutive for Assault on PC)</p>
<p><b>Transcript case 11 – 2016</b> Argument between neighbours over the use of washing lines. Defendant meant to hit male in retaliation to being pushed, but struck the female neighbour with a decanter that he swung. Injuries were "not particularly serious" - a nasty two inch cut to the back of her neck and some other small cuts and scratches. Defendant was drunk and has drinking problem. Offender lost his flat as result of incident.</p>	<p>Early Guilty plea – starting point 12 months reduced to 8 months' custody suspended for 18 months, with a rehabilitation activity requirement for 25 days, an alcohol treatment requirement for six months, and a condition to reside only in residences approved by the probation officer.</p>
<p><b>Transcript case 14 – 2016</b> "Nasty" assault in the middle of the night on the street, caused victim serious injury - knocked out his front teeth. Victim had to undergo dental treatment, and now feels reluctance to go out/nervous on the street. Offender of previous good character and Judge refers to job in passing sentence.</p>	<p>Guilty plea but credit not specified. Community Order – 100 hours unpaid work Compensation of £2400 for victims dental work ordered.</p>
<p><b>Transcript case 21 - 2016</b> - Pre planned revenge on ex-partner of female co defendant – very few details but Judge says was intimidation of victim and would</p>	<p>Plea not specified. SSO 12 months suspended for 2 years, 180 hours unpaid work.</p>

<p>have been terrifying for him. Limited physical injuries not most serious.</p>	
<p><b>Transcript case 22 - 2016</b> - Offence in victims home. Used weapon and kicked him. Sustained and unprovoked assault. Injuries described as serious. Lacerations to the back and right side of victims head and injuries to the other side of his body.</p>	<p>Aggravating factors - pre cons, offence location, ongoing effect upon victim which Judge says deserves higher sentence. Limited credit for G plea as no remorse 10% credit. 26 months immediate custody</p>
<p><b>Transcript case 16 - 2016</b> Beat girlfriend's 3 year old daughter. Very few details but Judge says "quite frankly, I cannot conceive of how an adult male can beat a little girl like this but you did".</p>	<p>Plea not specified – 2 years 6 months immediate custody.</p>
<p><b>Transcript case 22 - 2016</b> Female offender; likened to male getting drunk and acting with savage violence in city centre due to drink and short temper. Committed savage attack on woman who was trying to help her, punched and kicked her while she was on ground until she was unconscious, and then continued to attack her. Physical injuries were serious, but nowhere near as serious as the level of the attack delivered to her. Severe effect upon victim's psychological wellbeing. Is scared to go out and has lost all of her confidence.</p>	<p>Guilty plea at earliest opportunity. Judge mitigates for age of offender (19). 13 months YOI.</p>
<p><b>S20 GBH</b></p>	
<p><b>Transcript case 10 – 2016</b> In 2006, D was in a relationship with V's mother. The mother went out to work, leaving V (a two year old) in D's care. When the mother returned home, V was "a wholly different, damaged" child, and was "unresponsive, stiff" and with a reduced level of consciousness. V suffered a fractured skull and brain damage such that she needed surgery to reduce the inter-cranial pressure. V is now partially sighted, has substantial learning difficulties, and behavioural problems. She is four years delayed in her learning. Places great pressure on and has impact on family. Medical evidence shows the injuries were non-accidental, but over the 20 years following, D never revealed what had happened or why. Prosecuting authorities could not take the investigation further at the time (not clear why) but in 2012 D made comments as to what may have occurred. Original charge was s18. D was being treated for PTSD due to time spent in the army, but evidence showed he never went past basic training. D said that he was not fit to</p>	<p>Starting point 4 years immediate custody. 25% credit for plea, 3 years custody</p>

<p>plead, but psychiatrists found him to be suffering from an anxiety disorder and judge ruled he was fit to plead.</p>	
<p><b>Transcript case 11 – 2016</b> D and co-D attacked a man in his own flat. Reason hadn't ever become clear, but it "involved drugs". They forced their way into V's home, threw items at him (dumbbells and wood), and D hit him repeatedly with a saucepan. Flat was "trashed" (glass table was smashed and other items damaged). Very few details re injury – Judge just says it wasn't major.</p>	<p>Starting point not specified but 33% reduction for plea and 6 months custody suspended for 12 months.</p>
<p><b>Transcript case 29 – 2016</b> Offender went with co-defendant to a property to buy drugs. Due to drug debt, victim (drug dealer) attacked offender with claw hammer, hitting him on head. Offender took hammer from him and hit him back - argued excessive self defence. Serious injuries to face, fractures to nose and facial bones and fractures to ribs and wounds to scalp. Offender received life changing brain injury himself during incident described as significant cognitive impairment.</p>	<p>Guilty plea. Starting point 2 years custody reduced to 16 months for plea.</p>
<p><b>Transcript case 35 - 2018</b> Disagreement in club with others, including 50 year old victim. Victim extended hand to shake D's hand but in fact punched offender in face. Later on offender saw victim and ran at him and while he was standing kicked him to head and shoulder area. Hard kick and took victim to the ground where he struck his head and suffered a subdural haemorrhage and immediate bleeding from skull fracture. Underwent emergency surgery to remove blood clot and in hospital for three weeks. Injuries life changing. Character changed, becomes irritable and cannot taste or smell. Short term memory affected. Has lost confidence in driving and has given up. Blurred vision in one eye and used to keep fit at gym and run but no longer can due to effect on balance. Still able to work.</p>	<p>Guilty plea. Starting point 18 months custody. Discount 33% for plea. 12 months immediate custody.</p>
<p><b>Transcript case 40 – 2014</b> Injured 3 month old baby son. Thought to have shaken baby and smacked his head against hard object. Injuries - Multiple retinal haemorrhage to eye, long transverse skull fracture of left parietal bone. Invasive medical procedures required before</p>	<p>20% credit for plea, final sentence 2 years 4 months immediate custody.</p>

<p>identified as non-accidental injury, including lumber puncture and antibiotics through IV. No long term impact and discharged after 10 days.</p>	
<p><b>Transcript case 41 – 2014</b> J describes as single shaking to baby by mother under very great strain. She injured him then neglected to seek treatment. Baby needed to be resuscitated by offender’s husband. Report from consultant set out devastating neurological and other serious effects on baby.</p>	<p>Plea in fifth week of trial, Judge still gives very limited 5% credit. Says as no premeditation top end of Cat 2 case, but says SP of 18 months far too low and imposes 3 years immediate custody.</p>
<b>S20 WOUNDING</b>	
<p><b>R v Hegarty – appeal case</b> Pleaded to s20 wounding as alternative to s18. Offender had known victim for about two years and had been living at victim’s address for about six months, as he was struggling for a place to stay and victim wanted to help him out. Offence came about during argument between the two men because victim considered that the appellant was overstaying his welcome. The appellant threw a small coffee table or stool at victim, causing an injury to his head. He then punched him twice in the head. When he saw blood pouring down victim’s head, the appellant stopped, realised what he had done and started to panic. He offered to grab a towel and clean up the blood, but victim was so scared that the appellant would attack him again that he grabbed his house keys and fled. He asked a resident who was out in the street to help him. Treated in hospital for an 8-centimetre wound to the left of the top of his head, which was treated with eight staples to the wound. He underwent a CT scan which demonstrated no acute intracranial pathology. Victim was subsequently discharged after a period of observation. Appellant said he had not intended to hit the complainant on the head with the stool but merely to shut him up.</p>	<p>Judge found that it was a repeated assault but not sustained, as it was over quickly, so it was on the borderline between greater and lesser harm. However, it was clearly a matter where there was higher culpability because he used a stool as a weapon. Victim did not attend trial so Judge gave 15% credit to offender as he pleaded in absence of victim. After trial would have been 18 months but sentenced to 15 months' imprisonment. Upheld on appeal.</p>
<p><b>Transcript case 13 – 2016</b> Incident started in a shop, something was said between V and D. V left the shop and waited outside, D came out of the shop and viciously punched V, fracturing his jaw. D then got into a fight with V and possibly V's friend.</p>	<p>Starting point 4 years Immediate custody. Discount of 20%. Overall 3 years and 4 months for wounding and 2 years 6 months for fractured jaw, to be served concurrently.</p>



<p>During the fight, D bit a section of V's ear off. Judge said the two offences (wounding and jaw fracture) aggravate each other. D had many previous convictions, including some for similar offences. Two fractures to V's jaw, and V had to have his jaws wired and had to eat and drink "no doubt using a straw", causing a great deal of discomfort and unpleasantness for him". V also had a sizeable section of his ear bitten off ("a permanent disfigurement") and may have to undergo plastic surgery for reconstruction.</p>	
<p><b>Transcript case 30 -2016</b> Victim was ex-boyfriend of a friend of the offender. She saw him out with new girlfriend and attacked him in a nightclub. She smashed a bottle and used it to attack him, first to his legs and then to his arm cutting him and then she punched him. He was trying to protect new girlfriend and thought she was punching did not know was using bottle. Injuries required stitches but not serious and he was at work next day.</p>	<p>Immediate custody starting point. Plea not specified but 16 months custody suspended for 2 years plus 300 hours unpaid work</p>
<p><b>Transcript case 8- 2016</b> Female defendant stabbed partner in leg. They had been out drinking together. When they came home, he fell asleep on the sofa and woke to find her standing beside him with a knife in her hand and stab wound in his thigh which judge described as "unpleasant, but it is not a particularly bad wound". D admitted stabbing him and called an ambulance, and told the police the voices made her do it. Later, a consultant psychiatrist concluded that she was not suffering from any psychotic/psychiatric illness but the problem was caused by alcohol consumption. D had a previous caution for affray for cutting her mother's mouth/nose with a knife while drunk.</p>	<p>Starting point 18 months immediate custody. G plea 33% reduction. Final sentence CO for 12 months with RAR, alcohol treatment requirements for 9 months and 100 hours unpaid work. (Judge said he may have imposed SSO of 9 or 10 months, but offender had already spent 3 and a half months in custody.)</p>
<p><b>Transcript case 12 - 2016</b> D struck out at V with his hand, which contained keys, and it was the keys that caused the injury. The injury was not a serious one, but could have been." V bled profusely. No further details of offence. Sentenced on basis of plea, but original allegation (involving a knife) was very different and Judge says he would have sentenced use of knife differently.</p>	<p>Guilty plea 33% reduction. Sentence - 6 months' custody suspended for 12 months, with a RAR for up to 20 days</p>

<p><b>Transcript case 15 - 2017</b> Breakdown of friendship between the victim and offender. Both were on a night out; by chance met in nightclub and D tried to make contact a number of times over a resentment (repelled by victim or friends when trying to do this); exacerbated by alcohol. Got down on knees when victim was sitting; victim was looking away. Took a bottle and struck her forehead. Split skin causing a centimetre long wound - needed 4 stitches and left an embarrassing scar. Victim now anxious about seeing D again in similar situation. Judge said aggravated by use of alcohol, but defendant young and this was out of character for her. No previous convictions and has shown remorse.</p>	<p>Starting point 12 months immediate custody. G plea 33% reduction. 8 months suspended for 2 years, with Rehabilitation Activity Requirement plus 150 hours unpaid work.</p>
<p><b>Transcript case 31 - 2017</b> On off relationship with ex-partner. Went to her house at 6.30am, forced her into house as she was leaving and had a knife and made threats to her. Another female upstairs in house, offender called her down. Removed bag from victim (ex-partner) took her keys and forced her into living room. Suspected she had been seeing another man and got angry. Picked up tv and smashed against wall, armed himself with a leg from TV stand as a weapon and carried out a brutal and vicious attack striking her face, head, legs and body. Then picked up sound bar and did same, then punched her and stamped on her repeatedly. Violence continued, picked up a glass and threw it towards her but it didn't smash, then smashed glass towards her which cut her forearm. Held out knife to her and told her he had spent two hours sharpening it in order to inflict serious harm upon her. She sustained a cut to back of her shin - unclear if intentional or reckless. Other female needed to leave house and he let her on condition she returned with a plaster. Left property after 6 hours as had to go to Benefits office. Good fortune injuries were not serious bearing in mind brutal and sustained assault. Bruising to face, lips and eyes all over her legs and 10in wound to back of shin which required 8 stitches</p>	<p>Judge said after trial would have been 54 months, with credit for plea 3 years for s20.</p>

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

**16 November 2018**  
**SC(18)NOV05 – Drugs guideline**  
**Eleanor Nicholls**  
**Sarah Poppleton**

## **1 ISSUE**

1.1 This paper considers revisions to the guideline for the offence of permitting premises to be used, under section 8 of the Misuse of Drugs Act 1971. It also covers some aspects of the assessment of harm and harm-related aggravating factors which Council agreed in October to discuss at the later meeting when we had the benefit of input from the police, CPS and NCA.

## **2 RECOMMENDATION**

2.1 That the Council agrees the proposed changes to the guideline for the permitting premises to be used offence, and harm and other factors for the importation, supply and production offences.

## **3 CONSIDERATION**

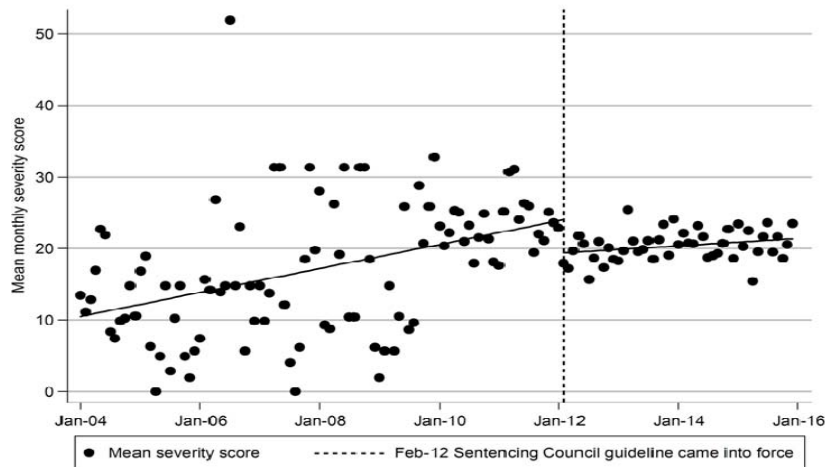
### *Permitting premises to be used*

3.1 Permitting premises<sup>1</sup> to be used is a low volume offence which is mostly sentenced in the Crown Court (the Crown Court accounting for 75 per cent of a total 256 offenders sentenced in 2017). Only 13 per cent of offenders sentenced for this offence received an immediate custodial sentence in 2017, with a majority receiving either a suspended sentence or community order (38 per cent and 29 per cent respectively). Our assessment, published earlier this year, showed that sentencing severity for this offence shifted down a little and stabilised following the introduction of the guideline in 2012 (see below). The guideline appeared to narrow the

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<sup>1</sup> This includes both residential and commercial premises e.g. a cafe where cannabis is smoked, or a pub or club in which drugs are supplied.

sentencing range for a relatively uncommon offence that was previously very dispersed.



3.2 Given this positive outcome, we suggest that the guideline should be revised as little as possible, in order to maintain the current trend rather than disrupt it. We are only suggesting small changes to capture more effectively some of the characteristics of offending that have changed since 2012, particularly those relating to county lines and the practice of cuckooing.

3.3 We are suggesting the inclusion of several new culpability factors, the first under higher culpability, the other two under lower. These are:

- *'Participation in the exploitation of vulnerable adult or person under 18 who is also involved in the drugs operation'*. This is intended to capture the situation described in one sentencing remarks transcript where the offender was a drug addict who had allowed storage and dealing to happen in his home, but knew that the dealer staying with him was a 15 year old who had been trafficked, with drugs in his rectum. The judge noted this as a "grave" aggravating factor, and the offender received an immediate custodial sentence which was above the guideline range.
- *'Involvement due to pressure, intimidation or coercion falling short of duress'*. This is a mitigating factor in the current guideline which was more common in the transcripts examined than the current low culpability factor, *'Involvement through naivety'* (now repositioned under mitigation). We think the 'coercion' factor better typifies an offender who is also the victim of cuckooing, as exemplified in this excerpt from a recent interview with a judge:

*It's [Permitting Premises] coming up as the alternative [to possession] for those who've been cuckooed, and it [the guideline] doesn't really deal with...[judge reads from the guideline], 'Involvement through naivety'- well they're not involved through naivety, they're involved because they're basically forced to do it.*

It also captures the situation described in research into gangs, whereby a local business (e.g. a fast food outlet frequented by the gang) is coerced into becoming the hub of drug dealing activity. In this instance, we would expect the judge to balance this factor against the higher culpability factor, *'Uses legitimate business premises to aid/or conceal illegal activity'* to arrive at what they deem to be the right level of culpability for the offender before them. We suggest an explicit reference to the balancing of factors should also be included in the guideline.

- *'Offender's vulnerability has been exploited'*. This similarly is intended to capture the offender who is also vulnerable and has been the victim of cuckooing, in situations where there is exploitation but not clearly-evidenced pressure.

3.4 In addition, we are suggesting small changes to the current culpability factors as set out in annex A, the main one being removal of examples. This is because the Council has moved away from giving examples in guidelines in recent years because they may encourage an unduly literal and restricted interpretation of a guideline. Also, the examples used in the guideline do not feel particularly current.

***Question 1: Does the Council agree with the proposed changes to culpability in the 'Permitting' guideline?***

3.5 On harm, we are suggesting only small changes: Firstly we suggest bringing the quantities in lesser harm fully in line with those in category 4 in 'Supply' and 'Importation' because at the moment the quantity of class A is in line with this guideline, but class B is lower. We do not expect this to have a notable effect on sentencing, because the quantities are used as examples (rather than hard and fast thresholds), and because the information on quantity in the transcripts tends to be quite scant unless the quantities are very high.

3.6 Secondly, we would like to hear the Council's view on *'Regular'* and *'Infrequent drug related activity'*. Few of the transcripts examined had information on frequency so we suspect these factors are not often used. More commonly, the Court heard details of the time period over which dealing or producing was carried out on the premises. Council may therefore wish to re-position *'Regular'* and *'Infrequent drug related activity'* as aggravating/mitigating factors, and place the re-worded aggravating and mitigating factors which deal with duration in harm. Because this change may affect sentence levels, our preliminary advice is to keep frequency in harm, even though it may be little used. Its inclusion could be probed at consultation.

**Question 2: Does the Council agree with the small change to the example quantities under harm?**

**Question 3: Does the Council agree to retain the harm factors relating to regularity of activity at step one, keeping the factors relating to frequency of activity as aggravating/mitigating factors at step two?**

3.7 The other changes proposed are all cosmetic, to bring the guideline into line with the Council's more recent ones. For example, the current sentencing starting points and ranges are merely translated into the four-box grid. Two other small changes are the step two are the removal of, '*Volume of drug activity permitted*' and '*Isolated incident*' from aggravating and mitigating factors respectively, since we think that quantity combined with duration of activity obviate the need for these.

**Question 4: Does the Council agree with these other small changes to the guideline?**

*Importation/supply/production offences – “supply directly to users”*

3.8 At the October meeting we considered the approach to the assessment of harm and whether any additional factors should enable sentencers to move the offence into another category of harm, or to a starting point higher up within the category. Council members agreed not to change the model, but to consider again the question of how to approach “supply directly to users”. The current approach and wording is based on the agreement post-consultation for the original guideline that supply directly to users (which was seen as synonymous with “street dealing”) usually involves, by its nature, very small quantities of drugs, but the harm caused is likely to be greater than indicated by the quantity.

3.9 Some Council members were concerned about the way in which this approach reduces judicial discretion to consider an offence as being of a lower category of harm in cases of supply directly to users where there is a very small quantity of drugs, in particular because for Class A supply offences the range of category 3/lesser role offences only just goes down to 2 years so few custodial sentences can be suspended. Where the role is considered significant, the starting point is 4 years 6 months' custody, and the range goes down to only 3 years 6 months' custody. Of course, sentencers can go outside the range where they feel that it is in the interests of justice to do so, but the current approach with the clear instruction for all “supply directly to users” offences may make this unlikely and members have themselves mentioned this difficulty.

3.10 In considering how do cover supply directly to users, we need to consider the current nature of offending and how offences of supplying directly to users currently take place. For example, offences committed online are often those of supplying directly to users. After some discussion at the last meeting, Council members agreed to discuss this again, having heard from the NCA about trends in current offending, and with the police and CPS representatives present at this meeting.

3.11 If Council members wish to retain the current approach in broad terms, some additional discretion could be added by amending the wording around supply to users which is currently “not based on quantity”. This currently means that, unlike for other cases in which the indicative quantity is that on which the starting point is based so that a lesser quantity would have a starting point somewhat lower within the category range, in “supply directly to users” cases the quantity is irrelevant, and the starting point is that given in the table. This wording could be amended so that all “supply to users” cases are automatically placed in category 3, but the sentencer can then set a starting point within the category depending on the quantity in the case. This would mean, for example, that in a supply case involving 20g of heroin, this would (by quantity) be likely to fall within category 4, though with a higher starting point than given in the guideline because it is higher than the indicative quantity. If it was a “supply directly to users” case, however, then it would be placed in category 3, but with a lower starting point than that indicated, because the quantity was lower than the indicative quantity. This would allow the sentencer to set an appropriate starting point and, importantly, would allow aggravating factors to increase the sentence up to the top of the category 3 range to take account of the seriousness of supply directly to users where there was aggravation.

3.12 Alternative wording for this (replacing that which appears on p10 of the current guideline) would be as follows:

Where the offence is supply directly to users ~~street dealing~~, the quantity of product is less indicative of the harm caused and therefore the starting point is not solely based on quantity. The court should consider all offences involving supplying directly to users as category 3 harm, and set an appropriate starting point within that category considering the quantity of drugs in the particular case.

***Question 5: Does the Council continue to feel that “supply directly to users” should still be considered as a category 3 level harm even when the quantities are very small?***

**Question 6: Does the Council agree to changing the wording on assessing harm as proposed?**

*Importation/supply/production offences – “more than usual danger”*

3.13 At the October meeting, the Council agreed revisions to most of the aggravating factors for these offences. One factor outstanding was that currently worded:

Exposure of others to more than usual danger, for example, drugs cut with harmful substances.

I had proposed moving this factor to step one, and making some changes to wording to include additional examples. Council members wanted to retain this as a step two factor, and consider wording further at this meeting in light of information from the NCA, police and CPS on current drug offending and types of “danger” that they are seeing.

3.14 In October, Council members discussed two distinct types of danger covered here, one relating to dangers to the end user of the drugs (by methods of production or cutting of the drug, or changes in purity), the other relating to danger caused to others involved in the drug (including dangers to couriers by methods of transportation such as plugging, and dangers to innocent bystanders). As we are retaining a model of harm based on quantity, it is important to capture other aspects of harm fully at step two as aggravating factors. Danger to drug users can be covered by a slightly expanded version of the current factor. Dangers to others are potentially wide ranging and some are covered by existing aggravating factors such as presence of a weapon or presence of others, especially children and/or non-users. I therefore do not propose a “catch-all” factor to cover all these dangers; rather I am proposing to add one new aggravating factor to capture the concerns about dangers to couriers caused by methods of transporting drugs but which could be used for other similar circumstances. I am therefore proposing the following two factors to replace the factor above:

Exposure of drug user to more than usual danger, for example, through the method of production/mixing of the drug.

Involving others in the operation in a way which exposes them to more than usual danger, for example, through the method of transporting drugs.

**Question 7: Is the Council content with the wording of these two proposed aggravating factors for the importation, supply and production offences?**



*Importation/supply/production offences - changes to other factors*

3.15 At the last meeting the Council agreed some changes to culpability and harm factors as well as aggravating and mitigating factors. These are set out in Annex B. The revisions include the changes to the culpability factors relating to financial or other advantage, which members agreed in October. They also include the new “Leading role” culpability factor relating to exploitation of children and vulnerable persons, whose inclusion the Council agreed but which I have redrafted based on the drafting of the Modern Slavery Act 2015.

***Question 7: is the Council content with the revisions set out in Annex B, in particular with the drafting of the factor relating to exploitation of children and vulnerable persons?***

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

4.1 Impact of the proposed changes will be considered alongside changes in sentence levels at a future meeting, and will be tested through road testing prior to and during consultation.

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**STEP ONE**  
**Determining the offence category**

The court should determine the offender's culpability and the harm caused (extent of the activity or the quantity of drugs) with reference to the table below.

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account as step 1 but is dealt with at step 2.

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

**Culpability**

Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.

**A - Higher culpability:**

- Participates in the exploitation of a child or vulnerable person who is also involved in the drugs operation
- Permits premises to be used primarily for drug activity ~~for example crack house~~
- Permits use in expectation of substantial financial gain
- Uses legitimate business premises to aid and/or conceal illegal activity, ~~for example public house or club~~

**B – Lower culpability**

- Permits use for limited or no financial gain
- No active role in supply drug activity taking place
- ~~Involvement through naivety~~
- Involvement due to pressure, intimidation or coercion falling just short of duress
- Offender's vulnerability has been exploited

**Harm**

Where there are characteristics present which fall under different levels of harm, the court should balance these characteristics to reach a fair assessment of the harm caused or likely to be caused

**Category 1**

- Regular drug-related activity
- Higher quantity of drugs, for example:
  - Heroin, cocaine – more than 5g
  - Cannabis – more than 50g/100g or 9 plants

**Category 2**

- Infrequent drug-related activity
- Lower quantity of drugs, for example:
  - Heroin, cocaine – up to 5g
  - Cannabis – up to 50g/100g or 9 plants

**STEP TWO**

Having determined the category, the court should use the corresponding starting points to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Where the defendant is dependent on or has a propensity to misuse drugs and there is sufficient prospect of success, a community order with a drug rehabilitation requirement under section 209 of the Criminal Justice Act 2003 can be a proper alternative to a short or moderate length custodial sentence.

For class A offences, section 110 of the Powers of Criminal Courts (Sentencing) Act 2000 provides that a court should impose a minimum sentence of at least seven years' imprisonment for a third class A trafficking offence except where the court is of the opinion that there are particular circumstances which (a) relate to any of the offences or to the offender; and (b) would make it unjust to do so in all the circumstances.

## Class A

<b>HARM</b>	<b>CULPABILITY</b>	
	<b>A</b>	<b>B</b>
Harm 1	<p><b>Starting point</b> 2 years 6 months' custody</p> <p><b>Category range</b> 18 months' – 4 years' custody</p>	<p><b>Starting point</b> 36 weeks' custody</p> <p><b>Category range</b> High level community order - 18 months' custody</p>
Harm 2	<p><b>Starting point</b> 36 weeks' custody</p> <p><b>Category range</b> High level community order - 18 months' custody</p>	<p><b>Starting point</b> Medium level community order</p> <p><b>Category range</b> Low level community order - High level community order</p>

## Class B

<b>HARM</b>	<b>CULPABILITY</b>	
	<b>A</b>	<b>B</b>
Harm 1	<p><b>Starting point</b> 1 year's custody</p> <p><b>Category range</b> 26 weeks' – 18 months' custody</p>	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Low level community order - 26 weeks' custody</p>
Harm 2	<p><b>Starting point</b> High level community order</p> <p><b>Category range</b> Low level community order - 26 weeks' custody</p>	<p><b>Starting point</b> Band C fine</p> <p><b>Category range</b> Band A fine - low level community order</p>

## Class C

HARM	CULPABILITY	
	A	B
Harm 1	<p><b>Starting point</b> 12 weeks' custody</p> <p><b>Category range</b> High level community order – 26 weeks' custody*</p>	<p><b>Starting point</b> Low level community order</p> <p><b>Category range</b> Band C fine - high level community order</p>
Harm 2	<p><b>Starting point</b> Low level community order</p> <p><b>Category range</b> Band C fine - high level community order</p>	<p><b>Starting point</b> Band A fine</p> <p><b>Category range</b> Discharge - low level community order</p>

\*When tried summarily, the maximum penalty is 12 weeks' custody.

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

When considering imposing a custodial sentence, the court should also consider the Imposition guideline, and specifically the section on imposition of custodial sentences. In particular the following must be considered;

- 1) **Has the custody threshold been passed?**
- 2) **If so, is it unavoidable that a custodial sentence be imposed?**

### Factors increasing seriousness

#### **Statutory 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

Offence committed whilst on bail

Offence motivated by, or demonstrating hostility based on any of the following characteristics of the victim: disability, sexual orientation or gender identity

#### **Other aggravating factors:**

~~Length of time over which premises used for drug activity~~ Premises used for drug activity over a long period of time

~~Volume of drug activity permitted~~

Premises adapted to facilitate drug activity

Location of premises, for example proximity to school

Attempts to conceal or dispose of evidence, where not charged separately

Presence of others, especially children and/or non-users

High purity

Presence of weapons, where not charged separately

Failure to comply with current court orders

Other offences taken into consideration (TICs)

Offence committed whilst on licence or subject to post sentence supervision

Established evidence of community impact

**Factors reducing seriousness or reflecting personal mitigation**

No previous convictions or no relevant/recent convictions

Remorse

Good character and/or exemplary conduct

Premises used for drug activity over a short period of time

Involved due to naivety

~~Isolated incident~~

Low purity

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

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

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

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

Sole or primary carer for dependent relative(s)

## Revision of Drug Offences Guideline – proposed sections for new guideline October 2018

Changes from current guideline indicated by struck through/underlined text

### **Fraudulent evasion of a prohibition by bringing into or taking out of the UK a controlled drug**

Misuse of Drugs Act 1971 (section 3)

Customs and Excise Management Act 1979 (section 170(2))

#### Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (quantity) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at step one but is dealt with at step two.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

#### *Culpability demonstrated by the offender's role*

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

##### **Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage-gain
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

##### **Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward

- Motivated by Expectation of significant financial or other advantage, whether or not operating alone
- Some awareness and understanding of scale of operation

**Lesser role:**

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)
- Expectation of limited, if any, financial or other advantage

*Category of harm*

Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows:

[TABLE OF QUANTITIES]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

For appropriate class C ranges, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

*Factors increasing seriousness*

*Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.
- Offence committed on bail

*Other aggravating factors include:*



- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of drug user to more than usual danger, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to more than usual danger, for example through method of transporting drugs
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

*Factors reducing seriousness or reflecting personal mitigation*

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of drug to which offender addicted
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

Supplying or offering to supply a controlled drug  
**Misuse of Drugs Act 1971 (section 4(3))**

Possession of a controlled drug with intent to supply it to another  
**Misuse of Drugs Act 1971 (section 4(3))**

Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (quantity) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

In assessing harm, quantity is determined by the weight of the product. Purity is not taken into account at step one but is dealt with at step two. Where the offence is supply directly to users street-dealing, the quantity of product is less indicative of the harm caused and therefore the starting point is not solely based on quantity. The court should consider all offences involving supplying directly to users as category 3 harm, and set an appropriate starting point within that category considering the quantity of drugs in the particular case.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

*Culpability demonstrated by the offender's role*

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

**Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage-gain
- Uses business as cover
- Abuses a position of trust or responsibility, for example, prison employee, medical professional
- Systematic exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

**Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage, whether or not operating alone
- Some awareness and understanding of scale of operation

**Lesser role:**

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation
- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial or other advantage
- ~~If own operation, absence of any financial gain, for example joint purchase for no profit, or sharing minimal quantity between peers on non-commercial basis~~

*Category of harm*

Indicative quantities of the most common drugs, upon which the starting point is to be based) are as follows:

[TABLE OF QUANTITIES]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

For appropriate class B and C ranges, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

For appropriate class B and C ranges, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

*Factors increasing seriousness*

*Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offender used or permitted a person under 18 to deliver a controlled drug to a third person
- Offender 18 or over supplies or offers to supply a drug on, or in the vicinity of, school premises either when school in use as such or at a time between one hour before and one hour after they are to be used.

- Offence committed on bail

*Other aggravating factors include:*

- ~~Targeting of any premises intended to locate vulnerable individuals or supply to such individuals and/or supply to those under 18~~
- Targeting of any premises where children or other vulnerable persons are likely to be present
- Exposure of drug user to more than usual danger, for example, through the method of production/mixing of the drug
- Exposure of those involved in drug dealing to more than usual danger, for example through method of transporting drugs
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately
- High purity
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection
- ~~Prevalence~~

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

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

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

*Factors reducing seriousness or reflecting personal mitigation*

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Supply only of drug to which offender addicted
- Mistaken belief of the offender regarding the type of drug, taking into account the reasonableness of such belief in all the circumstances
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives
- Offender's vulnerability was exploited

## **Production of a controlled drug**

Misuse of Drugs Act 1971 (section 4(2)(a) or (b))

## **Cultivation of cannabis plant**

Misuse of Drugs Act 1971 (section 6(2))

### Step one – determining the offence category

The court should determine the offender's culpability (role) and the harm caused (output or potential output) with reference to the tables below.

In assessing culpability, the sentencer should weigh up all the factors of the case to determine role. Where there are characteristics present which fall under different role categories the court should balance these characteristics to reach a fair assessment of the offender's culpability.

In assessing harm, output or potential output are determined by the output or the potential output (the weight of the product or number of plants/scale of operation). For production offences purity is not taken into account at step one but is dealt with at step two.

Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender.

#### *Culpability demonstrated by the offender's role*

One or more of these characteristics may demonstrate the offender's role. These lists are not exhaustive.

#### **Leading** role:

- Directing or organising buying and selling on a commercial scale
- Substantial links to, and influence on, others in a chain
- Close links to original source
- Expectation of substantial financial or other advantage gain
- Uses business as cover
- Abuses a position of trust or responsibility
- Systematic exploitation of children and/or vulnerable persons to assist in drug-related activity
- Exercising control over the home of another person for drug-related activity

#### **Significant** role:

- Operational or management function within a chain
- Involves others in the operation whether by pressure, influence, intimidation or reward
- Expectation of significant financial or other advantage, whether or not operating alone  
Some awareness and understanding of scale of operation

#### **Lesser** role:

- Performs a limited function under direction
- Engaged by pressure, coercion, intimidation
- Involvement through naivety/exploitation

- No influence on those above in a chain
- Very little, if any, awareness or understanding of the scale of operation
- Expectation of limited, if any, financial advantage
- If own operation, solely for own use (considering reasonableness of account in all the circumstances)

*Category of harm*

Indicative output or potential output, upon which the starting point is to be based:

[TABLE OF QUANTITIES]

Step two – starting point and category range

[Sentence level tables and accompanying text to be considered at future meeting]

The table below contains a non-exhaustive list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Where appropriate, consider the custody threshold as follows:

- Has the custody threshold been passed?
- If so, is it unavoidable that a custodial sentence be imposed?
- If so, can that sentence be suspended?

Where appropriate, the court should also consider the community threshold as follows:

- Has the community threshold been passed?

*Factors increasing seriousness*

*Statutory aggravating factors:*

- Previous convictions, having regard to a) nature of the offence to which condition relates and relevance to current offence; and b) time elapsed since conviction
- Offence committed on bail

*Other aggravating factors include:*

- Nature of any likely supply
- Level of any profit element
- Use of premises accompanied by unlawful access to electricity/other utility supply of others, where not charged separately
- Ongoing/large scale operation as evidenced by presence and nature of specialist equipment
- Exposure of drug user to more than usual danger, for example, through the method of production/mixing of the drug
- Attempts to conceal or dispose of evidence, where not charged separately
- Presence of others, especially children and/or non-users
- Presence of weapons, where not charged separately

- High purity or high potential yield
- Failure to comply with current court orders
- Offence committed on licence or post sentence supervision
- Established evidence of community impact
- Deliberate use of encrypted communications or similar technologies to facilitate the commission of the offence and/or avoid or impede detection

*Factors reducing seriousness or reflecting personal mitigation*

- Involvement due to pressure, intimidation or coercion falling short of duress, except where already taken into account at step one.
- Isolated incident
- Low purity
- No previous convictions **or** no relevant or recent convictions
- Offender's vulnerability was exploited
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability
- Sole or primary carer for dependent relatives

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

**16 November 2018**  
**SC(18)NOV06 – General guideline**  
**Maura McGowan**  
**Ruth Pope**  
**0207 071 5781**

## **1 ISSUE**

1.1 At the October meeting the Council considered the first tranche of proposed changes to the General guideline in response to the consultation. At this meeting the remaining proposed changes will be considered. Any changes made to the explanations will also apply to those to be used in offence specific guidelines.

1.2 The consultation on providing explanations for factors in offence specific guidelines is now scheduled to start at the end of February. This will mean that it will need to be signed off for consultation at the January 2019 meeting.

1.3 The plan is then to consider the responses to that consultation in June 2019 and to publish both phases of the project to replace the SGC Seriousness guideline at the end of July 2019. This will allow for training on the guidelines in September and October 2019.

## **2 RECOMMENDATION**

2.1 That the Council considers the draft guideline at Annex A (suggested additions are shown underlined; deletions struck through) and

- reviews the changes made at the October meeting (pages A2 to A17);
- and considers the remaining suggestions made in consultation responses and agrees revisions (pages A18 to A30).

## **3 CONSIDERATION**

*Review of changes made in October*

3.1 Comments are invited on any of the content covered at the October meeting up to and including the aggravating factor 'Abuse of trust'.

**3.2 Question 1: Is the Council content with the changes made as a result of the October meeting?**

*Aggravating factors- continued*

3.3 Link asked for clarification of what is meant by 'victim' in the factor 'Vulnerable Victim' and ask if it could include an animal. WWF suggested additional aggravating factors relating to victims:

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

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

**Question 2: Should any additional factors be added relating to vulnerability of animals or the environment?**

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

3.6 Suggested additional text to address these points is shown underlined

**Question 3: Should any of the suggested additional text relating to actions after the event be added?**

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

**Question 4: Should the suggested additional text relating to blame wrongly placed on others be added?**

3.8 The CPS noted that there was no reference to whether extensive compliance with a licence/order would mitigate the aggravating effect of an offence committed on licence etc. Suggested additional text is shown underlined. As with factor A13 above, the reference to being dealt with separately has been changed.

**Question 5: Should the suggested changes to the information on offence committed on licence etc be made?**

3.9 In relation to 'prevalence', the CPS commented:

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

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

3.10 Other respondents were broadly supportive of the explanation.

**Question 6: Should any change be made to the explanation of prevalence?**

*Mitigating factors*

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

**Question 7: Should the qualification relating to the seriousness of the offence be removed in factors M1 and M2?**

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

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

**Question 8: Should the suggested wording in the explanation for remorse be added?**

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

**Question 9: Should the suggested wording regarding limited awareness of the offence be added?**

3.14 There was some misunderstanding of the explanation regarding little or no financial gain, with one respondent suggesting that it might be relied on where gain was intended but

did not materialise. It is therefore proposed to put the words 'did not seek to gain financially' in bold.

**Question 10: Should the suggested emphasis regarding financial gain be added?**

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

**Question 11: Should the suggested wording regarding delay be added?**

3.16 Suggested wording is shown underlined to qualify the factor 'activity originally legitimate'.

**Question 12: Should the suggested wording relating to activity that was originally legitimate be added?**

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

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

**Question 13: Should the suggested wording relating to age and immaturity be added?**

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

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

**Question 14: Should a separate factor or explanatory wording be added in relation to pregnant offenders?**

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

**Question 15: Should the additional wording relating to obtaining reports from court mental health teams be added?**

*Remaining issues from the consultation and research*

3.21 The remaining issues arising from the consultation and the research with sentencers relate to the presentation of the guideline, difficulties with navigation, the density of the text and the lack of direction on sentence levels.

3.22 Presentational and navigation issues are being addressed. The consultation on expanded factors in offence specific guidelines will provide an opportunity to test whether the changes we make help to resolve the concerns raised.

3.23 Many of the difficulties experienced by users were due to the unfamiliarity of the format, the density of the information and the fact that in any given case much of the information would be irrelevant. The problem of unfamiliarity will naturally resolve itself to an extent when the digitisation project is completed and the format is used across all guidelines. The problem of the density and irrelevance of the information is more difficult to address. Suggestions for change arising out of the consultation involve adding rather than subtracting information.

3.24 For the General guideline to work effectively sentencers, prosecutors and defence representatives will need to be familiar with the guideline and be able to refer to the relevant sections in any given sentencing exercise. We will work with the Judicial College to provide training materials for sentencers and could consider producing some material for publication on our website to assist other users to use the guideline effectively.

**Question 16: Should training materials be developed to assist users to become familiar with the General guideline?**

**4 RISKS/IMPACT**

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

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# General guideline

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

### Applicability of guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this definitive guideline. It applies to all offenders aged 18 and older, who are sentenced on or after [date].

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

“Every court –

- a. must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender’s case, and
- b. must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.”

This guideline applies only to offenders aged 18 and older. General principles to be considered in the sentencing of youths are in the Sentencing Guidelines Council’s definitive guideline, [Sentencing children and young people - overarching principles](#).

**STEP ONE – reaching a provisional sentence**

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

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

For the avoidance of doubt the court should **not** take account of any draft sentencing guidelines.

When considering definitive guidelines for analogous offences the court must apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetical exercise.

- b) Where possible the court should follow the stepped approach of sentencing guidelines to arrive at the sentence.

The seriousness of the offence is assessed by considering:

- the **culpability** of the offender and
- the **harm** caused by the offending.

- c) The initial assessment of harm and culpability should take no account of plea or previous convictions.

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

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

More information:

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

- The court should balance these factors to reach a fair assessment of the offender’s overall culpability in all the circumstances of the case and the offender.



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

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

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


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

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

**Harm – which the offence caused, was intended to cause or might foreseeably have caused**

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

- A Victim Personal Statement (VPS) or other impact statement may assist the court in assessing harm, but the absence of a VPS or other impact statement should not be taken to indicate the absence of harm.
- The court should balance these characteristics to reach a fair assessment of harm in the context of the circumstances of the offence

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

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

## STEP TWO

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

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

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More information:

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

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

In some cases of non-payment, the penalty is automatically registered and enforceable as a fine without need for recourse to the courts. This procedure applies to penalty notices for

disorder and fixed penalty notices issued in respect of certain road traffic offences but not to fixed penalty notices issued for most other criminal offences

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

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

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

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More information - fines

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

- Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived through the commission of the offence including:
  - avoided costs;
  - operating savings;
  - any gain made as a direct result of the offence.

- The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.
- In considering economic benefit, the court should avoid double recovery. Where the means of the offender are limited, priority should be given to compensation (where applicable) over payment of any other financial penalty (see further step seven below)
- Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.
- When sentencing **organisations** the fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law.
- Obtaining financial information: It is for the offender to disclose to the court such data relevant to their financial position as will enable it to assess what they can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances pursuant to section 162 of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case. In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied financial information to the contrary.

#### More information – community orders

For further information see the [Imposition of community and Custodial Sentences guideline](#)

- The seriousness of the offence should be the **initial** factor in determining which requirements to include in a community order. Offence specific guidelines refer to three sentencing levels within the community order band based on offence seriousness (low, medium and high). The culpability and harm present in the offence(s) should be considered to identify which of the three sentencing levels within the community order band is appropriate. See below for **non-exhaustive** examples of requirements that might be appropriate in each.
- At least one requirement **MUST** be imposed for the purpose of punishment and/or a fine imposed in addition to the community order unless there are exceptional circumstances which relate to the offence or the offender that would make it unjust in all the circumstances to do so.
- A suspended sentence **MUST NOT** be imposed as a more severe form of community order. A suspended sentence is a custodial sentence.
- Community orders can fulfil all of the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.

- A community order must not be imposed unless the offence is 'serious enough to warrant such a sentence'. Where an offender is being sentenced for a non-imprisonable offence, there is no power to make a community order.
- Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty. In particular, a Band D fine may be an appropriate alternative to a community order.
- The court must ensure that the restriction on the offender's liberty is commensurate with the seriousness of the offence and that the requirements imposed are the most suitable for the offender.
- Sentences should not necessarily escalate from one community order range to the next on each sentencing occasion. The decision as to the appropriate range of community order should be based upon the seriousness of the new offence(s) (which will take into account any previous convictions).
- In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a community order and, if so, whether particular requirements or combinations of requirements are suitable for an individual offender. Whenever the court reaches the provisional view that a community order may be appropriate, it should request a pre-sentence report (whether written or verbal) unless the court is of the opinion that a report is unnecessary in all the circumstances of the case. It may be helpful to indicate to the National Probation Service the court's preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil. Ideally a pre-sentence report should be completed on the same day to avoid adjourning the case. If an adjournment cannot be avoided, the information should be provided to the National Probation Service in written form and a copy retained on the court file for the benefit of the sentencing court. However, the court must make clear to the offender that all sentencing options remain open including, in appropriate cases, committal for sentence to the Crown Court.

<b>Low</b>	<b>Medium</b>	<b>High</b>
<p>Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender's record means that a discharge or fine is inappropriate</p> <p>In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary</p>	<p>Offences that obviously fall within the community order band</p>	<p>Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances</p> <p>More intensive sentences which combine two or more requirements may be appropriate</p>

- |   |  |  |
|---|--|--|
| <ul style="list-style-type: none"> <li>• Suitable requirements might include:</li> <li>• Any appropriate rehabilitative requirement(s)</li> <li>• 40 – 80 hours of unpaid work</li> <li>• Curfew requirement for example up to 16 hours per day for a few weeks</li> <li>• Exclusion requirement, for a few months</li> <li>• Prohibited activity requirement</li> <li>• Attendance centre requirement (where available)</li> </ul> | <ul style="list-style-type: none"> <li>• Suitable requirements might include:</li> <li>• Any appropriate rehabilitative requirement(s)</li> <li>• 80 – 150 hours of unpaid work</li> <li>• Curfew requirement for example up to 16 hours for 2 – 3 months</li> <li>• Exclusion requirement lasting in the region of 6 months</li> <li>• Prohibited activity requirement</li> </ul> | <ul style="list-style-type: none"> <li>• Suitable requirements might include:</li> <li>• Any appropriate rehabilitative requirement(s)</li> <li>• 150 – 300 hours of unpaid work</li> <li>• Curfew requirement for example up to 16 hours per day for 4 – 12 months</li> <li>• Exclusion requirement lasting in the region of 12 months</li> </ul> |
|---|--|--|

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

**BAND A FINE**

**BAND B FINE**

**BAND C FINE**

More information – custodial sentences

Taken from the [Imposition of Community and Custodial Sentences guideline](#)

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

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

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

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

- Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could

provide sufficient restriction on an offender’s liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.

- For offenders on the cusp of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

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

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

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

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

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

- Offender presents a risk/danger to the public
- Appropriate punishment can only be achieved by immediate custody
- History of poor compliance with court orders

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

- Realistic prospect of rehabilitation
- Strong personal mitigation
- Immediate custody will result in significant harmful impact upon others

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

**Pre-sentence report**

Whenever the court reaches the provisional view that:

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

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

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

**Suspended Sentences: General Guidance**

- i) The guidance regarding pre-sentence reports applies if suspending custody.
- ii) If the court imposes a term of imprisonment of between 14 days and 2 years (subject to magistrates’ courts sentencing powers), it may suspend the sentence for between 6 months and 2 years (the ‘operational period’). The time for which a sentence is suspended should reflect the length of the sentence; up to 12 months might normally be appropriate for a suspended sentence of up to 6 months.
- iii) Where the court imposes two or more sentences to be served consecutively, the court may suspend the sentence where the aggregate of the terms is between 14 days and 2 years (subject to magistrates’ courts sentencing powers).
- iv) When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community. The requirements are identical to those available for community orders, see the guideline on [Imposition of Community and Custodial Sentences](#).
- v) A custodial sentence that is suspended should be for the same term that would have applied if the sentence was to be served immediately.

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

**Statutory aggravating factors**

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

Short description:

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

More information:

**Guidance on the Use of Previous Convictions**

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

Section 143 of the Criminal Justice Act states that:

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

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



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

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

Short description:

Offence committed whilst on bail

More information:

S143 (3) Criminal Justice Act 2003 states:

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

Short description:

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

More information:

See below for the statutory provisions.

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

**Increase in sentences for racial or religious aggravation**

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

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

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

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

- at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence, hostility based on the victim's membership (or presumed membership) of a racial or religious group; **or**
- the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.

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

*“presumed”* means presumed by the offender.

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

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

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

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

s146 of the Criminal Justice Act 2003 states:

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

(2) Those circumstances are—

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

- (i) the sexual orientation (or presumed sexual orientation) of the victim,
  - (ii) a disability (or presumed disability) of the victim, or
  - (iii) the victim being (or being presumed to be) transgender, or
  - (b) that the offence is motivated (wholly or partly)—
    - (i) by hostility towards persons who are of a particular sexual orientation,
    - (ii) by hostility towards persons who have a disability or a particular disability or
    - (iii) by hostility towards persons who are transgender.
- (3) The court—
- (a) must treat the fact that the offence was committed in any of those circumstances as an aggravating factor, and
  - (b) must state in open court that the offence was committed in such circumstances.
- (4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.
- (5) In this section “disability” means any physical or mental impairment.
- (6) In this section references to being transgender include references to being transsexual, or undergoing, proposing to undergo or having undergone a process or part of a process of gender reassignment.

Short description:

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

More information:

See below for the statutory provisions.

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

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

**2 Aggravating factor**

- (1) This section applies where—
- (a) the court is considering for the purposes of sentencing the seriousness of an offence listed in subsection (3), and
  - (b) the offence was committed against an emergency worker acting in the exercise of functions as such a worker.
- (2) The court—
- (a) must treat the fact mentioned in subsection (1)(b) as an aggravating factor (that is to say, a factor that increases the seriousness of the offence), and
  - (b) must state in open court that the offence is so aggravated.
- (3) The offences referred to in subsection (1)(a) are—
- (a) an offence under any of the following provisions of the Offences against the Person Act 1861—

- (i) section 16 (threats to kill);
- (ii) section 18 (wounding with intent to cause grievous bodily harm);
- (iii) section 20 (malicious wounding);
- (iv) section 23 (administering poison etc);
- (v) section 28 (causing bodily injury by gunpowder etc);
- (vi) section 29 (using explosive substances etc with intent to cause grievous bodily harm);
- (vii) section 47 (assault occasioning actual bodily harm);
- (b) an offence under section 3 of the Sexual Offences Act 2003 (sexual assault);
- (c) manslaughter;
- (d) kidnapping;
- (e) an ancillary offence in relation to any of the preceding offences.

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

(5) In this section—

“ancillary offence”, in relation to an offence, means any of the following—

- (a) aiding, abetting, counselling or procuring the commission of the offence;
- (b) an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) in relation to the offence;
- (c) attempting or conspiring to commit the offence;

“emergency worker” has the meaning given by section 3.

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

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

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

(1) In sections 1 and 2, “emergency worker” means—

- (a) a constable;
- (b) a person (other than a constable) who has the powers of a constable or is otherwise employed for police purposes or is engaged to provide services for police purposes;
- (c) a National Crime Agency officer;
- (d) a prison officer;
- (e) a person (other than a prison officer) employed or engaged to carry out functions in a custodial institution of a corresponding kind to those carried out by a prison officer;
- (f) a prisoner custody officer, so far as relating to the exercise of escort functions;
- (g) a custody officer, so far as relating to the exercise of escort functions;
- (h) a person employed for the purposes of providing, or engaged to provide, fire services or fire and rescue services;
- (i) a person employed for the purposes of providing, or engaged to provide, search services or rescue services (or both);
- (j) a person employed for the purposes of providing, or engaged to provide—

- (i) NHS health services, or
- (ii) services in the support of the provision of NHS health services, and whose general activities in doing so involve face to face interaction with individuals receiving the services or with other members of the public.

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

(3) In this section—

“custodial institution” means any of the following—

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

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

“escort functions”—

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

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

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

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

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

Short description:

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

More information:

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

Short description:

A2. Offence was committed as part of a group

More information:

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 involvement of others through coercion, intimidation or exploitation, to

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

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

When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and immaturity when considering the significance of group offending. **(See Question 13 below)**

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Short description:

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

More information:

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

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Short description:

A4. Planning of an offence

More information:

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

- Planning may be inferred from the scale and sophistication of the offending
  - The greater the degree of planning the greater the culpability
- 

Short description:

A5. Commission of the offence for financial gain

More information:

- Where an offence (which is not one which by its nature is an acquisitive offence) has been committed wholly or in part for financial gain or the avoidance of cost, this will increase the seriousness.
  - Where the offending is committed in a commercial context for financial gain or the avoidance of costs, this will normally indicate a higher level of culpability.
    - examples would include, but are not limited to, dealing in unlawful goods, failing to disclose relevant matters to an authority or regulator, failing to comply with a regulation or failing to obtain the necessary licence or permission in order to avoid costs.
    - offending of this type can undermine legitimate businesses.
  - See the guidance on fines if considering a financial penalty
- 

Short description:

A6. High level of profit from the offence

More information:

- A high level of profit is likely to indicate:
    - high culpability in terms of planning and
    - a high level of harm in terms of loss caused to victims or the undermining of legitimate businesses
  - In most situations a high level of gain will be a factor taken in to account at step one – care should be taken to avoid double counting.
  - See the guidance on fines if considering a financial penalty
- 

Short description:

A7. Abuse of trust or dominant position

More information:

- In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely.
- Abuse of trust may occur in many factual situations. Examples may include relationships such as teacher and pupil, parent and child, professional adviser and client, or carer (whether paid or unpaid) and dependant. It may also include ad hoc situations such as a late-night taxi driver and a lone passenger. These examples are not exhaustive and do not necessarily indicate that abuse of trust is present.
- Where an offender has been given an inappropriate level of responsibility, abuse of trust is unlikely to apply.
- A close examination of the facts is necessary and a clear justification should be given if abuse of trust is to be found.

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Short description:

A8. Gratuitous degradation of victim / maximising distress to victim

More information:

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

---

Short description:

## Question 2

A9. Vulnerable victim

More information:

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

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Short description:

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

More information:

This reflects:

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

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

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Short description:

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



More information:

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

Short description:

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

More information:

- This reflects the psychological harm that may be caused to those who witnessed the offence.
  - The presence of one or more children may in some situations make the primary victim more vulnerable – for example an adult may be less able to resist the offender if concerned about the safety or welfare of children present.
- 

Short description:

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

**Question 3**

More information:

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

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

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

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Short description:

A14. Blame wrongly placed on other(s)

**Question 4**

More information:

- Where the investigation has been hindered and/or other(s) have suffered as a result of being wrongly blamed by the offender, this will make the offence more serious.
  - This factor will **not** be engaged where an offender has simply exercised his or her right not to assist the investigation or accept responsibility for the offending.
  - When sentencing young adult offenders (typically aged 18-25), consideration should also be given to the guidance on the mitigating factor relating to age and immaturity when considering the significance of such conduct.
- 

Short description:

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

More information:

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

This may particularly be the case when:

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

Short description:

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

Question 5

More information:

- An offender who is subject to licence or post sentence supervision is under a particular obligation to desist from further offending.
- Commission of an offence while subject to a **relevant** court order makes the offence more serious. ~~(where not dealt with separately as a breach of that order).~~
- The extent to which the offender has complied with the conditions of a licence or order will be a relevant consideration.
- Where the offender is dealt with separately for a breach of a licence or order regard should be had to totality (see step six)
- Care should be taken to avoid double counting matters taken into account when considering previous convictions.

Short description:

A17. Offence committed in custody

More information:

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

Short description:

A18. Offences taken into consideration

More information:

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

### **General principles**

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

### **Offences to be Taken into Consideration**

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

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

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

### **Jurisdiction**

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

### **Procedural safeguards**

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

- the police or prosecuting authorities have prepared a schedule of offences (TIC schedule) that they consider suitable to be taken into consideration. The TIC schedule should set out the nature of each offence, the date of the offence(s), relevant detail about the offence(s) (including, for example, monetary values of items) and any other brief details that the court should be aware of;
- a copy of the TIC schedule must be provided to the defendant and his representative (if he has one) before the sentence hearing. The defendant should sign the TIC schedule to provisionally admit the offences;

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

## Application

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

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

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

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

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### Short description:

A19. Offence committed in a domestic context

### More information:

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

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### Short description:

A20. Offence committed in a terrorist context

### More information:

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

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Short description:

A21. Location and/or timing of offence

More information:

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

Short description:

A22. Established evidence of community/ wider impact

More information:

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

Short description:

A23. Prevalence

**Question 6**

More information:

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

- Even if such material is provided, a sentencer will only be entitled to treat prevalence as an aggravating factor if satisfied
  - that the level of harm caused in a particular locality is significantly higher than that caused elsewhere (and thus already inherent in the guideline levels);
  - that the circumstances can properly be described as exceptional; **and**
  - that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced.

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

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

Short description:

M1. No previous convictions or no relevant/recent convictions

More information:

- First time offenders generally represent a lower risk of re-offending. Re-offending rates for first offenders are significantly lower than rates for repeat offenders. In addition, first offenders are normally regarded as less blameworthy than offenders who have committed the same crime several times already. For these reasons first offenders attract a mitigated sentence (unless the crime is particularly serious).

**Question 7**

- Where there are previous offences but these are old and /or are for offending of a different nature, the sentence will normally be reduced to reflect that the new offence is not part of a pattern of offending and there is therefore a lower likelihood of reoffending.
- When assessing whether a previous conviction is ‘recent’ the court should consider the time gap since the previous conviction and the reason for it.
- Previous convictions are likely to be ‘relevant’ when they share characteristics with the current offence (examples of such characteristics include, but are not limited to: dishonesty, violence, abuse of position or trust, use or possession of weapons, disobedience of court orders). In general the more serious the previous offending the longer it will retain relevance.

Short description:

M2. Good character and/or exemplary conduct

More information:

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

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

**Question 7**

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Short description:

M3. Remorse

**Question 8**

More information:

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

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

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Short description:

M4. Self-reporting

More information:

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

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Short description:

M5. Cooperation with the investigation/ early admissions

More information:

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

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Short description:

M6. Little or no planning

More information:

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

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

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Short description:

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

More information:

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

Short description:

M8. Involved through coercion, intimidation or exploitation

More information:

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

Short description:

M9. Limited awareness or understanding of the offence

**Question 9**

More information:

The factor may apply to reduce the culpability of an offender

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

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

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

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

Short description:

M10. Little or no financial gain

**Question 10**

More information:

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



Short description:

M11. Delay since apprehension

More information:

**Question 11**

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

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Short description:

M12. Activity originally legitimate

More information:

**Question 12**

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

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

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Short description:

M13. Age and/or lack of maturity

More information:

**Question 13**

Age and/or lack of maturity can affect:

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

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

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

In particular young adults (typically aged 18-25) may still be developing neurologically and consequently be less able to:

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

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

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

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

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

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

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

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

Short description:

M14. Sole or primary carer for dependent relatives

**Question 14**

More information:

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

Short description:

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

More information:

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

Short description:

M16. Mental disorder or learning disability

**Question 15**

More information:

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

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

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

Offenders may have a combination of the above conditions.

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

A mental disorder or learning disability can affect both:

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

The court will be assisted by a PSR and, where appropriate, medical reports (including from court mental health teams) in assessing:

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

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Short description:

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

More information:

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

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

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

**STEP THREE**

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

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

**STEP FOUR**

**Reduction for guilty pleas**

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

**STEP FIVE**

**Dangerousness**

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

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

**STEP SIX**

**Totality principle**

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

**STEP SEVEN**

**Compensation and ancillary orders**

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

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

**STEP EIGHT**

**Reasons**

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

**STEP NINE**

**Consideration for time spent on bail**

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