

# The Sentencing Process Guideline

## Analysis of Consultation Responses

Submitted to the Scottish Sentencing Council in March 2020

Published June 2021

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Analysis prepared for the consideration of the Scottish Sentencing Council. The views expressed are those of the author and do not necessarily represent those of the Council.

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# THE SENTENCING PROCESS GUIDELINE

## ANALYSIS OF CONSULTATION RESPONSES

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## 1.0 BACKGROUND

The Scottish Sentencing Council (SSC) was established in 2015, under the Criminal Justice and Licensing (Scotland) Act 2010<sup>1</sup>. Its function is that of an independent advisory body and its main remit is to provide guidance on sentencing to the Scottish courts.

One of the founding aims of the SSC is to promote greater awareness and understanding of sentencing. Recognising that the sentencing process itself is not always fully understood by the public, the SSC considers that a guideline on the sentencing process will help to increase public knowledge and understanding of how courts make sentencing decisions, whilst also promoting greater consistency in sentencing, by providing a useful framework which applies to all sentencing decisions.

In particular, the Council is of the view that, read together with the Principles and Purposes of Sentencing Guideline (which came into force in November 2018), the Sentencing Process Guideline will provide a framework for every sentencing decision in Scotland.

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<sup>1</sup> Sections 1-13.

## 2.0 OVERVIEW OF THE CONSULTATION

The consultation on the Sentencing Process Guideline was open to the public between the period 12 June and 6 September 2019. Twenty-three substantive questions were put to respondents in the consultation. These questions contained both closed (yes/no) and open (free) responses.

There were 41 responses to the consultation in total: 20 from individual members of the public and 21 from organisations.

Scotland's Campaign Against Irresponsible Drivers (hereinafter SCID) provided three organisational responses. Additionally, three individual respondents were affiliated to this campaign group, with two of these three respondents providing identical responses to one another (and, at times, to the organisational responses made by the group). The organisational responses are counted as a single response for the purposes of this analysis. Where the responses conflict (e.g. where the responses answered both "yes" and "no" to the same question) this is noted in the relevant table and both responses are counted. As a result, tables will not always sum to 41. Where additional comments were provided, these are counted separately, but only given as much weight as a single response would have been.

The organisation 'Victims' Organisation Collaboration Forum Scotland' (hereinafter VOCFS) includes in its membership two organisations who submitted separate organisational responses (SCID and Scottish Women's Aid). These responses are counted separately.

An organisational response was submitted by the Children and Young People's Commissioner for Scotland. However, only question 23 ('Further comments') was answered. This answer was a general overview of the view that a human rights-based approach to sentencing should be adopted in Scotland.

The consultation was open through the Council's Citizen Space consultation platform. Thirty-five of the 41 responses were submitted through Citizen Space and a further six responses were submitted to the Council directly.

Where an individual respondent has not agreed to the publication of their details, responses have been anonymised and references to any personal details have been omitted in order to ensure this anonymity.

Due to the limited number of responses, analysis is presented only in terms of "individuals" and "organisations". Further breakdowns (such as by organisational focus) resulted in too small numbers to identify key themes.

As with any consultation analysis, there cannot be a representation of each and every point made, but the results provide an overview of the relevant themes which emerged. What will follow is an analysis of the responses received.

A full breakdown of the organisations who responded is provided in Annex 1.

### 3.0 CULPABILITY AND HARM

Two questions were asked in relation to culpability and harm:

1. Is the guidance on assessing seriousness - by reference to culpability and harm - helpful?

Answer	Individuals	Organisations
Yes	13	15
No	4	2
No answer	3	2

Amongst the four individuals who considered that the guidance on assessing seriousness was not helpful, comments were made that culpability should be given more weight, that the language of the guideline is too legalistic and not accessible to those with additional support needs in particular, and that the concept of harm should be wider than just physical harm (a view also espoused by Howard League Scotland and the Faculty of Advocates).

Four individual respondents considered that the impact on the victim should be recognised and emphasised within the guideline. Respondent Fergus Whyte considered that a clearer distinction should be made between harm and culpability.

The organisations who disagreed that the reference to culpability and harm in assessing seriousness was helpful were Scottish Women's Aid and Community Justice Scotland. For Community Justice Scotland:

Responsibility is a key issue missing from the guidelines. Some people such as those with learning difficulties are vulnerable to exploitation and manipulation which may influence things like being in a gang (which is identified an aggravating factor in the guidelines).

The inference is that a person is a conscious rational actor when it comes to decision-making, whereas they may in fact be someone with unresolved trauma for example in relation to Adverse Childhood Events (ACEs). Also, where do issues such as prior victimisation come under consideration, e.g. in relation to people who are themselves victims of domestic violence?

Scottish Women's Aid noted their concern with the concepts of seriousness, culpability and harm. They raised the point that most domestic abuse related offending is prosecuted under summary procedure and as such may be deemed 'less serious' - which minimises the significant harm caused to women and children. They considered that culpability stemming from reckless conduct could be strengthened within the Guideline. They were concerned that the interpretation of harm arising from the Guideline's definition may result in lenient sentencing of domestic abuse. Lastly, they

considered that the need to impose civil protection orders and community-based punishment should be fully considered here.

Five organisations emphasised their support for the guidance on seriousness. Other specific points raised by organisations included questioning how the mental attitude of the offender would be discerned (Faculty of Advocates), whether there could be difficulty distinguishing between corporate entities and individuals in the context of environmental offences (Chartered Institute of Waste Management, hereinafter CIWM), public understanding of legal terminology (Law Society of Scotland), and whether a deeper examination was required in relation to how the culpability of young offenders is assessed, given their maturity (Centre for Youth and Criminal Justice, hereinafter CYCJ).

2. Is the approach to avoid double-counting set out in the guideline appropriate?

<b>Answer</b>	<b>Individuals</b>	<b>Organisations</b>
Yes	12	10
No	5	4
No answer	3	5

Nine individuals left further comments in response to this question, four emphasising their general support of the guideline. Two individuals considered that this would be offence dependent (a view echoed by three organisations), and respondent Meg Thomas noted the potential confusion of this terminology (despite her own experience of working in the criminal justice system for 17 years).

Four organisations echoed their support for the approach adopted in relation to double-counting.

Those organisations who disagreed that the approach to avoid double-counting was appropriate were the three responses from SCID (counted as a single response) and the responses from CYCJ, VOCFS and Scottish Women's Aid. For CYCJ, reference to double-counting "ought to be more explicit at an earlier stage of the final version. Providing a real-life case scenario would be beneficial in clarifying the Sentencing Council's position on this." Scottish Women's Aid considered that the Guideline takes a different approach towards double-counting from the consultation, which they find confusing.

The Law Society of Scotland noted that the term 'double-counting' does not appear in the Guideline and that although they understand this terminology, others may not.

## 4.0 AGGRAVATION AND MITIGATION

Six questions were asked in relation to aggravation and mitigation:

1. Is the guidance on aggravating and mitigating factors helpful?

Answer	Individuals	Organisations
Yes	11	13
No	7	4
No answer	2	2

Ten individuals provided relevant further comments to this question. The three respondents affiliated with SCID put forward the view that too much emphasis is currently placed on mitigation. Another respondent considered that not enough emphasis was currently put on the effect that prison has on a child of the family, regardless of whether that parent looks after the child full time or not.

Responding as an individual, Dr Carly Lightowlers of the University of Liverpool reflected on her own extensive research in this area. Specifically she has carried out work which has considered an offender's behaviour when acting under the influence of drink and/or drugs at the time of the offence. Dr Lightowlers makes five recommendations to the Council: include a clear explanation, to which the guideline can point, as to why alcohol or drug intoxication constitutes an aggravating factor; provide a clear explanation, to which the guideline can point, for the lack of distinction between prescribed and recreational substances (both illicit and licit); provide a clear definition or explanation of what is meant by "under the influence" to assist sentencers achieve consistency in interpretation; clarify how overlap with mitigation on the basis of "The offender has demonstrated determination/motivation to address his or her personal problems and to change their offending behaviour, including addressing any drug, drink or mental health issues" is to be reconciled; facilitate ongoing data capture to monitor how the aggravation of intoxication is used to modify sentence outcomes.

Sixteen comments were made in relation to this question from organisational responses. Of the four who did not consider the guidance on aggravating and mitigating factors to be helpful (three SCID, CYCJ, VOCFS, and Scottish Women's Aid), the reasons provided were that too much emphasis is placed on the offender's family (and not enough on the victims of crime) (SCID) and that the first sentence of paragraph 21 requires clarification in order to make "clear that the impact and details of the offence are being affected, rather than the offence itself would be clearer for those who may read this guidance" (CYCJ).

Comments from the organisations who did find the guidance helpful nevertheless pointed to points where detail could be added such as environmental offences (CIWM), the process (Community Justice Glasgow) and how aggravating factors which are not proved beyond a reasonable doubt are treated by the court (Howard League Scotland).



Although supportive of the guidance offered on aggravation and mitigation, the Faculty of Advocates also suggested the following amendments to the Council:

In our opinion, however, the manner in which steps 1 and 3 of the sentencing process have been divided is, in part, uneasy. For example, it is (correctly) emphasised in step 3 that a factor which is integral to an offence should not be considered an aggravating factor at step 3, it having properly been considered at step 1. A simple example may be driving with blood alcohol above the prescribed limit – that the offence was committed after having consumed alcohol is integral to the offence and so should not be considered an aggravating factor at step 3. The possible difficulty that arises is that step 1, as presently drafted, does not stipulate any particular issues to consider beyond culpability and harm. If factors are to be disregarded at step 3 to avoid double counting, it may be that there should be some clear instruction to consider those particular factors at step 1.

We also wonder whether, given the statutory basis of the Annex B aggravations, they might more helpfully be put first, in Annex A, with Annexes B and C then considering the more ‘general’ aggravating and mitigating factors.

## 2. Are the aggravating factors set out in Annex A appropriate?

Answer	Individuals	Organisations
Yes	12	16
No	4	0
No answer	4	3

Seven relevant comments were made by individual respondents. Those affiliated with SCID called for a separate examination of driving offences and the aggravating factors which can be involved in these (this point was also made by the three SCID organisational responses).

One individual respondent called for more reference to be made to the victims of crime.

Dr Lightowlers disagreed with intoxication being included as an aggravating factor and commented that: “it certainly should not be considered a mitigating factor, but understanding addiction and offering treatment instead of a harsher punishment would most likely be more beneficial to society.”

Another respondent was of the view that it would be useful to “clarify the difference between an accidental or unintentional misuse of drugs and cases in which self-administration was voluntary or conscious. It may also be worth considering the degree to which demonstrable addiction affects the voluntariness of administration and therefore the applicability of this factor (though this might be considered under the mental illness mitigating factor).”

Sixteen further comments were made by those acting as organisational representatives. Community Justice Scotland considered that the relationship

between mitigation and aggravation could be made clearer. Community Planning Aberdeen Community Justice Group noted that the Guideline currently uses a mix of bullet points and complete sentences, whereas a consistent presentation would be more helpful. Whilst supporting the guidance offered, Families Outside raised concerns about the terminology "operating in a group or gang" and "offence committed whilst under the influence of drink or drugs". For them:

participation in gang activities can be through fear or coercion, while addiction - if this were behind the consumption of alcohol or other drugs - should be treated rather than punished. The context of these two aggravating factors should therefore be explored rather than presumed to be aggravating.

The Faculty of Advocates warned against a potential overlap between the factors highlighted in step 3 and those considered in step 1:

We do wonder if it may be possible to expand slightly on step 1 so that a fuller, general consideration of factors relevant to the seriousness of the offence can take place; before then moving on to consider solely aggravating and mitigating factors at step 3. For example, to target deliberately a vulnerable victim seems like a factor relevant to culpability (deliberate targeting) and harm (the exploited vulnerability of the victim). Thus, that is perhaps something which should, specifically, be discussed at step 1 rather than at step 3.

It is also not immediately apparent why the 'financial gain' aggravating factor has the additional proviso in parenthesis that it is specifically not an aggravating factor if the financial gain is an inherent part of the offence itself. The note which precedes and introduces the list of general aggravating factors specifies that integral features of offences are to be considered at step 1 and not considered at step 3. That is to avoid double counting. The Faculty considers that putting that proviso in the heading of the annex is sensible.

However, giving the 'financial gain' aggravating factor the extra text in parenthesis potentially confuses, when the proviso is not repeated in respect of the other general aggravating factors which may also, in certain cases, be integral parts of the offence. For example, the use of a weapon to frighten or injure a victim is an integral feature of some commonly seen offences. The proviso being absent from that factor, but present for the 'financial gain' factor, may lead to confusion as it may seem that particular emphasis is being placed on the financial gain aggravating factor at the expense of the other potentially aggravating factors which may, in certain cases, be understood as integral features of the offence already considered at step 1 of the sentencing process.

Scottish Women's Aid were of the overall view that the Guideline pay too much attention to mitigatory factors and not enough to the victims of crime. In relation to this question specifically the commented that:

While paragraph 23 of the Guidance indicates that the aggravating factors in Annex A are not listed in any order of priority, and the lists are not intended to be in any way exhaustive, the wording is not repeated in the text for Annex B and should likewise be clearly stated there. Also, for the avoidance of doubt, this information should be repeated at the beginning of Annexes A and B themselves....We could not envisage a situation whereby a court would not take account of an offender's relevant criminal history, or where repeated relevant offending would not influence sentencing. Consideration of these matters should always be an aggravating factor and this should not be a discretionary option for the court. ..The distinction that these factors do not increase the seriousness of the offence but the commission of the offence is confusing. Both matters are important, particularly if the offender is on license and goes on to repeat previous offending behaviour which displays a contempt for the victim and the criminal justice process.

### 3. Is it helpful to include the statutory aggravations at Annex B?

Answer	Individuals	Organisations
Yes	12	16*
No	2	0
No answer	6	4*

\*: Includes multiple, conflicting responses from a single organisation.

The only relevant comment from an individual respondent came from Fergus Whyte who questioned whether the aggravations in Annex B could be merged with the list of factors relevant to aggravating the offending.

Sixteen comments were made by those responding as organisations. Eight of these comments reiterated general support for Annex B. The complexity of the language of the Guideline was raised again by CYCJ and the Joint Faiths Board on Community Justice noted that including internet links in Annex B would be helpful. The Law Society of Scotland asked how the SSC plan to "future proof" the Guideline:

We are aware that none of items included in the list included in the Annexes are intended to be prescriptive. How does this allow for additions/ deletions, for instance, when other statutory aggravations may be created? Should this be specifically stated?

### 4. Should any additional aggravating factors (statutory or non-statutory) be listed?

Answer	Individuals	Organisations
Yes	12	7
No	4	8
No answer	4	4

Amongst the nine comments from individual respondents were the suggestions that the list should be exhaustive, that it should include the intention to start a fire, that severe economic and/or psychological impact of an offence should be included and

that references to “transgender identity” should be changed to “gender identity”. Those with affiliations with SCID suggested driving specific aggravations which could be added, as did the three organisational responses from SCID.

Seven organisations emphasised their general support for Annex B in their further comments. Community Justice Edinburgh were of the view that “Consideration should be given to including an example where a person is subject to a Community Payback Order and has repeatedly breached it.”

5. Are the mitigating factors set out in Annex C appropriate?

Answer	Individuals	Organisations
Yes	9	11
No	7	5
No answer	4	3

Ten individual respondents commented. Those affiliated with SCID emphasised that a balance must be struck in order to recognise the harm caused to victims mitigating factors and aggravating factors for victims. The three organisational responses from SCID made similar comments.

Individual respondents’ comments also included the opinion that ACEs should be included as mitigation. This view was also espoused by Community Justice Scotland in their response.

The five organisations who did not feel that the mitigating factors set out in Annex C were appropriate were Scottish Women’s Aid, Community Justice Glasgow, Community Justice Scotland, Wellbeing Scotland, and the Joint Faiths Boards on Community Justice. Community Justice Glasgow explained that in their view:

While most of the mitigating factors set out in Annex C are appropriate, “The offender is in, or has good prospects of, employment” is not considered appropriate. This could have the potential to appear to be discriminating against those who have less good employment opportunities or lower socio economic status when making sentencing decisions. Such a narrow view on value to employment prospects does not take into account the wide ranging factors involved in employability, and does not take into account positive steps individuals maybe taking towards employability.

Scottish Women’s Aid were of the view that further clarity was required about how mental illness can operate as mitigation. They also point out that the effect of the sentence on the family (and the employment status of the offender) is particularly complex in the context of domestic abuse cases, and that often there can be civil actions about child custody going on concurrently. They also voiced their scepticism over apparent behavioural changes being viewed as mitigatory and pointed out that a lack of previous convictions is not an indication of previous good character.

Although considering the mitigating factors set out in Annex C appropriate, Community Justice Edinburgh similarly were of the view that the word “especially” should be removed from the first example in Annex C and further commented that: “People already marginalized and who do not present well are unlikely to benefit from a mitigating factor such as “the offender is in, or has good prospects of, employment”. Therefore, there is a risk that the mitigating factors are applied superficially, and those with less to lose are treated more harshly, thus becoming more marginalized.”

Families Outside reiterated their concerns about the damage that a prison sentence can inflict on an offender’s family.

The Law Society of Scotland commented:

We refer to the justification for an absolute discharge which is still a sentencing decision reached after consideration of all the facts and circumstances of the case.

Three organisations offered general support for Annex C in their comments.

#### 6. Should any additional mitigatory factors be listed?

<b>Answer</b>	<b>Individuals</b>	<b>Organisations</b>
Yes	12	5
No	4	9
No answer	4	5

Eleven individual respondents made further comments here. Two respondents considered that the offender’s involvement in political protests/civil disobedience should be considered as mitigating circumstances. Three respondents considered that it should be considered mitigatory if the offender is now involved with positive community work, including charity work, and one respondent considered that participation in restorative justice practices should be considered as mitigation. Two respondents were of the view that any ACEs of which the offender had experience should be listed. Those affiliated with SCID considered that, in the context of causing death by driving offences, killing a “nearest and dearest” should act as mitigation and should be included in the Guideline. This point was also raised by the three respondents answering on behalf of the organisation.

Three organisations reiterated their general support for the existing factors listed in the Guideline, and Social Work Scotland noted that the Council should avoid giving the impression that the list is exhaustive.

Community Planning Aberdeen Community Justice Group and CYCJ both considered that the age of an offender should be considered explicitly (with CYCJ also noting that whether pressure has been exerted on the offender by third parties to the offender should also be considered). The Faculty of Advocates commented:

We consider that there should be specific mention of consideration of the background of the offender and of the general personal circumstances of the offender. For example, the fact that the offender has, themselves, been a victim of crime in their formative years may be seen as a mitigatory factor. Similarly, if an offender has, for example, stolen in order to feed themselves or their family while in dire straits. The circumstances in which an offender finds themselves, and an offender's background, are factors which are not wholly within the control of the offender and which can, on occasion, help to understand and mitigate their offending. We would therefore recommend the following additional mitigating factor:

The offence has been committed in extenuating circumstances (e.g. a theft committed to provide food for a destitute offender's family).

## 5.0 HEADLINE SENTENCE AND MULTIPLE OFFENDING

Two questions were asked in relation to headline sentence and multiple offending:

1. Is the guideline on the selection of the headline sentence helpful?

Answer	Individuals	Organisations
Yes	13	14*
No	3	4*
No answer	4	2

\*: Includes multiple, conflicting responses from a single organisation.

Eight individual respondents made further comments. Six respondents considered that further clarification was required, including more detail on how a sentence was arrived at. For one respondent:

The notion of a headline sentence combining elements of aggravation (or mitigation) related to both the offending and the offender is problematic for a variety of reasons...as it potentially aggregates together a great deal of information and mixes together a greater [number] of factors without attributing clear weight to them.

One individual respondent specifically proposed that a flow chart could be used in order to assist public understanding.

The four organisations who did not consider the guidance on headline sentences were one of the SCID responses, Community Justice Scotland, Scottish Women's Aid, and the Joint Faiths Board on Community Justice. Community Justice Scotland noted that they would like reference to the Risk Management Authority within the Guideline. Scottish Women's Aid considered that step 2 requires further clarification and that paragraph 20 is particularly unhelpful in its current form given some of the recent sentences handed down to those convicted of domestic abuse. They also refer to their broader concerns around the extension of the presumption against short term sentences.

Seven organisations considered that more clarification or breakdown was required. For Community Justice Glasgow:

While this section is helpful, it could go further. It explains the options and defines the terms 'consecutive', 'concurrent' and 'cumulo', but does not explain the factors that determine how decisions are arrived at, just that they should be fair and proportionate. Providing more detail around how decisions are made would be helpful.

The Faculty of Advocates raised concern about using the terminology 'headline sentence' and that to:

use the term 'headline sentence' in the guidelines in contexts removed from the section 196 context runs the risk of confusion between the concept of headline sentences as narrowly defined in the caselaw on section 196, and in a broader context as intended, it seems, within the draft guideline.

Four organisations offered general support for the guidance provided by the Guideline.

## 2. Is the guidance on multiple offending helpful?

Answer	Individuals	Organisations
Yes	8	12*
No	7	4*
No answer	5	4

\*: Includes multiple, conflicting responses from a single organisation.

Nine further comments were made by individuals in relation to this question. Six espoused the view that more clarification on multiple offending was required. For one respondent, the terminology of ‘fair and proportionate’ requires to be unpacked more specifically and another felt that more information on in cumulo sentences:

In cumulative sentencings, it may be useful for the judge to identify, isolate and focus on a lead offence and indicate what the sentence would have been for that offence in isolation before then considering what additional period is necessary to reflect the balance between the presence of other offences and the principles of totality and proportionality. This is likely to assist on appeals and in other contexts by giving a clear indication of how the lead sentencing and the cumulative element have come together.

The five organisations who considered that the guideline on multiple offending was not helpful were two SCID responses, Community Justice Glasgow, Scottish Women’s Aid, and CYCJ. Community Justice Glasgow considered that the rationale behind the decision-making process in sentencing could be better communicated and CYCJ raised a separate concern about the accessibility of the Guideline to those with additional support needs. Scottish Women’s Aid questioned who the sentence is fair and proportionate to, noting the tensions between what a victim and offender considers to be fair. Scottish Women’s Aid were also of the view that this section should not only explain the options open to the court, but also explain why the court considers a concurrent custodial sentence to be more appropriate than a consecutive sentence and why one disposal option has been selected over another.

However, despite agreeing that the guidance on multiple offending was helpful, most organisations considered that further clarity was required, especially in relation to consecutive and concurrent sentences. This view was espoused by Howard League Scotland and the Faculty of Advocates.

The Joint Faiths Board on Community Justice questioned the role of discretion, especially in matters involving young offenders.



## 6.0 SENTENCING DISCOUNT

Respondents were asked one question in relation to the sentence discount: Is step 5 on sentence discount helpful?

Answer	Individuals	Organisations
Yes	7	12
No	7	4
No answer	6	3

Eight individuals provided further comment to this, however, six of these comments related to more general views on the sentencing discount and its appropriateness. Two individuals considered that the Guideline could set out more clearly the maximum and minimum degree to which the discount can operate.

The four organisations who considered that step 5 was not helpful were three of the SCID organisational responses, VOCFS, Scottish Women's Aid, and CYCJ. The CYCJ were of the view that more could be done to assist the understanding of those with additional needs. For VOCFS:

From a victims' perspective, a reduction of a headline sentence can be distressing to them, and their families, and can leave many questions about whether justice has been met or not. Careful consideration on how this is communicated to the victims must be considered.

Four organisations reiterated a general support for step 5. The Faculty of Advocates and Howard League Scotland both considered that the Guideline provides an opportunity to outline justification for the discount, something which is perhaps necessary given public levels of understanding.

Community Justice pointed specifically to the justification that it lessens the impact on witnesses and complainers who will not be required to give evidence during a trial.

The Law Society of Scotland were of the view that it could be helpful to explicitly include the fact that the discount also applies to offences under the Road Traffic Act.

Although generally supportive of step 5, the Faculty of Advocates further commented that:

We also consider that the guideline is unfortunately phrased where it suggests that the timing of the plea may reduce the headline sentence – that may give the erroneous impression that the headline sentence is reduced by the early plea. In our understanding, a level of discount is deemed appropriate by the court in consideration of the timing of the plea and that level of discount is then applied to the headline sentence to give a resultant sentence to be served. The timing of the plea and any question of discount is not a relevant consideration in the fixing of the headline sentence as discussed in *Gemmell*. It may be this is an issue that arises from the

narrow use of 'headline sentence' in *Gemmell*, and the broader usage envisioned by the guideline.<sup>2</sup>

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<sup>2</sup> This refers to the case of *Gemmell v HM Advocate* 2012 J.C. 223 which considered the appropriate approach to sentencing discounts. The case held that it is for the sentencing judge to decide whether a discount is to be applied and what that discount should be. They must also set out the sentence would have been in the absence of any discount applied. The factors relevant to sentence discounting are also considered.

## 7.0 TIME SPENT IN CUSTODY

Respondents were asked one question in relation to time spent in custody: Is step 6 on consideration of time spent in custody helpful?

Answer	Individuals	Organisations
Yes	13	13*
No	3	3*
No answer	4	4

\*: Includes multiple, conflicting responses from a single organisation.

Seven individuals made further comments here. Three offered general support of step 6. The remaining four individuals provided broader opinions on the appropriateness of taking into account time already spent in custody.

The three organisations who did not consider step 6 to be helpful were one of the SCID organisational respondents, Scottish Women’s Aid, and the Joint Faiths Board on Community Justice, who raised a broader point about whether it would be more appropriate to date a sentence from the point that a prisoner is taken into custody. For Scottish Women’s Aid:

The explanation of the requirements on the court in these circumstances is not clear. While the court must “have regard” to this mechanism, the consultation paper, at page 22, suggests that the “backdating” of the custodial sentence is actually not mandatory but simply an option open to the court, meaning that the court could choose not to take custody into consideration. This needs to be explicit in the Guidance.

The rationale behind the court having the option to use this provision is also not clear. If the offender was judged too dangerous for release into the community before trial, either on bail or subject to a police undertaking, then this is a public protection issue. Logically, therefore, the time that the offender spent on pre-trial remand should not be deducted from the subsequent sentence imposed as a result of their offending. Their conduct and the nature of the offence has resulted in their remand so the eventual sentence should not be compromised as a result.

Overall thirteen organisations made further comments. Six offered general support for step 6. The Faculty of Advocates suggested that more could be done in step 6 of the Guideline to highlight what this means in practice:

It may be, in that regard, that reference could usefully be made to the reasoning contained in *Martin v HM Advocate* 2007 JC 70. To assist with public understanding, it could make clear that the idea is to, as much as possible, prevent double counting against the offender by providing them with ‘full credit’ for time spent on remand at an earlier stage in proceedings.

## 8.0 ANCILLARY ORDERS

Respondents were asked one question in relation to the ancillary orders: Is the list of ancillary orders available at Annex D helpful?

<b>Answer</b>	<b>Individuals</b>	<b>Organisations</b>
Yes	13	16
No	2	0
No answer	5	3

Seven individuals left further comments relating to this question. Three individuals and those acting on behalf of SCID responded that they would have liked to have seen the inclusion of forfeiture of a motor vehicle (legislated for under the Road Traffic Offenders Act 1988) included within the list.

Eight organisations echoed a general support of Annex D within their further comments. Community Planning Aberdeen Community Justice Group were of the view that the link between the orders included and their role in reduced harm/reoffending could be made clearer within the Guideline

CIWM pointed to the fact that none of the orders pertained to environmental harm or offences.

## 9.0 IMPOSING SENTENCE AND GIVING REASONS

Respondents were asked one question in relation to imposing sentence and giving reasons: Is step 8 on imposing sentence and giving reasons helpful?

<b>Answer</b>	<b>Individuals</b>	<b>Organisations</b>
Yes	14	16
No	2	0
No answer	4	3

Ten individual respondents made further comments. Almost all reiterated the need for reasons to be provided for the sentence which is imposed. Two respondents also urged that individual aspects of cases should also be emphasised.

Twelve further comments were made by organisations. Four of these comments offered general support for step 8. Community Justice Glasgow considered that the Guideline explained especially well why sentencing guidelines may not be followed. Three organisations (Community Justice Scotland, CYCJ, and Howard League Scotland) were all of the view that keeping a written record of the reasons behind the sentence being imposed would be helpful, for victims, to guide the media, and also for future data analysis which could inform policy development.

## 10.0 THE GUIDELINE OVERALL

Four questions were asked in relation to the guideline overall:

1. Is the overall sentencing process set out in the guideline appropriate?

Answer	Individuals	Organisations
Yes	9	12
No	4	3*
No answer	7	5*

\*: Includes multiple, conflicting responses from a single organisation.

Seven individuals made further comments here, three of which espoused the view that further clarification was required on the sentencing process. One felt clarification was required on how mitigating and aggravating factors are distinguished.

The three organisations who did not consider the overall sentencing process set out appropriate were one of the SCID organisational respondents, Wellbeing Scotland, and the Joint Faiths Board on Community Justice. The SCID respondent commented that more should be added to the Guideline on the victim notification scheme. Wellbeing Scotland commented:

Sentences are often restricted to a range open to the court which is often not appropriate to the crime despite the analysis of aggravating factors and harm to the victim. This area of sentencing should be reviewed.

Overall, twelve further comments were made by organisations. Three offered general support for how the sentencing process is set out in the Guideline. Families Outside specifically pointed to the usefulness of including the consideration which must be given as to whether or not a sentence will have the effect of a child being placed in care. Howard League Scotland suggested that an additional annex could be added to the Guideline on all available sentencing options, from absolute discharge through to life sentences, in order to avoid the Guideline as being interpreted as only applying to custodial, rather than all, sentences.

2. Are there any additional steps which should be included?

Answer	Individuals	Organisations
Yes	11	9
No	3	6
No answer	6	4

Nine individual respondents provided further comments to this question. Two respondents considered that it would be useful to include more on the offender's history and background, including any ACEs they may have. Four respondents commented that further clarity and explanation of the factors which influence

sentencing decision-making would be helpful, especially for victims of crimes and their families.

Twelve further comments were made by organisations. The future harm to victims and victims' families was mentioned here by VOCFS, Wellbeing Scotland, and Families Outside. The organisational responses from SCID also noted that it would be useful for families to be notified more explicitly about when an offender is entitled to early release. Scottish Women's Aid advised that:

the information available to the court is crucial in their decision-making process, in relation to seriousness, culpability and risk. Information can be provided through the police statement, risk assessments prepared by advocacy support organisations, Women's Aid support workers and appropriate and informed reports from social work. All of these sources are vital in giving the court as much information as possible to support their determination of a sentence that will act not only as a deterrent but also protect vulnerable women and children.

The Faculty of Advocates considered that reference to sections 204(2) and 207(3) of the Criminal Procedure (Scotland) Act 1995 could also be useful for inclusion within the Guideline<sup>3</sup>. Community Planning Aberdeen Community Justice Group were of the view that a useful addition to the Guideline could be further information on the journey of a complaint through the criminal justice system.

### 3. Are the steps in appropriate order?

Answer	Individuals	Organisations
Yes	13	14*
No	2	2*
No answer	5	4

\*: Includes multiple, conflicting responses from a single organisation.

Six individual respondents made further comments. Only one comment made explicit reference to the order of the steps of the Guideline and this respondent was of the view that statutory aggravations should be the first thing which is considered.

SCID and Community Justice Scotland did not consider that the steps were in appropriate order. Community Justice Scotland were of the view that the current sequencing could be improved, in particular the fact that aggravation and mitigation appears before headline sentence. For them, this would be better placed before selecting the sentencing range.

The Faculty of Advocates, whilst broadly supporting the current order, commented:

<sup>3</sup> Section 204(2) and 207(3) of the Criminal Procedure (Scotland) Act 1995 direct that a court shall not pass a sentence of imprisonment on a person of or over twenty-one years of age who has not been previously sentenced to imprisonment unless it is considered that no alternative appropriate method of sentencing exists.

it may be that some of the factors discussed in step 3 may be appropriately mentioned in step 1. It may also be that the consideration of multiple sentences, discussed in step 4, should take place after consideration of discounting as discussed in step 5, or that discounting is a factor which can make sense to be considered before or at the same time as considering if and when to impose sentences consecutively, concurrently, or cumulatively.

Nine further comments were made by organisations, most of which reiterated general support for the order in which the steps currently appear.



4. Are the steps and accompanying explanatory sections expressed clearly and accurately?

Answer	Individuals	Organisations
Yes	10	13*
No	4	2
No answer	6	5*

\*: Includes multiple, conflicting responses from a single organisation.

Three relevant further comments were made by individual respondents. These pertained to the accessibility of the Guideline, the language being used and how easy it was to follow. This included one respondent who had experience of working in the criminal justice system.

Ten further comments were made by organisations. The two organisations who did not consider that the steps and accompanying explanatory sections were expressed clearly were Scottish Women's Aid and the Joint Faiths Board on Community Justice. Scottish Women's Aid elucidated:

There must be an explanation for the public and victims about the length of a custodial sentence that the offender will actually serve. This must explain that "life does not actually mean life" and the offender may be released early on parole. It should also cover how release of short-term and long-term prisoners operates in practice, including monitoring on release and return to prison, or not, as a result of further offending.

VOCFS voiced similar concerns to Scottish Women's Aid in their response. Although agreeing that the steps were clearly expressed in the Guideline, the issue of the complexity of the language being used in the Guideline was raised by Community Justice Scotland and CYCJ. The Faculty of Advocates considered that more explanation could be provided as to what section 210 means in practice. Four organisations reiterated a general support for how the sections are currently expressed in the Guideline.

## 11.0 POTENTIAL IMPACTS OF THE GUIDELINE

Four questions were asked in relation to the potential impacts of the guideline:

1. Do you agree or disagree that the guideline would lead to an increase in public understanding of how sentencing decisions are made?

<b>Answer</b>	<b>Individuals</b>	<b>Organisations</b>
Agree	11	13
Disagree	7	3
No answer	2	3

Twelve individual respondents made further comment here. On reiterated concern about the language of the Guideline being inaccessible (a view also shared by Wellbeing Scotland). Three respondents emphasised general support. Three made specific reference to concerns over road traffic offences and two recognised the role that the media have to play in the communication of sentencing to the public. This concern was also evident amongst the responses from organisations.

The organisations who disagreed that the Guideline would lead to an increase in public understanding were Families Outside, Wellbeing Scotland, and CYCJ. Families Outside were of the view that:

The extent of public understanding depends on how thoroughly they make an effort to learn about how decisions are made. The guidelines being available will only increase public understanding if they read them and then see them working in practice (e.g. through court open days). With most information to the public reaching them via the media, which often operates to sell itself rather than to present a methodical account of how sentencing decisions are made, we are not optimistic that the guidelines will have a measurable impact on public understanding more broadly.

Howard League Scotland considered that the methods of communication adopted by the SSC would be key to facilitating public understanding of sentencing matters:

Information should be provided in a variety of formats (visual and oral) to so as to be understood by those with literacy issues. It should be communicated widely and actively, rather than being only available on the Scottish Sentencing Council's website for example. A feedback mechanism should also be included, whereby members of the public can make suggestions for improvements with a view to it being updated on a regular basis.

2. Do you agree or disagree that the guideline would lead to an increase in public confidence in sentencing?

Answer	Individuals	Organisations
Agree	7	10*
Disagree	7	4
No answer	6	6*

\*: Includes multiple, conflicting responses from a single organisation.

Thirteen individual respondents left further comments. Amongst those who disagreed that the Guideline would lead to an increase in public confidence in sentencing, the view was raised that the public would not read the Guideline, which would limit any potential impact and again, the role of the media was noted:

Again, the public rely on the media for information so confidence in the system is borne through the media portrayal. The media sensationalise and are more likely to present a story on lenient sentencing than an expected sentence.

Families Outside, CYCJ, Howard League Scotland, and the Joint Faiths Board on Community Justice all disagreed that the Guideline would lead to an increase in public confidence in sentencing. For Howard League Scotland, public confidence can only be achieved if additional methods are also used to engage with the public, such as public education. Criminal Justice Scotland and Criminal Justice Edinburgh were of a similar view, that the Guideline would need to be supplemented by additional efforts to engage with the public, in order for public confidence to be affected. Six organisations also spoke of the need to properly disseminate the Guideline in order for it to have an impact on the public.

### 3. What costs (financial or otherwise) do you see arising from the introduction of this guideline, if any?

Thirteen individual respondents commented here. Four were of the view that there would either be no associated costs, or they would not be able to say what the costs could be. One respondent considered that dissemination costs would be involved (something that was mentioned by four organisations also). Four individual respondents considered that there would be costs associated with the initial implementation of the Guideline. The three individual respondents affiliated with SCID all considered that there would be an increase in appeals, which would be a cost of the Guideline, although no supporting evidence was provided for this position. The official organisational response from SCID also mentioned an increase in appeals by offenders as did the response from VOCFS.

Conversely, The Faculty of Advocates were of the opinion that there would be fewer appeals as a result of the Guideline and as such considered that there would be savings for the justice system arising out of implementation of the Guideline.

Two organisations (Families Outside and CYCJ) considered that there would be an increase in the amount of time spent in court. The remaining five organisations who commented did not consider that there would be any additional costs incurred by the Guideline.

#### 4. What benefits do you see arising from the introduction of this guideline, if any?

Fourteen individual respondents answered this question. Two considered that consistency in sentencing would be achieved by the Guideline. One respondent considered that the Guideline would offer the media a template on which better reporting on sentencing matters could be based, something they considered to be positive. Better general understanding and understanding for those working in the criminal justice system was mentioned by two respondents. An increase in public trust and understanding was mentioned by a further two respondents. Six did not consider that the Guideline would give rise to a specific benefit.

Eighteen organisations addressed this question. The issue of increased awareness amongst victims, those working in the criminal justice system and the public more generally was the most commonly cited benefit of the Guideline, mentioned in nine of the 16 comments. Transparency and clarity was mentioned by three organisations (Howard League Scotland, the Law Society of Scotland, and Criminal Justice Edinburgh).

## 12.0 FINAL COMMENTS

Finally, respondents were asked if they would like to make any further comments. Fifteen individual respondents made further comments, most of which provided general views on sentencing or included future ideas for the SSC.

Sixteen further comments were made by organisations. These also included recommendations to the SSC. The Children and Young People's Commissioner for Scotland submitted their view about the importance of adopting a human rights-based approach to sentencing in Scotland.

VOCFS emphasised the importance of making the Guideline accessible to everyone with language, literacy and visual impairments all taken into consideration. They also questioned whether there exists scope for changing the Guideline in the future, if necessary:

For example, we know that crime types evolve due to technology, and therefore judging and assessing a sentencing decision for a specific crime, while keeping the process consistent, is a challenging [juggling] act.

Three organisations (Community Planning Aberdeen Community Justice Group, Social Work Scotland and Families Outside) voiced concern over the use of the terminology 'offender' which has been adopted by the Guideline. Community Planning Aberdeen Community Justice Group suggested that this could be replaced by 'people convicted of an offence'.

## **ANNEX 1: ORGANISATIONS RESPONDING TO THE CONSULTATION (20)**

British Transport Police

Centre for Youth and Criminal Justice

Chartered Institute of Waste Management

Children and Young People's Commissioner for Scotland

Community Justice Edinburgh

Community Justice Glasgow

Community Justice Scotland

Community Planning Aberdeen Community Justice Group

Faculty of Advocates

Families Outside

Howard League Scotland

Includem

Joint Faiths Board on Community Justice

Law Society of Scotland

Social Work Scotland

Scotland's Campaign Against Irresponsible Drivers

Scottish Environmental Protection Agency

Scottish Women's Aid

Victims' Organisation Collaboration Forum Scotland

Wellbeing Scotland

## ANNEX 2: DRAFT SENTENCING PROCESS GUIDELINE

The sentencing process  
Draft sentencing guideline



# 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.

<b>THE SENTENCING PROCESS</b>	
<p><b>ARRIVING AT THE HEADLINE SENTENCE</b></p> <p><b>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).</b></p> <p><b>In arriving at the headline sentence the court should also:</b></p> <ul style="list-style-type: none"> <li>• <b>have regard to any sentencing guideline or guidelines which apply to the case; and</b></li> <li>• <b>ensure that the headline sentence is fair and proportionate.</b></li> </ul>	<p><b>1. ASSESS SERIOUSNESS</b></p> <p>Consider how serious the offence is, in terms of culpability and harm.</p>
	<p><b>2. SELECT SENTENCING RANGE</b></p> <p>Select the sentencing range having regard, where applicable, to:</p> <ul style="list-style-type: none"> <li>• the range of appropriate sentences set out in any relevant sentencing guidelines;</li> <li>• any relevant guideline judgments; and</li> <li>• any relevant legislation, including any maximum and minimum sentence, the powers of the court, and any statutory presumptions relating to sentencing.</li> </ul>
	<p><b>3. CONSIDER AGGRAVATING AND MITIGATING FACTORS</b></p> <p>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.</p>
	<p><b>4. DETERMINE HEADLINE SENTENCE</b></p> <ul style="list-style-type: none"> <li>• 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.</li> <li>• In cases of multiple offending – where the court is considering more than one offence committed by the offender - ensure that the <i>overall</i> headline sentence selected is fair and proportionate.</li> </ul>

<p><b>OTHER CONSIDERATIONS</b></p> <p><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></p>	<p><b>5. TAKE A GUILTY PLEA INTO ACCOUNT</b></p> <p>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.</p>
	<p><b>6. CONSIDER TIME SPENT IN CUSTODY</b></p> <p>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).</p>
	<p><b>7. CONSIDER ANCILLARY ORDERS THAT MAY BE IMPOSED ALONGSIDE THE SENTENCE</b></p> <p>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.</p>
<p><b>SELECT SENTENCE TO BE IMPOSED</b></p>	<p><b>8. IMPOSE SENTENCE AND GIVE REASONS</b></p> <p>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).</p>

### 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

The sentencing process  
Draft sentencing guideline

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ISBN: 978-1-912442-11-9

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**ISBN: 978-1-912442-28-7**