

# The sentencing process

## Draft sentencing guideline

Effective from [date]

## Applicability

This guideline applies to all offenders who are sentenced on or after [date].

## Introduction

- I. This guideline provides a framework for the sentencing process. It sets out a sequence of actions or “steps” which courts should follow in order to reach a sentencing decision, including some of the factors which may be taken into account.
- II. The sentencing decision may be made swiftly, particularly when sentencing for less serious summary offences. In those cases the court may appear to consider all relevant factors at the same time. Where a court does not expressly take any step or steps, that does not in itself amount to a decision not to follow the guideline.
- III. A court may choose to explain aspects of a sentence it has passed by reference to a specific part of this guideline. But it does not have to give full reasons as to how each part of the process has affected the sentence.
- IV. The Council intends that this guideline will promote a consistent approach to the process of sentencing in Scotland’s courts, and will enhance understanding of that process.
- V. The first part of this guideline is a table of the different steps in the sentencing process. This is followed by further explanation of the process.

## THE SENTENCING PROCESS

### ARRIVING AT THE HEADLINE SENTENCE

The headline sentence is the sentence selected by the court which takes into account the seriousness of the offence and any aggravating and mitigating factors. It does not take into account any adjustment of the sentence for other reasons (see steps 5-7).

In arriving at the headline sentence the court should also:

- have regard to any sentencing guideline or guidelines which apply to the case; and
- ensure that the headline sentence is fair and proportionate.

#### 1. ASSESS SERIOUSNESS

Consider how serious the offence is, in terms of culpability and harm.

#### 2. SELECT SENTENCING RANGE

Select the sentencing range having regard, where applicable, to:

- the range of appropriate sentences set out in any relevant sentencing guidelines;
- any relevant guideline judgments; and
- any relevant legislation, including any maximum and minimum sentence, the powers of the court, and any statutory presumptions relating to sentencing.

#### 3. CONSIDER AGGRAVATING AND MITIGATING FACTORS

Consider the offender's criminal record and personal circumstances, and any relevant aggravating and mitigating factors unless these have already been considered at step 1.

#### 4. DETERMINE HEADLINE SENTENCE

- Select the appropriate headline sentence, having regard to the 'Principles and purposes of sentencing' guideline, particularly the purpose or purposes the sentence is intended to achieve.
- In cases of multiple offending – where the court is considering more than one offence committed by the offender - ensure that the *overall* headline sentence selected is fair and proportionate.

<b>OTHER CONSIDERATIONS</b>  These will not be relevant in every case. Where any of them apply, they may affect the decision about the final sentence to be imposed.	<b>5. TAKE A GUILTY PLEA INTO ACCOUNT</b>  Where the offender has pled guilty to the offence or offences, take into account the stage in the proceedings at which, and the circumstances in which, the offender indicated their intention to plead guilty, as required by section 196 of the Criminal Procedure (Scotland) Act 1995.
	<b>6. CONSIDER TIME SPENT IN CUSTODY</b>  Consider any matters specified in section 210 of the Criminal Procedure (Scotland) Act 1995 (for example any period of time spent in custody by the person awaiting trial or sentence).
	<b>7. CONSIDER ANCILLARY ORDERS THAT MAY BE IMPOSED ALONGSIDE THE SENTENCE</b>  Where the offence before the court allows for the imposition of an ancillary (additional) order - for example, an order for forfeiture of a knife under section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 – consider whether it is fair and proportionate to do so.
<b>SELECT SENTENCE TO BE IMPOSED</b>	<b>8. IMPOSE SENTENCE AND GIVE REASONS</b>  Select the sentence to be imposed. The reasons for imposing the sentence should be stated. The court must also state its reasons if it decides not to follow, or departs from, an applicable sentencing guideline (as required by section 6(2) of the Criminal Justice and Licensing (Scotland) Act 2010).

## Arriving at the headline sentence (steps 1 – 4)

1. The “headline sentence” is the sentence selected by the court after assessing the seriousness of the offence. It also takes into account any aggravating and mitigating factors.
2. In arriving at the headline sentence the court should, in all cases, have regard to the first three steps in this guideline.
3. Where an applicable sentencing guideline exists – for example, a guideline which applies to the offence before the court, or a guideline which applies to the type of offender being sentenced – the court should also have regard to it in arriving at the headline sentence.
4. Where more than one guideline is applicable, the effect of section 6(1) of the Criminal Justice and Licensing (Scotland) Act 2010 is that the court must have regard to all of those guidelines when sentencing. The court may, however, need to consider whether or not it is appropriate to apply each guideline in its entirety, depending on the particular circumstances of the case. Any decision not to follow any guideline or guidelines (in whole or in part) must, in those circumstances, still be dealt with in the manner set out in paragraph 47.
5. The headline sentence does not take account of such matters as time already spent in custody before sentence, or the offender pleading guilty. These are considered at a later part of the process.

### Step 1: Assessing the seriousness of the offence

6. The first stage in sentencing an offender is to assess the nature and seriousness of the offence.
7. The seriousness of an offence is determined by two things: the **culpability** of the offender and the **harm** caused, or risked being caused, by the offence. As either or both culpability and harm increase, so may the seriousness of the offence.
8. The assessment of seriousness will be a key factor in deciding the appropriate type of sentence (for example, whether to impose a fine, a community payback order, or a period of

imprisonment). It is also important in deciding the level of sentence to be applied (for example, the amount of any fine, the requirements to be included in a community payback order, or the length of a prison sentence).

9. In assessing the seriousness of a particular offence, the court should also refer to any applicable sentencing guideline which lists any factors relevant to the evaluation of culpability and harm.

### **Culpability**

10. In assessing culpability, the court should assess the blameworthiness of the offender at the time of committing the offence. Factors relevant to the assessment of culpability include (but are not limited to):

- whether the offender intended to cause harm;
- whether the offender was reckless as to whether harm was caused;
- whether, and to what extent, there was any premeditation on the part of the offender;
- whether the offender had specific knowledge of the risks that might arise from his or her actions, even although he or she did not intend to cause the harm that resulted; and
- the offender's age or lack of maturity at the time of committing the offence, where this affects his or her level of responsibility.

11. Strict liability offences are offences where it is necessary to prove only that the criminal act took place. So the offender's intention to commit harm is generally not a factor in deciding guilt in such cases. Although no culpability needs to be proved to obtain a conviction for such an offence, the question of whether there was intention, recklessness, or knowledge involved in committing the offence may still be relevant in deciding on the sentence.

## Harm

12. An offence will, generally, be regarded as more serious the greater the amount of harm done.
13. Harm is to be interpreted broadly. It may cover a wide range of different types of harm, from offences where actual harm is caused, to offences where the risk of harm is present, although no actual harm has resulted.
14. In offences where the risk of harm is present, but actual harm has not resulted, the court should consider the relative dangerousness of the offender's conduct, the likelihood of harm occurring, and the gravity of the harm that could have resulted.
15. The types of harm can include risk of harm to individuals or particular groups, or more widely to society or the public generally.
16. In assessing the level of harm the court must have regard to any victim statement which has been put before it, to the extent that it considers the information to be relevant to the offence.

## The assessment of seriousness

17. Assessing seriousness may be complex, particularly where there is an imbalance between culpability and harm.
  - In some circumstances, the harm that actually results may be greater than the harm intended by the offender. In that case culpability will be influenced by the extent to which the offender could have foreseen harm.
  - In other circumstances, the offender's culpability may be high, although there is a low level of harm.
18. Factors which are to be considered "aggravating" and "mitigating" are not to be included in the initial assessment of culpability or harm, apart from any aggravating factors which are regarded as integral to the offence (see step 3 below).

## Step 2: Select the sentencing range

19. The court should next select the sentencing range. This is the range of sentences within which the appropriate headline sentence for the offence appears to fall, having regard to the assessment of seriousness at step 1. If there is a guideline which applies to the offence before the court, it may offer further guidance on how to select the sentencing range. It should be consulted at this point.

20. The court should also have regard to the following:

- any relevant guideline judgments<sup>1</sup>; and
- any relevant legislation, including any maximum and minimum sentence, the powers of the court, and any statutory presumptions relating to sentencing (such as, for example, the presumption against short term prison sentences in section 204 of the Criminal Procedure (Scotland) Act 1995).

## Step 3: Aggravating and mitigating factors

21. Aggravating factors are facts and circumstances which may make the offence more serious for sentencing purposes. Mitigating factors, including factors personal to the offender, may lead to a less severe sentence being imposed.

22. Cases may have both aggravating and mitigating factors. Some aggravating factors can be integral features of certain offences. In such cases, the court will already have reflected this in assessing seriousness at step 1, and they should not be used as a reason for further increasing the sentence.

23. Some examples of aggravating and mitigating factors are listed in **annexes A and C**. They are not listed in any order of priority, and the lists are not intended to be in any way exhaustive.

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<sup>1</sup> Under sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995, the High Court and the Sheriff Appeal Court, in disposing of an appeal, can pronounce an opinion on the sentence which is appropriate in any similar case. When that has happened, section 197 of that Act provides that a sentencing court shall have regard to any relevant opinion.

24. **Annex B** lists some examples of statutory aggravations. When a statutory aggravation applies to the case, the court must ensure that the requirements of the statute are followed.
25. Reference should also be made to any applicable sentencing guideline which lists any relevant aggravating and mitigating factors.

#### **Step 4: Determine the headline sentence**

26. Having completed steps 1, 2, and 3, the court should select the headline sentence. This is the sentence which is appropriate for the offence after consideration of all of the matters contained in steps 1-3 of this guideline, but *before* any adjustment as a result of steps 5-7 of this guideline.
27. When determining the headline sentence the court should have regard to the Council's guideline 'Principles and purposes of sentencing', in particular to the purpose or purposes the sentence is intended to achieve.

#### *Multiple offending*

28. Courts will sometimes have to deal with the situation where an offender appears for sentence for more than one offence. These offences might all be on the same complaint or indictment, or on separate ones. And sometimes an offender is already serving a sentence when he or she appears for sentencing on a different charge or charges.
29. When there is more than one offence on the same complaint or indictment, the court can give separate sentences for each offence. Or it can impose what is known as a "cumulo" sentence. In this case the court imposes one sentence for all of the offences.
30. When the offender appears on more than one offence and the court decides to impose custodial sentences for two or more of the offences, it is up to the court to decide whether the sentences are to be served concurrently (at the same time) or consecutively (one after the

other). This applies whether the offences are on the same complaint or indictment or on separate ones.

31. When the offender is already serving a sentence and appears for sentence on another charge or charges, the court may decide that the sentence should start from the date of the accused's appearance in court. In that case some or all of the new sentence will be served concurrently with the existing sentence. Or the court could decide that the sentence will start to run from the end of the existing sentence. In that case the new sentence will be served consecutively.
32. Sentences on multiple charges can be concurrent and consecutive. The court can state that some sentences are to be served concurrently and that other sentences will follow after those concurrent sentences.
33. In any case of multiple offending, the headline sentences should always reflect the general principles of sentencing. The *total* headline sentence must, in particular, be fair and proportionate.

### **Other considerations (steps 5 – 7)**

34. Steps 5 – 7 cover other issues which will not apply in every case, but where they do apply should be taken into account in arriving at the final sentence.

#### **Step 5: Take into account a plea of guilty**

35. This step applies where the offender has pled guilty to the offence or offences for which they are being sentenced.
36. When this is the case, section 196 of the Criminal Procedure (Scotland) Act 1995 provides that the court must take into account the stage in the proceedings at which, and the circumstances in which, the offender indicated their intention to plead guilty.

37. The effect of this is that a court can consider reducing the headline sentence where an offender has pled guilty, applying what is called a sentence discount.

### **Step 6: Consideration of time spent in custody**

38. This step applies only where

- the court is imposing a custodial sentence (a sentence of imprisonment or detention); and
- any of the circumstances in section 210 of the Criminal Procedure (Scotland) 1995 apply: most commonly that the offender was in custody on remand awaiting trial or sentence.

39. When this is the case the court must, in deciding on the length of the custodial sentence, have regard to the period of time spent in custody.

### **Step 7: Ancillary orders**

40. Ancillary orders are orders which may be imposed in addition to a sentence or, in some instances, as an alternative to the sentence which the court could have imposed.

41. Ancillary orders may be mandatory or discretionary, and may be aimed at redressing the harm caused by an offender, or at the prevention of re-offending.

42. In deciding whether to impose an ancillary order the court may have regard to the risk of harm which might be caused to any individual, or to the wider public or to society, through re-offending.

43. The court should also consider whether imposition of any ancillary order is fair and proportionate.

44. **Annex D** provides examples of ancillary orders. The list is non-exhaustive and examples are not listed in any order of priority.

45. **At the end of the process set out in steps 1 - 7 the court will have decided on the sentence to be imposed.**

### **Step 8: Impose sentence and give reasons**

46. When imposing the sentence the court should, as provided in the Council's guideline 'Principles and purposes of sentencing', set out the reasons for its decision as clearly and openly as circumstances permit.

47. The court must also state its reasons if it decides not to follow, or departs from, an applicable sentencing guideline (as required by section 6(2) of the Criminal Justice and Licensing (Scotland) Act 2010).

## ANNEX A

### EXAMPLES OF GENERAL AGGRAVATING FACTORS

These factors may, in certain cases, be integral features of the offence. In such cases, they should be considered as part of the initial assessment of the seriousness of the offence at step 1, and not as separate aggravating factors at step 3.

- The offence was committed after careful planning or premeditation
- The presence of others, for example the children or partner of the victim
- The offender was operating in a group or gang
- The deliberate targeting of a victim who is vulnerable or perceived to be vulnerable
- Deliberate degradation or humiliation of a victim
- Steps taken to prevent the victim reporting/obtaining assistance and/or from assisting the prosecution
- Multiple victims
- A sustained offence or repeated offences against the same victim
- An especially serious physical or psychological effect on the victim, even if unintended
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where theft of equipment causes serious disruption to a victim's life or business)
- Commission of the offence for financial gain (where this is not an inherent part of the offence itself)
- Use of a weapon to frighten or injure a victim
- An attempt to conceal or dispose of evidence

- An offence against a public official which arises out of the victim's status as a public official
- The offence was committed whilst the offender was on licence
- Any relevant previous conviction(s) which the offender has, particularly where they disclose a pattern of repeat and/or similar offending
- The offence was committed whilst under the influence of drink or drugs
- Abuse of power or a position of trust

## ANNEX B

### EXAMPLES OF STATUTORY AGGRAVATIONS

- Bail aggravation under section 27(3) of the Criminal Procedure (Scotland) Act 1995
- Racial aggravation under section 96 of the Crime and Disorder Act 1998
- Aggravation by religious prejudice under section 74 of the Criminal Justice (Scotland) Act 2003
- Aggravation by prejudice relating to disability under section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009
- Aggravation by prejudice relating to sexual orientation or transgender identity under section 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009
- Antisocial behaviour order (ASBO) aggravation under section 9 of the Antisocial Behaviour etc. (Scotland) Act 2004
- Terrorist connection aggravation under section 31 of the Counter-Terrorism Act 2008
- Serious organised crime aggravation under section 29 of the Criminal Justice and Licensing (Scotland) Act 2010
- Aggravation as to human trafficking under sections 5 – 7 of the Human Trafficking and Exploitation (Scotland) Act 2015
- Aggravation where abuse of a partner or ex-partner is involved, under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016

## ANNEX C

### EXAMPLES OF GENERAL MITIGATING FACTORS

- Mental illness or disability on the part of the offender, especially where linked to the commission of the offence
- The likely effect of the sentence on the offender or their family: for example, the offender is the primary or sole carer of any dependants, and a sentence of imprisonment would result in the offender's children being taken into care
- Cooperation with authorities: for example, voluntary surrender or assistance to the police or prosecution
- The offender is remorseful, and/or has been affected significantly by the offence
- The offender has demonstrated determination/motivation to address their personal problems and to change their offending behaviour, including addressing any drug, drink or mental health issues
- The offender is in, or has good prospects of, employment
- Previous good character; no previous, or recent, relevant convictions; otherwise exemplary conduct
- The offender had been provoked at the time of committing the offence

## ANNEX D

### EXAMPLES OF ANCILLARY ORDERS

- Recommendation by a court for deportation under section 3(6) of the Immigration Act 1971
- Forfeiture of a motor vehicle under section 33A of the Road Traffic Offenders Act 1988
- Orders returning a released prisoner to custody to serve all or part of the unexpired portion of a prison sentence under section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993
- Forfeiture of an offensive weapon or a knife under sections 47 or 49 of the Criminal Law (Consolidation) (Scotland) Act 1995
- Non-harassment orders (NHOs) under section 234A of the Criminal Procedure (Scotland) Act 1995
- Antisocial behaviour orders (ASBOs) under section 234AA of the Criminal Procedure (Scotland) Act 1995
- Confiscation orders under part 3 of the Proceeds of Crime Act 2002
- Notification requirements under section 80 of the Sexual Offences Act 2003
- Sexual offences prevention orders (SOPOs) under section 104 of the Sexual Offences Act 2003
- Exclusion orders under section 94 of the Licensing (Scotland) Act 2005
- Football banning orders under sections 51 or 52 of the Police, Public Order and Criminal Justice (Scotland) Act 2006
- Disqualification orders under section 40 of the Animal Health and Welfare (Scotland) Act 2006

- Referral for possible inclusion in the list of persons who may be unsuitable to work with children or vulnerable adults under part 1 of the Protection of Vulnerable Groups (Scotland) Act 2007
- Serious crime prevention orders (SCPOs) under section 1 of the Serious Crime Act 2007
- Notification requirements under part 4 of the Counter-Terrorism Act 2008

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