

The sentencing process

Sentencing guideline

Effective from 22 September 2021

Applicability

This guideline applies to all offenders who are sentenced on or after 22 September 2021.

Introduction

- A. 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. The Scottish Sentencing 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.
- B. This guideline is to be read alongside the Council's guideline '[Principles and purposes of sentencing](#)'. In particular, throughout the sentencing process the court should seek to ensure that the sentence to be imposed is fair and proportionate. This is the core principle of sentencing in Scotland.
- C. The sentencing decision may be made swiftly and in many cases the court may appear to consider some or all relevant factors at the same time. Where a court does not expressly take any individual step, that does not in itself amount to a decision not to follow the guideline.
- D. A court may choose to explain aspects of a sentence it has passed by reference to a specific part of this guideline. It does not have to give full reasons as to how each part of the process has affected the sentence.
- E. The first part of this guideline is a table setting out the different steps in the sentencing process. This is followed by an explanation of the process.

The sentencing process

Arriving at the headline sentence (steps 1 - 4)

Step 1. Assess the seriousness of the offence

Step 2. Select the sentencing range

Step 3. Identify aggravating and mitigating factors

Step 4. Determine the headline sentence

Other considerations (steps 5 - 7)

Step 5. Take into account a plea of guilty

Step 6. Consider time spent in custody

Step 7. Consider ancillary orders

Imposing sentence (step 8)

Step 8. Impose sentence and give reasons

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 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: Assess the seriousness of the offence

6. The first step in sentencing is an assessment of 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 which might have been caused, by the offence. As either or both culpability and harm increase, so may the seriousness of the offence.
8. The assessment of seriousness is a key factor in deciding the appropriate type of sentence (for example, whether to impose a fine, a community payback order, or a custodial sentence). It is also important in deciding the level of sentence to be imposed (for example, the amount of any

fine, the requirements to be included in a community payback order, or the length of a custodial 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 consideration 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 planning or premeditation on the part of the offender
 - whether the offender knew, or should have known, of the risks that might arise from their actions, even although they did not intend to cause the harm that resulted, and
 - the offender's age, or level of maturity, at the time of committing the offence.
11. Strict liability offences are offences where it is necessary to prove only that the criminal act took place. In these cases, an intention to commit harm does not need to be proved in order for the accused person to be found guilty of the offence. However, 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.
13. Harm includes the impact on any victim or victims. In particular, 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 in the statement to be relevant to the offence¹.
14. Harm is to be interpreted broadly. It includes cases where actual harm was caused, and cases where there was a risk of harm but no actual harm resulted. It includes a wide range of different types of harm, such as offences where harm is caused to an individual or to property, or more widely to society or the environment.
15. In offences where there was a risk of harm, but no actual harm resulted, the court should consider the nature of the offender's conduct, the likelihood of harm occurring, and the gravity of the harm that could have resulted.
16. Some examples of factors which may be relevant to the assessment of harm include (but are not limited to):
 - deliberate degradation or humiliation of a victim
 - multiple victims
 - a sustained offence or repeated offences against the same victim,
 - an especially serious physical or psychological effect on a 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).

¹ As provided in section 14 of the Criminal Justice (Scotland) Act 2003.

The assessment of seriousness

17. Assessing seriousness may be complex, particularly where there is an imbalance between culpability and harm.

- In some cases, the harm that actually results may be greater than the harm intended by the offender. In that event culpability will be influenced by the extent to which the offender ought to have foreseen harm.
- In other cases, the offender's culpability may be high, although there is a low level of harm.

18. Factors which are included in the initial assessment of seriousness should not also be considered as aggravating or mitigating factors (see step 3 below). This is to avoid what is sometimes known as 'double-counting'.

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 sentencing guideline which applies to the offence before the court it may offer further guidance on how to select the sentencing range, and should be consulted at this point.

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

- any relevant guideline judgments²
- any statutory provision relevant to the offence, including any maximum and minimum sentence, and

² Under sections 118(7) and 189(7) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act), 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.

- any statutory provision applicable to the sentencing of the offender, including the presumptions against:
 - passing a sentence of imprisonment on a person aged 21 or over who has not previously been sentenced to imprisonment or detention³
 - imposing custodial sentences of under 12 months⁴, and
 - passing a sentence of detention on a person aged under 21⁵.

Step 3: Identify 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. Whether any factor has an aggravating or mitigating effect will depend on all of the circumstances of the case. 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. **Annex A** 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.

24. Some other examples of possible aggravating and mitigating factors are listed in **annexes B and C**.

³ 1995 Act, section 204(2)

⁴ 1995 Act, section 204(3A)

⁵ 1995 Act, section 207(3)

25. The factors in these lists are not in any order of priority and the lists are not intended to be in any way exhaustive.
26. Reference should also be made to any applicable sentencing guideline which lists any relevant aggravating and mitigating factors.

Step 4: Determine the headline sentence

27. 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.
28. 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. The purposes of a sentence may include, in no order of priority: protection of the public; punishment; rehabilitation of offenders; giving the offender the opportunity to make amends; and expressing disapproval of offending behaviour. The court should also have regard to any statutory provisions relating to the specific offence for which the offender is being sentenced⁶.

Sentencing for multiple offences

29. 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. Sometimes an offender is already serving a sentence when they appear for sentencing on a different offence or offences.

⁶ For example, when sentencing for certain offences listed in section 210AB of the 1995 Act, the court must have particular regard to the aim of ensuring that the victim is not the subject of a further such offence committed by the convicted person.

30. 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, which is when the court imposes one sentence for all of the offences.
31. When the offender appears for sentence on more than one offence and the court decides to impose separate 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.
32. When the offender is already serving a custodial sentence the court may decide that the sentence for any new offence should start from the date of sentencing for that offence. In that event some or all of the new sentence will be served concurrently with the existing sentence. Alternatively, the court may decide that the new sentence will start to run from the end of the existing sentence. In that event the new sentence will be served consecutively.
33. The court can use a combination of concurrent and consecutive sentences when sentencing on multiple offences. For example, the court can state that some sentences are to be served concurrently and that other sentences will follow after those concurrent sentences.
34. When sentencing for multiple offences the total headline sentence must be fair and proportionate.

Other considerations (steps 5 – 7)

35. 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

36. This step applies where the offender has pled guilty to the offence or offences for which they are being sentenced.

37. In these circumstances 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.

38. The effect of this is that where an offender has pled guilty a court will consider reducing the sentence to be imposed, applying what is known as a 'discount' to the headline sentence.

Step 6: Consider time spent in custody

39. 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) Act 1995 apply: most commonly that the offender was in custody on remand awaiting trial or sentence.

40. In these circumstances the court must, in deciding on the length and commencement date of the custodial sentence, have regard to the period of time spent in custody.

Step 7: Consider ancillary orders

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

42. Some ancillary orders are mandatory and other ancillary orders are discretionary, depending on the circumstances of the case.

43. **Annex D** provides examples of ancillary orders. The list is non-exhaustive and examples are not listed in any order of priority⁷.

Imposing sentence (step 8)

Step 8: Impose sentence and give reasons

44. At the end of the process set out in steps 1 - 7 the court will have decided on the sentence to be imposed.
45. The court should always be satisfied that the overall sentence, taken together with any ancillary order to be imposed, is fair and proportionate.
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 guideline⁸.

⁷ A requirement to comply with the notification requirements of section 80 of the Sexual Offences Act 2003 automatically follows a conviction for certain offences. It is not imposed by the court and is not an ancillary order for the purposes of this guideline.

Disqualification from holding or obtaining a driving licence and the endorsement of a driving licence with or without penalty points are part of the sentence, not an ancillary order.

⁸ As required by section 6(2) of the Criminal Justice and Licensing (Scotland) Act 2010.

ANNEX A

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
- 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
- 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
- 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 B

EXAMPLES OF POSSIBLE 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 presence of others, for example the children or partner of the victim
- The offender was operating in a group or gang
- Steps taken to prevent the victim reporting the offence, obtaining assistance, or from assisting the prosecution
- Commission of the offence for financial gain (where this is not an inherent part of the offence itself)
- 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 or subject to another order of the court
- 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 alcohol or drugs which were consumed voluntarily
- Abuse of power or a position of trust
- The deliberate targeting of a victim who is vulnerable or perceived to be vulnerable

ANNEX C

EXAMPLES OF POSSIBLE MITIGATING FACTORS

- Mental illness or disability, especially where linked to the commission of the offence
- Physical disability or infirmity
- 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 looked after away from home
- Cooperation with authorities: for example, voluntary surrender or assistance to the police or prosecution
- The offender is remorseful, and/or has been or will be affected significantly by the offence
- The offender has demonstrated a willingness to address their personal problems and to change their offending behaviour, including addressing any drug, alcohol, or mental health issues
- Previous otherwise 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
- Enforcement orders under section 226B of the Criminal Procedure (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
- Victim surcharges under section 253F of the Criminal Procedure (Scotland) Act 1995
- Confiscation orders under part 3 of the Proceeds of Crime Act 2002
- 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 section 51 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

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