

Sentencing Guidelines Committee



Overarching Sentencing Guideline

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Contents

Equal Treatment.....	7
Stages of Sentencing.....	8
Stage One: Identifying Sentencing Guidelines.....	9
Sentencing guidelines – Falkland Islands.....	9
Sentencing guidelines – England and Wales.....	9
Stages Two to Four: Determining offence category, starting point and aggravating/mitigating factors.....	11
Specific Offence Guideline.....	11
General Principles Guideline.....	11
Victim Personal Statements.....	11
Stage Five: Reduction in Sentence for Guilty Plea.....	13
Key principles.....	13
Determining the level of reduction.....	14
Applying the reduction.....	14
Exceptions.....	15
Mandatory life sentences for murder.....	16
Stage Six: Reduction – bail conditions (curfew).....	17
Stage Seven: Totality.....	18
General principles.....	18
Concurrent/consecutive sentences.....	18
Examples.....	21

Stage Eight: Ancillary Orders.....	22
Introduction.....	22
Binding over orders.....	22
Deprivation orders.....	22
Disqualification from driving orders.....	23
Automatic disqualification from driving orders.....	24
Disqualification from working with youths or vulnerable adults.....	24
Forfeiture and destruction orders.....	25
Restitution orders.....	25
Compensation orders.....	25
Restraining orders.....	27
Sexual harm prevention orders.....	27
Automatic Notification.....	28
Licensing Ordinance 1994 - exclusion orders and prohibition orders.....	29
Stage Nine: Reasons.....	30
Financial Penalties.....	32
Fine bands.....	32
General principles.....	32
Obtaining financial information.....	33
Determining relevant weekly income.....	33
No reliable information.....	34
Out of the ordinary expenses.....	35

Unusually low outgoings.....	35
Savings.....	35
Household has more than one source of income.....	35
Potential earning capacity.....	35
High income offenders.....	36
Low income offenders.....	36
Significant commercial benefit.....	36
Fines and custodial sentences.....	36
Payment of fines.....	37
Prosecution Costs.....	38
Principles.....	38
Imposition of Community Orders.....	40
General principles.....	40
Community order levels.....	40
Specific considerations in determining requirements.....	42
Requirements.....	42
Pre-sentence reports.....	43
Imposition of Custodial Sentences.....	44
Has the custody threshold been passed?.....	44
Is it unavoidable that a sentence of imprisonment be imposed?.....	44
What is the shortest term commensurate with the seriousness of the offence?.....	44
Can the sentence be suspended?.....	45

Pre-sentence report.....	46
Suspended sentences: general guidance.....	46
Differences in Maximum Sentence.....	47
Prevalence and Community Impact.....	49
Offences Taken into Consideration.....	51
General principles.....	51
Procedural safeguards.....	51
Application.....	52
Offenders Leaving the Jurisdiction.....	54
Domestic Abuse.....	57
Introduction.....	57
Assessing seriousness.....	57
Aggravating and mitigating factors.....	58
Other factors influencing sentence.....	59
Restraining Orders.....	60
Victim personal statements.....	60
Sentencing Offenders with Mental Disorders and Impairments.....	62
General approach.....	62
Assessing culpability.....	64
Determining the sentence.....	65
Main classes of mental disorders and presenting features.....	66
Children and Young People.....	67

Youth Court.....	67
General approach.....	67
Welfare.....	68
Parental responsibilities.....	71
Determining the sentence.....	71
The seriousness of the offence.....	72
Age and maturity of the child or young person.....	74
Attaining the age of 18 during the proceedings.....	75
Absolute or conditional discharge.....	75
Financial order.....	75
Reparation orders.....	75
Youth rehabilitation orders (YRO).....	76
Custodial sentence.....	78
Breaches and the commission of further offences.....	79
Annex One: General Principles Guideline.....	80
Annex Two: Examples relating to totality.....	84
Annex Three: Compensation starting points.....	89
Annex Four: Main classes of mental disorders and presenting features.....	93

Equal Treatment

1. Equal treatment is a fundamental principle embedded in the Constitution, and is therefore a vital judicial responsibility. When sentencing, the principles of fair treatment and equality will be inherent in everything sentencers do.
2. To ensure equality before the law, a sentencer must be free of prejudice and partiality, and conduct themselves so as to give no ground for doubting their ability and willingness to decide cases solely on their legal and factual merits, as appears from the exercise of an objective, independent and impartial judgment.
3. True equal treatment may not, however, always mean treating everyone in the same way. Treating people fairly requires awareness and understanding of their different circumstances, so that there can be effective communication, and so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage.
4. Sentencers should be aware that the Judicial College (England and Wales) has issued an Equal Treatment Bench Book which covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to consider, wherever applicable, to ensure that there is fairness for all involved in court proceedings.
5. The Equal Treatment Bench Book can be found via the Sentencing Council (England and Wales) webpages: www.sentencingcouncil.org.uk

Stages of Sentencing

In all cases, to determine sentence, these stages must be followed:

Stage One	<p>Identify the applicable sentencing guideline</p> <p>Identify the offence specific guideline that applies or use the general principles guideline.</p>
Stage Two	<p>Determine the offence category</p> <p>Determine the offence category by determining the culpability of the offender and the harm caused by the offending.</p>
Stage Three	<p>Determine the starting point</p> <p>Determine the starting point within the applicable offence category range using the culpability and harm factors. A case of particular seriousness, reflected by multiple features of culpability or harm, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features.</p>
Stage Four	<p>Adjust the starting point for aggravating/mitigating factors</p> <p>Identify aggravating and mitigating factors. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range, either by upward or downward adjustment.</p>
Stage Five	<p>Reduction in sentence for guilty plea</p> <p>Reduction for guilty plea. The court should take account of any potential reduction for a guilty plea.</p>
Stage Six	<p>Reduction in sentence – bail conditions (curfew)</p> <p>The court must consider whether to give credit for time spent on bail with a curfew condition.</p>
Stage Seven	<p>Consider totality</p> <p>For multiple offences consider whether the total sentence is just and proportionate to the overall offending behaviour.</p>
Stage Eight	<p>Consider ancillary orders</p> <p>Whether applied for by the prosecution or on the court's own motion.</p>
Stage Nine	<p>Reasons</p> <p>Give reasons for, and explain the effect of, the sentence.</p>

Stage One: Identifying Sentencing Guidelines

1. Every court must, in sentencing an offender, have regard to any sentencing guidelines which are relevant to the offender's case, and must follow those guidelines unless satisfied it would be contrary to the interests of justice to do so¹.
2. The first stage of sentencing is to identify the sentencing guidelines that are relevant to the case. Sentencing guidelines are divided into two categories:

Overarching guidelines which set out the general sentencing principles that should be considered in all cases to which they relate.

Offence specific guidelines which set out sentence starting points and ranges for specific criminal offences.

3. In the vast majority of cases sentencers will need to refer to two sentencing guidelines. This Overarching Sentencing Guideline and the relevant offence specific guideline.

Sentencing guidelines – Falkland Islands

4. Sentencing guidelines in the Falkland Islands are issued by the Sentencing Guidelines Committee which is part of the Criminal Justice Council. Falkland Islands sentencing guidelines have precedence over any other guideline and **must** be followed unless it would be contrary to the interests of justice.

Sentencing guidelines – England and Wales

5. Where sentencing guidelines have not been published for the relevant offence a court **may** have regard to the guidelines issued by the Sentencing Council (England and Wales)². The Sentencing Council (England and Wales) publishes guidelines online at the following web address: <https://www.sentencingcouncil.org.uk/>
6. The law provides sentencers with a wider discretion as to whether they have regard to guidelines issued by the Sentencing Council (England and Wales), but in practice sentencers **shall** follow relevant guidelines from England and Wales unless it would be contrary to the interests of justice to do so. Sentencers will rarely need to depart from relevant guidelines issued by the Sentencing Council (England and Wales).

¹ Section 482(3) Criminal Procedure and Evidence Ordinance 2014

² Section 482(4) Criminal Procedure and Evidence Ordinance 2014

7. When using offence specific guidelines issued by the Sentencing Council (England and Wales) sentencers should use the guideline for the criminal offence that is the closest equivalent of the offence for which the offender is being sentenced in the Falkland Islands.

Stages Two to Four: Determining offence category, starting point and aggravating/mitigating factors

Specific Offence Guideline

1. If a specific offence guideline can be identified in relation to the criminal offence for which the offender is to be sentenced then that guideline, together with this Overarching Sentencing Guideline, should be used by the court to determine the offence category (stage two), starting point (stage three) and aggravating/mitigating factors (stage four).
2. Offence specific guidelines set out the steps that should be followed to move through the stages of sentencing.

General Principles Guideline

3. When sentencing offences for which there is no offence specific sentencing guideline the General Principles Guideline (Annex One) should be applied.

Victim Personal Statements

4. Victims of crime are invited to make a statement, known as a Victim Personal Statement (VPS). The statement gives victims a formal opportunity to say how a crime has affected them. It may help to identify whether they have a particular need for information, support and protection. The court should take the statement into account when determining sentence and the following guidance applies:
 - the VPS and any evidence in support should be considered and taken into account by the court, prior to passing sentence;
 - evidence of the effects of an offence on the victim must be in the form of a witness statement or an expert's report;
 - the statement and any evidence in support must be served on the defence prior to sentence;
 - except where inferences can properly be drawn from the nature of, or circumstances surrounding the offence, the court must not make assumptions unsupported by evidence about the effects of an offence on the victim;
 - at the discretion of the court the VPS may also be read aloud, in whole or in part, or it may be summarised. If it is to be read aloud the court should also determine

who should do so. In making these decisions the court should take into account the victim's preferences, and follow them unless there is a good reason not to do so (for example, inadmissible or potentially harmful content);

- court hearings should not be adjourned solely to allow the victim to attend court to read the VPS;
- the court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and the offender, taking into account, so far as the court considers it appropriate, the consequences to the victim;
- the opinions of the victim or the victim's close relatives as to what the sentence should be are not relevant;
- the decision about whether or not to make a VPS is entirely a matter for the victim; no pressure should be brought to bear on their decision, and no conclusion should be drawn if they choose not to make such a statement. In cases of domestic abuse the absence of a VPS should not be taken to indicate the absence of harm.
- a court should consider, where available, a VPS which will help it assess the immediate and possible long-term effects of the offence on the victim (and any children, where relevant) as well as the harm caused, whether physical or psychological.
- a VPS or an updated VPS may be made (in the proper form) at any time prior to the disposal of the case.

Stage Five: Reduction in Sentence for Guilty Plea

1. In determining what sentence to pass on an offender who has pleaded guilty to an offence in criminal proceedings, a court must take into account:
 - the stage in the proceedings for the offence at which the offender indicated an intention to plead guilty; and
 - the circumstances in which this indication was given.
2. If, as a result of taking these matters into account, the court imposes a punishment on the offender which is less severe than the punishment it would otherwise have imposed, it must state in open court that it has done so³.

Key principles

3. The purpose of reducing a sentence as a result of a guilty plea is to encourage those who are going to plead guilty to do so as early in the court process as possible. Nothing in this guideline should be used to put pressure on a defendant to plead guilty.
4. Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt:
 - normally reduces the impact of the crime upon victims;
 - saves victims and witnesses from having to testify; and
 - is in the public interest in that it saves public time and money on investigations and trials.
5. A guilty plea produces greater benefits the earlier the plea is indicated. In order to maximise the above benefits and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, this guideline makes a clear distinction between a reduction in the sentence available at the first stage of the proceedings and a reduction in the sentence available at a later stage of the proceedings.
6. The purpose of reducing the sentence for a guilty plea is to yield the benefits described above.

³ Section 479 Criminal Procedure and Evidence Ordinance 2014

7. The guilty plea should be considered by the court to be independent of the offender's personal mitigation.
8. Factors such as admissions at interview, co-operation with the investigation and demonstrations of remorse should not be taken into account in determining the level of reduction. Rather, they should be considered separately and prior to any guilty plea reduction, as potential mitigating factors.
9. The benefits apply regardless of the strength of the evidence against an offender. The strength of the evidence should not be taken into account when determining the level of reduction.
10. The guideline applies only to the punitive elements of the sentence and has no impact on ancillary orders including orders of disqualification from driving.

Determining the level of reduction

11. The maximum level of reduction in sentence for a guilty plea is one-third.

Plea indicated at the first stage of the proceedings

12. Where a guilty plea is indicated at the first stage of proceedings a reduction of one-third should be made. The first stage will normally be the first hearing at which a plea or indication of plea is required by the court.

Plea indicated after the first stage of proceedings – maximum one quarter – sliding scale of reduction thereafter

13. After the first stage of the proceedings the maximum level of reduction is one-quarter.
14. The reduction should be decreased from one-quarter to a maximum of one-tenth on the first day of trial having regard to the time when the guilty plea is first indicated to the court relative to the progress of the case and the trial date.
15. The reduction should normally be decreased further, even to zero, if the guilty plea is entered during the course of the trial.
16. For the purposes of this guideline a trial will be deemed to have started when the prosecution begins to call evidence.

Applying the reduction

Imposing one type of sentence rather than another

17. The reduction in sentence for a guilty plea can be taken into account by imposing one type of sentence rather than another; for example:
 - by reducing a custodial sentence to a community sentence, or
 - by reducing a community sentence to a fine.
18. Where a court has imposed one sentence rather than another to reflect the guilty plea there should normally be no further reduction on account of the guilty plea. Where, however, the less severe type of sentence is justified by other factors, the appropriate reduction for the plea should be applied in the normal way.

Keeping a case in the Summary Court to reflect a guilty plea

19. Reducing a custodial sentence to reflect a guilty plea may enable the Summary Court to retain jurisdiction rather than committing the case to the Magistrate's Court for sentence. In such cases the Summary Court should apply the appropriate reduction to the sentence for the offence(s) arrived at in accordance with any offence specific sentencing guideline and if the resulting sentence is within its jurisdiction then it should go on to sentence.

Exceptions

Further information, assistance or advice necessary before indicating plea

20. Where the sentencing court is satisfied that there were particular circumstances which significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done, a reduction of one-third should still be made.
21. In considering whether this exception applies, sentencers should distinguish between cases in which it is necessary to receive advice and/or have sight of evidence in order to understand whether the defendant is in fact and law guilty of the offence(s) charged, and cases in which a defendant merely delays guilty plea(s) in order to assess the strength of the prosecution evidence and the prospects of conviction or acquittal.

Newton hearings and special reasons hearings

22. In circumstances where an offender's version of events is rejected at a Newton hearing or special reasons hearing, the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved. Where witnesses are called during such a hearing, it may be appropriate further to decrease the reduction, even to zero.

Offender convicted of a lesser or different offence

23. If an offender is convicted of a lesser or different offence from that originally charged, and has earlier made an unequivocal indication of a guilty plea to this lesser or different offence to the prosecution and the court, the court should give the level of reduction that is appropriate to the stage in the proceedings at which this indication of plea (to the lesser or different offence) was made taking into account any other of these exceptions that apply. Where the offered plea is a permissible alternative to the offence charged, the offender will not be treated as having made an unequivocal indication unless the offender has entered that plea.

Mandatory life sentences for murder and treason

24. Murder and treason are the most serious criminal offences and the sentence prescribed for these offences is different from all other sentences. By law, the sentence for murder and the sentence for treason is imprisonment (detention) for life and an offender will remain subject to the sentence for the rest of his or her life.
25. Given the special characteristic of these offences and the unique statutory starting points for the minimum term to be served by an offender, careful consideration has to be given to the extent of any reduction for a guilty plea and to the need to ensure that the minimum term properly reflects the seriousness of the offence.
26. Whilst the general principles continue to apply (both that a guilty plea should be encouraged and that the extent of any reduction should reduce if the indication of plea is later than the first stage of the proceedings) the process of determining the level of reduction will be different.
27. The court will weigh carefully the overall length of the minimum term taking into account other reductions for which the offender may be eligible so as to avoid a combination leading to an inappropriately short sentence.
28. Where it is appropriate to reduce the minimum term having regard to a plea of guilty, the reduction will not exceed one-sixth and will never exceed five years.
29. The maximum reduction of one-sixth or five years (whichever is less) should only be given when a guilty plea has been indicated at the first stage of the proceedings. Lesser reductions should be given for guilty pleas after that point, with a maximum of one-twentieth being given for a guilty plea on the first day of trial.
30. Notwithstanding this guidance the overriding principle of sentencing is that the minimum term should properly reflect the seriousness of the offence.

Stage Six: Reduction – bail conditions (curfew)

1. Any day on bail during which a person is subject to a qualifying curfew (at least 12 hours per day) counts as part of a term of imprisonment under the sentence⁴.
2. Once a court has pronounced the term of imprisonment the duration of the custodial part of the sentence of imprisonment (before release on licence) is calculated administratively and in accordance with the relevant statutory provisions⁵.
3. In these circumstances sentencers should not make any further reduction in sentence and should explain to the offender that the appropriate reduction will be made administratively.
4. Where the offender:
 - has been subject to a qualifying curfew (at least 12 hours per day) but is sentenced to a suspended custodial sentence, community order, fine or other disposal, or the offender has been subject to a non-qualifying curfew (less than 12 hours per day); and
 - the sentencer reaches the conclusion that the time spent subject to a curfew has not already been reflected in the sentence (for example by suspending the sentence; or in the extent of any community penalty; or amount fined);

then the sentencer should consider making a reduction to reflect the fact that the offender has spent time subject to a bail curfew condition that has not already been taken into account in some other way when deciding sentence.

5. The amount of the reduction is at the discretion of the sentencer and should reflect the period of curfew hours and the overall time during which the offender was subject to the curfew. It will not be appropriate to attempt to apply a mathematical formula.

⁴ Section 160 Criminal Procedure and Evidence Ordinance 2014

⁵ Section 563 Criminal Procedure and Evidence Ordinance 2014.

Stage Seven: Totality

General principles

1. The principle of totality comprises two elements:
 - All courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence.
 - It is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour, together with the factors personal to the offender as a whole.

Concurrent/consecutive sentences

2. There is no inflexible rule governing whether sentences should be structured as concurrent or consecutive components. The overriding principle is that the overall sentence must be just and proportionate.
3. The general approach (as applied to determinate custodial sentences) is as follows:
 - Consider the sentence for each individual offence, referring to the relevant sentencing guidelines.
 - Determine whether the case calls for concurrent or consecutive sentences.
 - Test the overall sentence(s) against the requirement that they be just and proportionate.
 - Consider whether the sentence is structured in a way that will be best understood by all concerned with it.

Concurrent sentences will ordinarily be appropriate where:

4. Offences arise out of the same incident or facts. Examples include:
 - robbery with a weapon where the weapon offence is ancillary to the robbery and is not distinct and independent of it;

- fraud and associated forgery;
 - separate counts of supplying different types of drugs of the same class as part of the same transaction.
5. There is a series of offences of the same or similar kind, especially when committed against the same person. Examples include:
- repetitive small thefts from the same person, such as by an employee;
 - repetitive benefit frauds of the same kind, committed in each payment period.
6. Where concurrent sentences are to be passed the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences.
7. Examples include:
- repetitive fraud or theft, where charged as a series of small frauds/thefts, would be properly considered in relation to the total amount of money obtained and the period of time over which the offending took place. The sentences should generally be passed concurrently, each one reflecting the overall seriousness;
 - robbery with a weapon where the weapon offence is ancillary to the robbery and is not distinct and independent of it. The principal sentence for the robbery should properly reflect the presence of the weapon. The court must avoid double-counting and may deem it preferable for the possession of the weapon offence to run concurrently to avoid the appearance of under-sentencing in respect of the robbery.

Consecutive sentences will ordinarily be appropriate where:

8. Offences arise out of unrelated facts or incidents. Examples include:
- where the offender commits a theft on one occasion and a common assault against a different victim on a separate occasion;
 - an attempt to pervert the course of justice in respect of another offence also charged;
 - a bail offence;
 - any offence committed within the prison context;

- offences that are unrelated because whilst they were committed simultaneously they are distinct and there is an aggravating element that requires separate recognition, for example:
 - an assault on a constable committed to try to evade arrest for another offence also charged;
 - where the defendant is convicted of drug dealing and possession of a firearm offence. The firearm offence is not the essence or the intrinsic part of the drugs offence and requires separate recognition;
 - where the defendant is convicted of threats to kill in the context of an indecent assault on the same occasion, the threats to kill could be distinguished as a separate element.

- 9. Offences that are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences. Examples include:
 - where offences are committed against different people, such as repeated thefts involving attacks on several different shop assistants;
 - where offences of domestic abuse or sexual offences are committed against the same individual.

- 10. It is not permissible to impose consecutive sentences for offences committed at the same time in order to evade the statutory maximum penalty.

- 11. Where consecutive sentences are to be passed add up the sentences for each offence and consider if the aggregate length is just and proportionate.

- 12. If the aggregate length is not just and proportionate the court should consider how to reach a just and proportionate sentence. There are a number of ways in which this can be achieved. Examples include:
 - When sentencing for similar offence types or offences of a similar level of severity the court can consider:
 - whether all of the offences can be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and passed consecutively;
 - whether, despite their similarity, a most serious principal offence can be identified and the other sentences can all be proportionately reduced (with particular reference to the category ranges within sentencing guidelines) and

passed consecutively in order that the sentence for the lead offence can be clearly identified.

- When sentencing for two or more offences of differing levels of seriousness the court can consider:
 - whether some offences are of such low seriousness in the context of the most serious offence(s) that they can be recorded as 'no separate penalty' (for example technical breaches or minor driving offences not involving mandatory disqualification);
 - whether some of the offences are of lesser seriousness and are unrelated to the most serious offence(s), that they can be ordered to run concurrently so that the sentence for the most serious offence(s) can be clearly identified.

Examples

13. Sentencers should refer to Annex Two for some examples of common sets of circumstances and guidance on how sentencers can apply the principles of totality in standard scenarios.

Stage Eight: Ancillary Orders

Introduction

1. There are a wide range of ancillary orders available to the courts when sentencing in certain circumstances or for specific types of offending. Below is a summary of the most common types of ancillary orders but sentencers should be aware that other orders may be available.
2. Before making an ancillary order sentencers should remind themselves of the relevant statutory provisions to ensure that they have the power to make an order and that any statutory requirements are satisfied.
3. Sentencers should give the parties to the case the opportunity to make submissions in relation to ancillary orders. This is especially the case where the court is proposing to make an order of its own volition as opposed to a party having made an application.

Binding over orders

4. The court has the power to bind an individual over to keep the peace⁶. The order is designed to prevent future misconduct and requires the individual to promise to pay a specified sum if the terms of the order are breached. Exercise of the power does not depend upon conviction and the following guidance should be followed:
 - before imposing the order, the court must be satisfied so that it is sure that a breach of the peace involving violence or an imminent threat of violence has occurred, or that there is a real risk of violence in the future. The court should hear evidence and the parties before making any order;
 - the court should state its reasons for making the order;
 - the order should identify the specific conduct or activity from which the individual must refrain, the length of the order and the amount of the recognisance;
 - the length of the order should be proportionate to the harm sought to be avoided and should not generally exceed 12 months;
 - when fixing the amount of the recognisance, the court should have regard to the individual's financial resources.

⁶ Justices of the Peace Act 1361

Deprivation orders

5. The court has the power to deprive an offender of property used for the purpose of committing or facilitating the commission of an offence, whether or not it deals with the offender in any other way⁷.
6. Before making the order, the court must have regard to the value of the property and the likely financial and other effects on the offender.
7. Without limiting the circumstances in which the court may exercise the power, a vehicle is deemed to have been used for the purpose of committing the offence where the offence is punishable by imprisonment and consists of:
 - driving, attempting to drive, or being in charge of a vehicle; or
 - failing to comply with a requirement to give specimen of breath in the course of an investigation into whether the offender had committed an offence while driving, attempting to drive or being in charge of a vehicle; or
 - failing, as the driver of a vehicle, to comply with a requirement to give name and address

Disqualification from driving orders

8. For offences punishable with imprisonment for a term of 2 years or more, where the court is satisfied that a motor vehicle was used, whether by the person convicted or by anyone else, for the purpose of committing, or facilitating the commission, of the offence in question, the court may order the person convicted to be disqualified for driving, for such period as the court thinks fit⁸.
9. In addition, under the Road Traffic Ordinance 1948, any court before which a person is convicted of an offence in connection with the driving of a motor vehicle may order that person to be disqualified from holding or obtaining a driver's licence for such a period as the court thinks fit⁹.

⁷ Section 617 Criminal Procedure and Evidence Ordinance 2014

⁸ Section 618 Criminal Procedure and Evidence Ordinance 2014

⁹ Section 6(10) Road Traffic Ordinance 1948

Automatic disqualification from driving orders

10. The Road Traffic Ordinance 1948 contains provisions for automatic disqualification from driving for specified offences unless 'special reasons' apply¹⁰.
11. Automatic disqualification applies to offences of driving, or being in charge of, a motor vehicle when above the prescribed alcohol concentration limit, or when unfit through drink or drugs, and failure to provide specimens for analysis.

Disqualification from working with youths or vulnerable adults

Automatic disqualification

12. Convictions for specified qualifying offences will result in automatic disqualification from working with youths and vulnerable adults¹¹.

Discretionary disqualification

13. The courts have a discretionary power of disqualification¹².
14. If a person is convicted of any offence in which the court finds that the person has engaged in relevant conduct with a youth aged under 16 or a vulnerable adult, the court may disqualify the person from working with youths or vulnerable adults for any period it thinks fit. Relevant conduct is:
 - conduct which endangers or is likely to endanger a child or vulnerable adult;
 - conduct which, if repeated against or in relation to a child or vulnerable adult, would endanger or be likely to endanger that person;
 - conduct involving sexual material relating to children (including possession of such material);
 - conduct involving sexually explicit images depicting violence against human beings (including possession of such images);
 - conduct of a sexual nature involving a child.
15. Before making an order, the court must hear any representations that the prosecution or the defence wish to make, and must take all the circumstances of the case into account.

¹⁰ Section 26 Road Traffic Ordinance 1948

¹¹ Section 619(1) and 620 Criminal Procedure and Evidence Ordinance 2014

¹² Section 619(2) and 620 Criminal Procedure and Evidence Ordinance 2014

Forfeiture and destruction orders

16. The court has the power, after a trial, to order the disposal, whether by way of deprivation, forfeiture, confiscation or otherwise, of any property produced before it regarding which any offence appears to have been committed, or which has been used for the commission of, or to facilitate the commission of, any offence¹³.
17. In a case where no evidence has been called, if the prosecutor wishes any property to be disposed of he or she must after the conviction of the defendant produce the property before the court and the court may make an order.
18. In cases involving misuse of drugs, the court has the power to order anything shown to the satisfaction of the court to relate to the offence to be forfeited, and either destroyed or dealt with in such other manner as the court may order¹⁴.

Restitution orders

19. Where goods have been stolen, and an offender is convicted of any offence with reference to theft of those goods, the court may make a restitution order¹⁵.
20. The court may:
 - order anyone in possession or control of the stolen goods to restore them to the victim;
 - on the application of the victim, order that goods directly or indirectly representing the stolen goods (as being the proceeds of any disposal or realisation of the stolen goods) be transferred to the victim; or
 - order that a sum not exceeding the value of the stolen goods be paid to the victim out of any money taken out of the offender's possession during the police investigation.

Compensation orders

21. The court must consider making a compensation order in any case where personal injury, loss or damage has resulted from the offence. The court must give reasons if it decides not to order compensation¹⁶.

¹³ Section 622 Criminal Procedure and Evidence Ordinance 2014

¹⁴ Section 24 Misuse of Drugs Ordinance 1987

¹⁵ Section 615 Criminal Procedure and Evidence Ordinance 2014

¹⁶ Section 608 Criminal Procedure and Evidence Ordinance 2014

22. There is no statutory limit on the amount of compensation that may be imposed but compensation awarded by the Summary Court must not exceed £5,000¹⁷.
23. Where the personal injury, loss or damage arises from a road accident, compensation is only payable for personal injury, loss or damage in respect of which the offender is uninsured in relation to the use of the vehicle. Compensation may include an amount representing the whole, or part of any loss of, or reduction in preferential rates, of insurance attributable to the accident.
24. Subject to consideration of the victim's views, the court must order compensation wherever possible and should not have regard to the availability of other sources of compensation, such as civil litigation. Any amount paid by an offender under a compensation order will generally be deducted from a subsequent civil award to avoid double compensation.
25. Compensation may be ordered for such amount as the court considers appropriate having regard to any evidence and any representations made by the prosecutor or the offender. The court must also take into account the offender's means.
26. Compensation should benefit, not inflict further harm on, the victim. Sentencers should bear in mind that any financial recompense from the offender may cause distress. If the victim has expressed the view that they do not want compensation, this should be made known to the court and respected.
27. In cases where it is difficult to ascertain the full amount of the loss suffered by the victim, consideration should be given to making a compensation order for an amount representing the agreed or likely loss. Where relevant information is not immediately available, it may be appropriate to grant an adjournment if it would enable the information to be obtained.
28. The court should consider two types of loss:
 - financial loss sustained as a result of the offence such as the cost of repairing damage or, in case of injury, any loss of earnings or medical expenses;
 - pain and suffering caused by the injury (including terror, shock or distress) and any loss of facility. This should be assessed in light of all factors that appear to the court to be relevant, including any medical evidence, the victim's age and personal circumstances.
29. Once the court has formed a preliminary view of the appropriate level of compensation, it must have regard to the means of the offender, so far as they are

¹⁷ Section 610 Criminal Procedure and Evidence Ordinance 2014

known. Where the offender has little money, the order may have to be scaled down, or additional time allowed to pay.

30. The fact that a custodial sentence is imposed does not, in itself, make it inappropriate to order compensation but it may be relevant to whether the offender has the means to satisfy the order.
31. Priority should be given to compensation over financial penalties and costs.
32. In respect of physical and mental injury, Annex Three sets out some suggested starting points for compensation based on the nature and seriousness of the injury sustained.

Restraining orders

33. Where an offender is convicted of any offence, the court may make a restraining order¹⁸.
34. The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence. The order may have effect for a specified period or until further order.
35. A court before which a person is acquitted of an offence may make a restraining order if the court considers that it is necessary to protect a person from harassment by the defendant¹⁹.
36. The prohibitions included in a restraining order should be clear, unambiguous and capable of being enforced.

Sexual harm prevention orders

37. Sexual Harm Prevention Orders (SHPO) can be made in relation to a person who has been convicted, found not guilty by reason of insanity or found to be under a disability and to have done the act charged, or cautioned etc. for specified offences²⁰.
38. No application is necessary for the court to make a SHPO at the point of sentence although the prosecutor may wish to invite the court to consider making an order in appropriate cases. The court may ask pre-sentence report writers to consider the suitability of a SHPO on a non-prejudicial basis.

¹⁸ Section 151 Crimes Ordinance 2014

¹⁹ Section 152 Crimes Ordinance 2014

²⁰ Part 11 – Sexual Offence Orders, Crimes Ordinance 2014

39. In order to make a SHPO, the court must be satisfied that the offender presents a risk of sexual harm to the public (or particular members of the public) and that an order is necessary to protect against this risk. The details of the offence are likely to be a key factor in the court's decision, together with the offender's previous convictions and the assessment of risk presented by the probation service in any pre-sentence report. The court may take into consideration the range of other options available to it in respect of protecting the public.
40. The court may want to consider:
 - Would an order minimise the risk of harm to the public or to any particular members of the public?
 - Is it proportionate?
 - Can it be policed effectively?
41. The only prohibitions which can be imposed by a SHPO are those which are necessary for the purpose of protecting the public from sexual harm from the defendant. These can, however, be wide ranging. An order may, for example, prohibit someone from undertaking certain forms of employment such as acting as a home tutor to children. It may also prohibit the offender from engaging in particular activities on the internet. The terms of a SHPO must be tailored to the exact requirements of the case.
42. SHPOs may be used to limit and manage internet use by an offender, where it is considered proportionate and necessary to do so. The behaviour prohibited by the order might well be considered unproblematic if exhibited by another member of the public – it is the offender's previous offending behaviour, and subsequent demonstration that he or she may pose a risk of further such behaviour, which will make them eligible for an order.
43. The order may include only negative prohibitions; there is no power to impose positive obligations. The order may have effect for a fixed period (not less than five years) or until further order.

Automatic Notification

44. A relevant offender automatically becomes subject to notification requirements, obliging him or her to notify the police of specified information for a specified period. The court should inform the offender accordingly²¹.
45. The operation of the notification requirement is not a relevant consideration in determining the sentence for the offence.

²¹ Sections 296 to 306 Crimes Ordinance 2014

Licensing Ordinance 1994 - exclusion orders and prohibition orders

46. Where a person is convicted of an offence involving violence, or the offer or threat of violence, on licensed premises, the court may make an order prohibiting the offender from entering specified licensed premises²².
47. Whether a person has been convicted of an offence or not, the court may make a prohibition order where it considers that a person's consumption of intoxicating liquor means that the person is severely prejudicing his or her health, or neglecting his or her person, is failing to make adequate provision for any spouse or dependent child, or is frequently violent or abusive²³.
48. The effect of a prohibition order is to render it unlawful for the person to consume, procure or attempt to procure, intoxicating liquor, or to enter or remain in licensed premises. The effect of the order is to also make it a criminal offence to sell or supply alcohol to the person subject to the prohibition order, and to allow them to enter or remain on licensed premises.
49. Exclusion orders and prohibition orders place significant restrictions on a person's liberty. Sentencers should ensure that the use of these orders is commensurate to the seriousness of the offending.
50. In the majority of cases exclusion orders and prohibition orders will only be appropriate where a community order is justified.

²² Section 74 Licensing Ordinance 1994

²³ Section 76 Licensing Ordinance 1994

Stage Nine: Reasons

1. A court passing sentence on an offender must state in open court, in ordinary language and in general terms, its reasons for deciding on the sentence passed²⁴. Clarity of explanation is also important for victims in order that they too can understand the sentence.
2. Sentencers must explain to the offender in ordinary language:
 - the effect of the sentence;
 - if the offender is required to comply with any order of the court forming part of the sentence, the effects of non-compliance with the order;
 - any power of the court, on the application of the offender or any other person, to vary or review any order of the court forming part of the sentence; and
 - if the sentence consists of or includes a fine - the effects of failure to pay the fine.
3. Sentencers must:
 - identify any sentencing guidelines relevant to the offender's case and explain how the court has applied the guideline;
 - give reasons, if they have departed from an applicable sentencing guideline, as to why it was not in the interests of justice to apply the guideline;
 - if imposing a custodial sentence:
 - state that the offence, or the combination of the offence and one or more offences associated with it, was so serious that only a custodial sentence can be justified for the offence; or
 - if the offence is a violent or sexual offence, state that only such a sentence would be adequate to protect the public from serious harm from the offender;
 - if the sentence is a community sentence, state that it is of the opinion that for the offence, or the combination of the offence and one or more offences associated with it, a community sentence is the most appropriate sentence in the circumstances of the case;

²⁴ Section 483 Criminal Procedure and Evidence Ordinance 2014

- in every case, mention any aggravating or mitigating factors which the court has regarded as being of particular importance; and
- if reducing a sentence to take into account a guilty plea, state that fact.

Financial Penalties

Fine bands

1. Sentencers should identify the appropriate band of fine by applying the offence specific guideline. Sentencers should then make a suitable adjustment within the applicable range to take into account aggravating and mitigating factors.

Fine Band	Starting Point	Range
A	50% of relevant weekly income	25 - 75% of relevant weekly income
B	100% of relevant weekly income	75 - 125% of relevant weekly income
C	150% of relevant weekly income	125 - 175% of relevant weekly income
D	250% of relevant weekly income	200 - 300% of relevant weekly income
E	400% of relevant weekly income	300 - 500% of relevant weekly income
F	600% of relevant weekly income	500 - 700% of relevant weekly income

General principles

2. Sentencers should determine the appropriate level of fine in accordance with the applicable guidelines. The fine must reflect the seriousness of the offence and sentencers must take into account the financial circumstances of the offender.
3. Where possible, if a financial penalty is imposed, it should remove any economic benefit the offender has derived through the commission of the offence including:
 - avoided costs;
 - operating savings;
 - any gain made as a direct result of the offence.

4. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to comply with the law.
5. In considering economic benefit, sentencers should avoid double recovery if also making confiscation, compensation and other ancillary orders.
6. Where the means of the offender are limited, priority should be given to compensation (where applicable) over payment of any other financial penalty.
7. Where it is not possible to calculate or estimate the economic benefit, sentencers may wish to draw on information from the enforcing authorities about the general costs of operating within the law.
8. When sentencing organisations, the fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with the law. Sentencers should ensure that the effect of the fine (particularly if it will result in closure of the business) is proportionate to the gravity of the offence.

Obtaining financial information

9. It is for the offender to disclose such data relevant to his or her financial position as will enable the sentencer to assess what the offender can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances.
10. In the absence of such disclosure, or if a sentencer is not satisfied that they have been given sufficient reliable information, the sentencer will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.
11. In setting a fine, sentencers may conclude that the offender is able to pay any fine imposed unless the offender has supplied financial information to the contrary.

Determining relevant weekly income

12. The seriousness of an offence determines the choice of fine band in accordance with the offence specific guideline and the position of the offence within the range for that band. The offender's financial circumstances are taken into account by expressing that position as a proportion of the offender's relevant weekly income.

- Where an offender is in receipt of income that is more than £120 per week after deduction of tax (or equivalent where the offender is self-employed), the actual income is the relevant weekly income.
- Where the offender is in receipt of income that is £120 per week or less, the relevant weekly income is deemed to be £120.

No reliable information

13. Where an offender has failed to provide information, or the sentencer is not satisfied that sufficient reliable information has been provided by the offender, the sentencer is entitled to make such determination as they think fit regarding the financial circumstances of the offender²⁵.
14. Any determination should be clearly stated on the court records for use in any subsequent variation or enforcement proceedings. In such cases, a record should also be made of the applicable fine band and the sentencer's assessment of the position of the offence within that band based on the seriousness of the offence.
15. Where there is no information on which a determination can be made, the sentencer should proceed on the basis of an assumed relevant weekly income of £440.
16. Where there is some information that tends to suggest a significantly lower or higher income than the recommended £440 default sum, the sentencer should make a determination based on that information.
17. A court is empowered to remit a fine in whole or part if the offender subsequently provides information as to means²⁶. The assessment of offence seriousness and, therefore, the appropriate fine band and the position of the offence within that band are not affected by the provision of this information.
18. While the initial consideration for the assessment of a fine is the offender's relevant weekly income, sentencers are required to take account of the offender's financial circumstances including assets more broadly.
19. An offender's financial circumstances may have the effect of increasing or reducing the amount of the fine; however, they are not relevant to the assessment of offence seriousness. They should be considered separately from the selection of the appropriate fine band and the sentencer's assessment of the position of the offence within the range for that band.

²⁵ Section 592 Criminal Procedure and Evidence Ordinance 2014

²⁶ Section 594 of the Criminal Procedure and Evidence Ordinance 2014.

Out of the ordinary expenses

20. In deciding the proportions of relevant weekly income that are the starting points and ranges for each fine band, account has been taken of reasonable living expenses. Accordingly, no further allowance should normally be made for these. In addition, no allowance should normally be made where the offender has dependants.
21. Outgoings will be relevant to the amount of the fine only where the expenditure is out of the ordinary and substantially reduces the ability to pay a financial penalty so that the requirement to pay a fine based on the standard approach would lead to undue hardship.

Unusually low outgoings

22. Where the offender's living expenses are substantially lower than would normally be expected, it may be appropriate to adjust the amount of the fine to reflect this. This may apply, for example, where an offender does not make any financial contribution towards his or her living costs.

Savings

23. Where an offender has savings, these will not normally be relevant to the assessment of the amount of a fine although they may influence the decision on time to pay.
24. However, where an offender has little or no income but has substantial savings, sentencers may consider it appropriate to adjust the amount of the fine to reflect this.

Household has more than one source of income

25. Where the household of which the offender is a part has more than one source of income, the fine should normally be based on the income of the offender alone. A second source of income in the household may influence the decision on time to pay.
26. However, where the offender's part of the income is very small (or the offender is wholly dependent on the income of another), sentencers may have regard to the extent of the household's income and assets which will be available to meet any fine imposed on the offender.

Potential earning capacity

27. Where there is reason to believe that an offender's potential earning capacity is greater than his or her current income, sentencers may wish to adjust the amount of

the fine to reflect this. This may apply, for example, where an unemployed offender states an expectation to gain paid employment within a short time. The basis for the calculation of the fine should be recorded to ensure that there is a clear record for use in variation or enforcement proceedings.

High income offenders

28. Where the offender is in receipt of very high income, a fine based on a proportion of relevant weekly income may be disproportionately high when compared with the seriousness of the offence. In such cases, sentencers should adjust the fine to an appropriate level; as a general indication, in most cases the fine for a first time offender pleading not guilty should not exceed 75 per cent of the maximum fine.

Low income offenders

29. Similar issues can arise where an offender is in receipt of a low income. A fine based on a proportion of relevant weekly income may become disproportionately high in the context of an offender in receipt of low income. In such cases, sentencers should adjust the fine to an appropriate level.

Significant commercial benefit

30. Some offences are committed with the intention of gaining a significant commercial benefit. These often occur where, in order to carry out an activity lawfully, a person has to comply with certain processes which may be expensive, such as obtaining a permit.
31. In some of these cases, a fine based on the standard approach set out above may not reflect the level of financial gain achieved or sought through the offending. Accordingly, where the offender has generated income or avoided expenditure to a level that can be calculated or estimated, the court may wish to consider that amount when determining the financial penalty.
32. Where it is not possible to calculate or estimate that amount, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.

Fines and custodial sentences

33. A fine and a custodial sentence may be imposed for the same offence although there will be few circumstances in which this is appropriate, particularly where the custodial sentence is to be served immediately.

34. One example might be where an offender has profited financially from an offence but there is no obvious victim to whom compensation can be awarded. Combining these sentences is most likely to be appropriate only where the custodial sentence is short and/or the offender clearly has, or will have, the means to pay.
35. Another example might be where a suspended sentence is imposed without requirements and a financial penalty serves as the punitive element to the sentence.
36. Care must be taken to ensure that the overall sentence is proportionate to the seriousness of the offence and that better off offenders are not able to 'buy themselves out of custody'.

Payment of fines

37. A fine is payable in full on the day on which it is imposed. The offender should always be asked for immediate payment when present in court and some payment on the day should be required wherever possible.
38. Where that is not possible the court may allow payments to be made over a period of time set by the court²⁷.
39. If periodic payments are allowed, the fine should normally be payable within a maximum of 12 months.
40. Where fine bands D, E and F apply, it may be appropriate for the fine to be of an amount that is larger than can be repaid within 12 months. In such cases, the fine should normally be payable within a maximum of 18 months (band D) or two years (bands E and F).
41. When allowing payment by instalments, payments should be set at a realistic rate taking into account the offender's disposable income.
42. If the offender has dependants or larger than usual commitments, the weekly payment is likely to be decreased.

²⁷ Section 595 Criminal Procedure and Evidence Ordinance 2014

Prosecution Costs

Where an offender is convicted of an offence, the court has discretion to make such order as to costs as it considers just and reasonable²⁸.

Principles

- An order for costs should never exceed the sum which, having regard to the offender's means and any other financial order imposed, he or she is able to pay and which it is reasonable to order him or her to pay;
- An order for costs should never exceed the sum which the prosecutor actually and reasonably incurred;
- The purpose of the order is to compensate the prosecutor. Where the conduct of the defence has put the prosecutor to avoidable expense, the offender may be ordered to pay some or all of that sum to the prosecutor but the offender must not be punished for exercising the right to defend himself or herself;
- The costs ordered to be paid should not be grossly disproportionate to any fine imposed for the offence. While there is no question of an arithmetical relationship, the question of costs should be viewed in the context of the maximum penalty considered to be appropriate for the seriousness of the offence;
- If the combined total of the proposed fine and the costs sought by the prosecutor exceeds the sum which the offender could reasonably be ordered to pay, the fine should be reduced rather than the costs order;
- It is for the offender to provide details of his or her financial position so as to enable the court to assess what he or she can reasonably afford to pay. If the offender fails to do so, the court is entitled to draw reasonable inferences as to means from all the circumstances of the case;
- If the court proposes to make any financial order against the offender, it must give him or her fair opportunity to adduce any relevant financial information and to make appropriate submissions.
- Where the prosecutor is the Crown, prosecution costs exclude the costs of the investigation, which are met by the police or other investigating body. The Attorney General has issued guidance to prosecutors on seeking orders for costs, including a

²⁸ Section 647 Criminal Procedure and Evidence Ordinance 2014

scale of prosecution costs for standard hearings²⁹. In private prosecution cases, where the costs of the investigation are incurred by the prosecutor, a costs award may cover the costs of investigation as well as prosecution.

- Where the court wishes to impose costs in addition to a fine and/or compensation but the offender has insufficient resources to pay the total amount, the fine should remain at the appropriate level and the costs should be reduced.

²⁹ AGG18 - The Attorney General's Guidance on Prosecution Cost Orders

Imposition of Community Orders

General principles

1. Community orders can fulfil all of the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities.
2. A community order must not be imposed unless the offence is serious enough to warrant such a sentence. Where an offender is being sentenced for a non-imprisonable offence, there is no power to make a community order.
3. Sentencers must consider all available disposals at the time of sentence; even where the threshold for a community sentence has been passed, a fine or discharge may be an appropriate penalty, depending on the circumstances of the case.
4. A Band D fine may be an appropriate alternative to a community order. This particularly may be the case where offenders are unable to meaningfully engage with a community order as a result of being due to leave the jurisdiction.
5. The court must ensure that the restriction on the offender's liberty is commensurate with the seriousness of the offence and that the requirements imposed are those most suitable to meet the purposes of sentencing.
6. Where an offender has previously been subject to a community order sentences should not necessarily escalate from one community order range to the next on each sentencing occasion. The decision as to the appropriate range of community order should be based upon the seriousness of the new offence(s) (which will take into account any previous convictions).
7. In general, sentencers should impose at least one requirement for the purpose of punishment and/or a fine imposed in addition to the community order, unless it would be unjust to do so in all the circumstances. It is a matter for the court to decide which requirements amount to a punishment in each case.

Community order levels

8. The seriousness of the offence should be the initial factor in determining which requirements to include in a community order. Offence-specific guidelines refer to three sentencing levels within the community order band based on offence seriousness (low, medium and high).

9. The culpability and harm present in the offence(s) should be considered to identify which of the three sentencing levels within the community order band (low, medium and high) is appropriate.

10. The table below lists non-exhaustive examples of requirements that might be appropriate in relation to each level of community order.

Low	Medium	High
<p>Offences only just cross community order threshold, where the seriousness of the offence or the nature of the offender’s record means that a discharge or fine is inappropriate</p> <p>In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary</p>	<p>Offences that obviously fall within the community order band</p>	<p>Offences only just fall below the custody threshold or the custody threshold is crossed but a community order is more appropriate in the circumstances</p> <p>More intensive sentences which combine two or more requirements may be appropriate</p>
<p>Suitable requirements might include:</p> <ul style="list-style-type: none"> • Rehabilitative requirement(s) • 40 – 80 hours of unpaid work • Curfew requirement within the lowest range (for example up to 12 hours per day for a few weeks) • Exclusion requirement, for a few months 	<p>Suitable requirements might include:</p> <ul style="list-style-type: none"> • Rehabilitative requirement(s) • 80 – 150 hours of unpaid work • Curfew requirement within the middle range (for example up to 12 hours for 2 – 3 months) • Exclusion requirement lasting in the region of 6 – 12 months 	<p>Suitable requirements might include:</p> <ul style="list-style-type: none"> • Rehabilitative requirement(s) • 150 – 300 hours of unpaid work • Curfew requirement for example up to 12 hours per day for 4 – 6 months • Exclusion requirement lasting in the region of 12 – 20 months • Prohibited activity

• Prohibited activity requirement	• Prohibited activity requirement	requirement
If order does not contain a punitive requirement, suggested fine levels are indicated below:		
BAND A FINE	BAND B FINE	BAND C FINE
If a community order is not appropriate a direct alternative is a band D fine		

Specific considerations in determining requirements

11. Where two or more requirements are included, they must be compatible with one another and must not be excessive. Any requirement must not conflict with an offender's religious beliefs or with the requirements of any other order to which the offender may be subject. Interference with an offender's attendance at work or educational establishment should also be avoided.
12. The particular requirements imposed must be suitable for the individual offender and will be influenced by a range of factors, including:
 - the stated purpose(s) of the sentence;
 - the risk of re-offending;
 - the ability of the offender to comply;
 - the availability of certain requirements.

Requirements

13. Community orders consist of one or more of the following requirements:
 - an unpaid work requirement;
 - an activity requirement;
 - a programme requirement;
 - a prohibited activity requirement;
 - a curfew requirement;
 - an exclusion requirement;
 - a residence requirement;
 - a foreign travel prohibition requirement;
 - a mental health treatment requirement;
 - a drug rehabilitation requirement;

- an alcohol treatment requirement;
 - an alcohol abstinence and monitoring requirement;
 - an intoxicating substance treatment requirement
 - a supervision requirement;
 - an electronic monitoring requirement.
14. A requirement cannot be imposed unless the court is satisfied that the requirement can be provided by the relevant service provider. The probation service should be consulted before a community order requirement is imposed.

Pre-sentence reports

15. In many cases, a pre-sentence report will be pivotal in helping the court decide whether to impose a community order and, if so, whether particular requirements or combinations of requirements are suitable for an individual offender. Whenever the court reaches the provisional view that a community order may be appropriate, it should request a pre-sentence report (whether written or verbal) unless the court is of the opinion that a report is unnecessary in all the circumstances of the case.
16. It may be helpful to indicate to the probation service the court's preliminary opinion as to which of the three sentencing ranges is relevant and the purpose(s) of sentencing that the package of requirements is expected to fulfil. However, the court must make clear to the offender that all sentencing options remain open including, in appropriate cases before the Summary Court, committal to the Magistrate's Court for sentence.

Imposition of Custodial Sentences

1. For offenders under the age of 21 at the date of conviction sentencers should apply the specific guidance on children and young offenders (see below).
2. For offenders aged 21 and over at the date of conviction the approach to the imposition of a custodial sentence should be as follows.

Has the custody threshold been passed?

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

Is it unavoidable that a sentence of imprisonment be imposed?

7. Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Custody should not be imposed where a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime. It remains the case that any sentence must reflect the seriousness of the offence.
8. For offenders on the borderline of custody, imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing.

What is the shortest term commensurate with the seriousness of the offence?

9. In considering this the court must **NOT** consider any licence requirements which may subsequently be imposed upon the offender’s release.
10. When applying offence specific guidelines from England and Wales sentencers **MUST NOT** make any adjustment to the custodial periods set out in the England and Wales sentencing guidelines due to the fact that a person often serves a shorter custodial period in England and Wales prior to release on licence³⁰.

Can the sentence be suspended?

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

Factors indicating that it would not be appropriate to suspend a custodial sentence	Factors indicating that it may be appropriate to suspend a custodial sentence
<ul style="list-style-type: none"> • Offender presents a risk/danger to the public • Appropriate punishment can only be achieved by immediate custody • History of poor compliance with court orders 	<ul style="list-style-type: none"> • Realistic prospect of rehabilitation • Strong personal mitigation • Immediate custody will result in significant harmful impact upon others

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

³⁰ See *R v Butler* [2018] SCCRIM 0417

Pre-sentence report

15. Whenever the court reaches the provisional view that the custody threshold has been passed, the court should obtain a pre-sentence report, whether verbal or written, unless the court considers a report to be unnecessary.

Suspended sentences: general guidance

16. The guidance regarding pre-sentence reports applies if suspending custody.
17. The time for which a sentence is suspended should reflect the length of the sentence; for example, up to 12 months might normally be appropriate for a suspended sentence of up to 6 months.
18. When the court suspends a sentence, it may impose one or more requirements for the offender to undertake in the community. The requirements are identical to those available for community orders.
19. A custodial sentence that is suspended should be for the same term that would have applied if the sentence was to be served immediately.

Differences in Maximum Sentence

1. Some offences in the Falkland Islands have different maximum sentences than the equivalent offence in England and Wales.
2. The fact that there are different maximum sentences for equivalent offences should not automatically be taken as an indication that the offence is seen as more or less serious by law makers in the Falkland Islands than in England and Wales.
3. The Falkland Islands and England and Wales are separate jurisdiction with a different court structure. The maximum sentence for an offence can have an impact on which of the criminal courts has jurisdiction to hear the case. Some offences have been given a different maximum sentence by law makers in the Falkland Islands which means that offences of that type can be allocated to certain courts, rather than because the offence itself is seen as more or less serious.
4. It is also the case that the maximum sentences for some offences have changed as a result of legislative review taking place in one jurisdiction that has not taken place in the other. It may therefore be the case that law makers in the Falkland Islands have not considered whether to adopt legislative changes from England and Wales one way or another.
5. Sentencers in the Falkland Islands must follow Falkland Islands sentencing guidelines unless it would not be in the interests of justice to do so³¹. Where no Falkland Islands guideline exists, sentencers in the Falkland Islands should have regard to the guidelines of England and Wales, but are not bound to follow them if it is not in the interests of justice to do so³². Where sentencers depart from following sentencing guidelines, including those guidelines from England and Wales, then reasons should be given.
6. If it is clear to sentencers that a difference between the maximum sentence available in the Falkland Islands and the equivalent offence in England and Wales would lead to injustice when applying the relevant sentencing guideline, then a departure from the guideline would be justified. The circumstances in which this could arise will be rare and sentencers should remember that departure from either the Falkland Islands or England & Wales sentencing guidelines, would need to be justified when it arises and pronounced in open court.
7. When sentencers are applying offence specific guidelines from England and Wales for offences that have a different maximum sentence to the equivalent offence in the Falkland Islands then the following principles **must** be applied.

³¹ Section 482(3) Criminal Procedure and Evidence Ordinance 2014.

³² Section 482(4) Criminal Procedure and Evidence Ordinance 2014.

- The maximum sentence for an offence sets the scope of the available length of sentence. The harm caused by the offence and the culpability of the offender are not made any more or less serious just because there is a different maximum sentence in the Falkland Islands than in England and Wales. The primary consideration of the sentencer should be an assessment of the seriousness of the offence committed, with regard to culpability and harm.
- In many cases it will not be necessary to consider the possible effect of different maximum sentences because offending will not frequently warrant sentencing at, or close to, the statutory maximum.
- The relevant offence specific guideline should be used to reach an appropriate sentence without reference to whether there is a different maximum sentence.
- Sentencers should not seek to reduce or increase the relevant starting point and applicable sentence range on the basis that a different maximum sentence applies to the specific offence. An attempt to arithmetically scale up or down based on different maximum sentences does not reflect the primary considerations of culpability and harm.
- The sentence passed **must not** exceed the statutory maximum available for the offence in the Falkland Islands.
- If the maximum sentence in England and Wales is greater than the maximum sentence in the Falkland Islands and the specific offence guideline provides for a starting point in excess of the Falkland Island maximum, then the sentencer should take the Falkland Islands maximum, or close to it, as the starting point and must not make any upward adjustment beyond the available maximum sentence.
- Where the maximum sentence in England and Wales is less than the maximum sentence in the Falkland Islands then the sentencer should take the starting point provided for in the England and Wales specific offence guideline. The sentencer should not increase the starting point simply because the Falkland Islands has a greater maximum sentence.

Prevalence and Community Impact

1. The starting points and ranges set out in the offence specific sentencing guidelines issued by the Sentencing Council (England and Wales) already take into account the impact of criminal offending on the community.
2. In the vast majority of cases it will not be necessary for sentencers to make any adjustment to an offence specific guideline from England and Wales to take into account issues of prevalence and community impact because the sentencing levels in offence specific guidelines take account of collective social harm.
3. In some circumstances, however, the sentencer may conclude that the applicable sentencing ranges set out in the offence specific guideline from England and Wales do not sufficiently take into account issues relating to prevalence and community impact that are particular to the Falkland Islands.
4. If the sentencer is considering making an upward adjustment to the starting point based on prevalence and/or community impact then the following principles **must** be applied:
 - The principle assessment of the level of culpability and harm caused by an offence must remain the starting point for any consideration of sentence.
 - An upward adjustment to the starting point should only be made on the basis of prevalence and/or community impact where there is clear evidence of wider harm not already taken into account elsewhere.
 - Clear evidence of wider harm must be established by a community impact statement in accordance with section 499 of the Criminal Procedure and Evidence Ordinance 2014.
 - Even if such material is provided, a sentencer will only be entitled to treat prevalence and/or community impact as an aggravating factor if satisfied:
 - that the level of harm caused in the Falkland Islands is significantly higher than that caused in England and Wales (and thus already inherent in the guideline levels);
 - that the circumstances can properly be described as exceptional; and
 - that it is just and proportionate to increase the sentence for such a factor in the particular case being sentenced.

- It is not open to a sentencer to increase a sentence for prevalence in ordinary circumstances or in response to a personal view that there is *'too much of this sort of thing going on in the Falkland Islands'*.
 - There is no justification for increasing sentence beyond the ranges set out in offence specific guidelines on the basis that offending is novel or has not occurred for a lengthy period of time.
 - Care must be taken not to confuse offending that is rare with offending that has become prevalent. In respect of offending that is rare the size of the jurisdiction means that there can be long periods without certain types of offences being committed, purely on the basis that there is no one present within the jurisdiction who is minded to engage in that type of offending.
5. If a sentencer makes an upward adjustment to sentence on the basis of prevalence and/or community impact then they must give reasons for doing so.
 6. Sentencers should state the sentence that would have been imposed without an upward adjustment to sentence on the basis of prevalence and/or community impact, and then state the amount by which the sentence has been adjusted to take into account prevalence and/or community impact.

Offences Taken into Consideration

General principles

1. When sentencing an offender who requests offences to be taken into consideration (TICs), courts should pass a total sentence which reflects all the offending behaviour. The sentence must be just and proportionate and must not exceed the statutory maximum for the conviction offence.
2. The court has discretion as to whether or not to take TICs into account. In exercising its discretion, the court should take into account that TICs are capable of reflecting the offender's overall criminality. The court is likely to consider that the fact that the offender has assisted the police (particularly if the offences would not otherwise have been detected) and avoided the need for further proceedings demonstrates a genuine determination by the offender to 'wipe the slate clean'.
3. It is generally undesirable for TICs to be accepted in the following circumstances:
 - where the TIC is likely to attract a greater sentence than the conviction offence;
 - where it is in the public interest that the TIC should be the subject of a separate charge;
 - where the offender would avoid a prohibition, ancillary order or similar consequence which it would have been desirable to impose on conviction. For example:
 - where the TIC attracts mandatory disqualification and the offence(s) for which the defendant is to be sentenced do not;
 - where the TIC constitutes a breach of an earlier sentence;
 - where the TIC is not founded on the same facts or evidence or part of a series of offences of the same or similar character (unless the court is satisfied that it is in the interests of justice to do so).
4. TICs should not be accepted where the offence to which the TIC relates is an offence that the sentencing court could not itself hear, for example because the TIC offence is an indictable offence.

Procedural safeguards

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

- the police or prosecuting authorities have prepared a schedule of offences (TIC schedule) that they consider suitable to be taken into consideration. The TIC schedule should set out the nature of each offence, the date of the offence(s), relevant detail about the offence(s) (including, for example, monetary values of items) and any other brief details that the court should be aware of;
- a copy of the TIC schedule must be provided to the defendant and his representative (if he has one) before the sentence hearing. The defendant should sign the TIC schedule to provisionally admit the offences;
- at the sentence hearing, the court should ask the defendant in open court whether he admits each of the offences on the TIC schedule and whether he wishes to have them taken into consideration;
- if there is any doubt about the admission of a particular offence, it should not be accepted as a TIC. Special care should be taken with vulnerable and/or unrepresented defendants;
- if the defendant is committed to the Magistrate's Court for sentence, this procedure must take place again even if the defendant has agreed to the TIC schedule in the Summary Court.

Application

6. The sentence imposed on an offender should, in most circumstances, be increased to reflect the fact that other offences have been taken into consideration. The court should:
 - Determine the sentencing starting point for the conviction offence, referring to the relevant sentencing guidelines. No regard should be had to the presence of TICs at this stage.
 - Consider whether there are any aggravating or mitigating factors that justify an upward or downward adjustment from the starting point.
 - The presence of TICs should generally be treated as an aggravating feature that justifies an upward adjustment from the starting point. Where there is a large number of TICs, it may be appropriate to move outside the category range, although this must be considered in the context of the case and subject to the principle of totality. The court is limited to the statutory maximum for the conviction offence.

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

Offenders Leaving the Jurisdiction

1. Sentencers are often required to sentence offenders who are non-resident and due to leave the jurisdiction, or offenders who may be leaving the jurisdiction at some point in the future (due to the offending or for another reason).
2. In some cases, it may be clear that the offender is leaving the jurisdiction. Examples include:
 - Short-term visitors who do not reside in the Falkland Islands e.g. tourists, military personnel and short-term workers.
 - People who are leaving the Falkland Islands after a period of residence e.g. contract workers at the completion of their contract.
3. In some cases, the situation is less clear and there may not be certainty about whether the offender is going to be leaving the jurisdiction. Examples include:
 - Non-permanent residents who expect to have their work permit revoked as a result of the offending and who are likely to face deportation proceedings.
 - Residents who are themselves planning to leave the jurisdiction (whether because of the offending or for some other reason) but have not booked flights and could remain in the jurisdiction if they decided to change their plans.
4. Depending on the specific circumstances of the case the following principles apply:
 - Sentencers should apply the relevant offence specific guideline or general principles guideline in the normal manner, to arrive at a sentence commensurate with the seriousness of the offence, that makes appropriate adjustment to reflect the mitigating and aggravating factors and applies any reductions for guilty plea and/or assistance.
 - Where it is not certain that an offender is going to leave the jurisdiction within a short period of time sentencers should not try to second guess what may happen in the future and should sentence on the basis that the offender will remain in the jurisdiction.
 - Sentencers should not take into account the fact that a person may leave the jurisdiction without completing the requirements of a community order or suspended sentence. If this situation arises at some point during the operation of a community order or suspended sentence, it will be for the probation service to decide whether to institute breach proceedings, request discharge of the order or

allow the order to lapse. The decision made by the probation service will depend on the nature of the offence, the type of order in place, the remaining terms and duration of the order, and the specific circumstances of the case.

- Where it is certain that an offender is leaving the jurisdiction within a short period of time and the appropriate sentence would otherwise have been a community order then sentencers can impose a Band D fine as a direct alternative to a community order where the circumstances of the case mean that a community order is not appropriate.
- A custodial sentence must not be imposed unless the offence, or the combination of the offence and one or more offences associated with it, is so serious that neither a fine alone nor a community sentence can be justified. A custodial sentence (including a suspended sentence) can only be imposed where the custody threshold has been passed and **MUST NOT** be imposed as an alternative to a financial penalty or community order.
- Where an offence crosses the custody threshold and sentencers are required to consider whether to suspend the sentence of imprisonment then the guidance on the imposition of custodial sentences should be applied.
- Where an offender is unable to complete requirements attached to a suspended sentence order due to leaving the jurisdiction then this is a factor that sentencers can take into account when deciding whether to suspend the custodial sentence. In these circumstances a sentencer may conclude that appropriate punishment can only be achieved by immediate custody.
- Sentencers should also bear in mind that the imposition of a custodial sentence is itself both a punishment and a deterrent, and factors such as strong personal mitigation and significant harmful impact upon others may mean that the custodial term should be suspended notwithstanding that the offender will then immediately leave the jurisdiction.
- A suspended sentence can be combined with a financial penalty, which could serve as an additional punitive element where required and where it is not practical to impose other requirements, such as unpaid work. Each case should be decided on its own facts and in accordance with the relevant guidance.
- Sentencers should not take into account the possible outcome of deportation proceedings. Decisions regarding deportation are mostly made after the conclusion of criminal proceedings and the situation regarding deportation is rarely clear at the time of sentence. Sentencers should not try to second guess

what decision may be made in future deportation proceedings and should not pass a sentence intended to take into account the possible outcomes of such proceedings.

- If a deportation order is made at some future point and the consequence is that an offender will not complete the requirements of a community order or suspended sentence order, then the Government has decided that the public interest is best served by the removal of the offender from the jurisdiction. Sentencers should not be influenced by this possibility when passing sentence. Decisions relating to deportation are for others to make at the relevant time.
- Where the offender has lost his or her employment as the result of the offending and has lost, or may possibly lose, his or her work permit, then this is personal mitigation that sentencers can take into account in the normal manner.

Domestic Abuse

Introduction

1. There is no specific offence of domestic abuse. It is a general term describing a range of violent and/or controlling or coercive behaviour.
2. Domestic abuse can be defined as any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial, or emotional.
3. Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting his or her resources and capabilities for personal gain, depriving them of the means needed for independence, resistance and escape and/or regulating his or her everyday behaviour.
4. Coercive behaviour is an act or pattern of acts of assault, threats, humiliation (whether public or private) and intimidation or other abuse that is used to harm, punish, or frighten the victim. Abuse may take place through person to person contact, or through other methods, including but not limited to, telephone calls, text, email, social networking sites or use of GPS tracking devices.
5. Care should be taken to avoid stereotypical assumptions regarding domestic abuse. Irrespective of gender, domestic abuse occurs amongst people of all ethnicities, sexualities, ages, disabilities, religion or beliefs, immigration status or socio-economic backgrounds. Domestic abuse can occur between family members as well as between intimate partners.
6. Many different criminal offences can involve domestic abuse and, where they do, the court should ensure that the sentence reflects that an offence has been committed within this context.

Assessing seriousness

7. The domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship. Additionally, there may be a continuing threat to the victim's safety, and in the worst cases a threat to the victim's life or the lives of others around them.

8. Domestic abuse offences are regarded as particularly serious within the criminal justice system. Domestic abuse is likely to become increasingly frequent and more serious the longer it continues, and may result in death. Domestic abuse can inflict lasting trauma on victims and their extended families, especially children and young people who either witness the abuse or are aware of it having occurred.
9. Domestic abuse is rarely a one-off incident and it is the cumulative and interlinked psychological, physical, sexual, financial or emotional abuse that has a particularly damaging effect on the victims and those around them.
10. Cases in which the victim has withdrawn from the prosecution do not indicate a lack of seriousness and no inference should be made regarding the lack of involvement of the victim in a case.

Aggravating and mitigating factors

11. The following list of non-exhaustive aggravating and mitigating factors are of particular relevance to offences committed in a domestic context, and should be considered alongside offence specific factors. The presence of domestic abuse aggravating and mitigating factors may justify an upward or downward adjustment in the applicable sentencing range.

Domestic Abuse: Aggravating Factors

- Abuse of trust and/or abuse of power
- Victim is particularly vulnerable (all victims of domestic abuse are potentially vulnerable due to the nature of the abuse, but some victims of domestic abuse may be more vulnerable than others, and not all vulnerabilities are immediately apparent)
- Steps taken to prevent the victim reporting an incident
- Steps taken to prevent the victim obtaining assistance
- Victim forced to leave home, or steps have to be taken to exclude the offender from the home to ensure the victim's safety
- Impact on children (children can be adversely impacted by both direct and indirect exposure to domestic abuse)
- Using contact arrangements with a child to instigate an offence
- A proven history of violence or threats by the offender in a domestic context
- A history of disobedience to court orders (such as, but not limited to, domestic violence protection orders, non-molestation orders, restraining orders or injunctions)

Domestic Abuse: Mitigating Factors

- Positive good character – as a general principle of sentencing, a court will take account of an offender’s positive good character. However, it is recognised that one of the factors that can allow domestic abuse to continue unnoticed for lengthy periods is the ability of the perpetrator to have a public and a private face. In respect of offences committed within a domestic context, an offender’s good character in relation to conduct outside these offences should generally be of no relevance where there is a proven pattern of behaviour
- Evidence of genuine recognition of the need for change, and evidence of obtaining help or treatment to effect that change.

Other factors influencing sentence

12. The following points of principle should be considered by a court when imposing sentence for any offences committed in a domestic context:

- **Wishes of the victim.** A sentence imposed for an offence committed within a domestic context should be determined by the seriousness of the offence, not by any expressed wishes of the victim.

There are a number of reasons why it may be particularly important that this principle is observed within this context:

- The court is sentencing on behalf of the wider public.
- No victim is responsible for the sentence imposed.
- There is a risk that a plea for mercy made by a victim will be induced by threats made by, or by a fear of, the offender.
- The risk of such threats will be increased if it is generally believed that the severity of the sentence may be affected by the wishes of the victim.
- **Provocation** is no mitigation to an offence within a domestic context, except in rare circumstances.
- **Children.** The offender or the victim may ask the court to consider the interests of any children by imposing a less severe sentence. The court should consider not only the effect on the children if the relationship is disrupted but also the likely effect of any further incidents of domestic abuse. The court should take

great care with such requests, as the sentence should primarily be determined by the seriousness of the offence.

- **Serious harm.** Offences involving serious violence, or where the emotional/psychological harm caused is severe, will warrant a custodial sentence in the majority of cases.
- **Alternatives to custody.** Passing the custody threshold does not mean that a custodial sentence should be deemed inevitable. Where the custody threshold is only just crossed, the court will wish to consider whether the better option is instead to impose a community order or suspended sentence, including a supervision requirement to address domestic abuse behaviours. Such an option will normally only be appropriate where the court is satisfied that the offender genuinely intends to reform his or her behaviour and that there is a real prospect of rehabilitation being successful.

Restraining Orders

13. The court should also consider whether it is appropriate to make a restraining order, and if doing so, should ensure that it has all relevant up to date information.
14. Orders can be made on the initiative of the court; the views of the victim should be sought, but the victim's consent is not required.
15. The order may prohibit the offender from doing anything for the purpose of protecting the victim of the offence, or any other person mentioned in the order, from further conduct which amounts to harassment or will cause a fear of violence.
16. If the parties are to continue or resume a relationship, courts may consider a prohibition within the restraining order not to molest the victim (as opposed to a prohibition on contacting the victim).
17. The order may have effect for a specified period or until further order.
18. A court before which a person is acquitted of an offence may make a restraining order if the court considers that it is necessary to protect a person from harassment by the defendant.

Victim personal statements

19. The absence of a victim personal statement (VPS) should not be taken to indicate the absence of harm.

20. A court should consider, where available, a VPS which will help it assess the immediate and possible long-term effects of the offence on the victim (and any children, where relevant) as well as the harm caused, whether physical or psychological.

Sentencing Offenders with Mental Disorders and Impairments

General approach

1. This guideline applies when sentencing offenders who at the time of the offence and/or at the time of sentencing have any mental disorder, neurological impairment or developmental disorder (see examples listed below).
2. The fact that an offender has an impairment or disorder should always be considered by the court but will not necessarily have an impact on sentencing.
3. There are a wide range of mental disorders, neurological impairments and developmental disorders and the level of any impairment will vary between individuals. Accordingly, in assessing whether the impairment or disorder has any impact on sentencing, the approach to sentencing should be individualistic and focused on the issues in the case.
4. Sentencers should note the following:
 - some mental disorders can fluctuate and an offender's state during proceedings may not be representative of his or her condition at the time the offence was committed;
 - care should be taken to avoid making assumptions. Many mental disorders, neurological impairments or developmental disorders are not easily recognisable;
 - no adverse inference should necessarily be drawn if an offender had not previously either been formally diagnosed or been willing to disclose an impairment or disorder;
 - offenders may be unaware or unwilling to accept they have an impairment or disorder and may fear stigmatisation if they disclose it;
 - it is not uncommon for people to have a number of different impairments and disorders. This is known as 'co-morbidity';
 - drug and/or alcohol dependence can be a factor, and may mask an underlying disorder;

- difficulties of definition and classification in this field are common. There may be differences of expert opinion and diagnosis in relation to the offender or it may be that no specific disorder can be identified;
 - a formal diagnosis is not always required; and
 - where a formal diagnosis is required, a report by a suitably qualified expert will be necessary.
5. It is important that courts are aware of relevant cultural, ethnicity and gender considerations of offenders within a mental health context. This is because a range of evidence suggests that people from black and minority ethnic communities may be more likely to experience stigma attached to being labelled as having a mental health concern, and may be more likely to have experienced difficulty in accessing mental health services and in acknowledging a disorder and seeking help.
 6. In addition, female offenders are more likely to have underlying mental health needs and the impact therefore on females from black and minority ethnic communities in particular is likely to be higher, given the intersection between gender and race.
 7. In any case where the offender is or appears to be mentally disordered at the date of sentencing, the court must obtain and consider a medical report before passing a custodial sentence other than one fixed by law, unless, in the circumstances of the case, the court is of the opinion that it is unnecessary. A report may be unnecessary if existing, reliable and up to date information is available.
 8. If considering making a hospital detention order, or interim order, the court can request information about a patient from the health service.
 9. Where a custodial sentence is passed the court should forward psychiatric, psychological, or other medical reports to the prison along with any other information relevant to the offender's physical and mental health. This will ensure that the prison has appropriate information about the offender's condition and can ensure his or her welfare.
 10. Courts should always be alive to the impact of an impairment or disorder on an offender's ability to understand and participate in proceedings. Courts should ensure that offenders understand their sentence and what will happen if they reoffend and/or breach the terms of their licence or supervision. Courts should also ensure that any ancillary orders, such as restraining orders, are capable of being understood and fulfilled by the offender. Courts should therefore put the key points in a clear and straightforward way. Clarity of explanation is also important for victims in order that they too can understand the sentence.

Assessing culpability

11. Culpability may be reduced if an offender, at the time of the offence, was suffering from an impairment or disorder (or combination of impairments or disorders).
12. The sentencer should make an initial assessment of culpability in accordance with any relevant offence-specific guideline, and should then consider whether culpability was reduced by reason of the impairment or disorder.
13. Culpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour. In some cases, the impairment or disorder may mean that culpability is significantly reduced. In other cases, the impairment or disorder may have no relevance to culpability. A careful analysis of all the circumstances of the case and all relevant materials is therefore required.
14. The sentencer, who will be in possession of all relevant information, is in the best position to make the assessment of culpability. Where relevant expert evidence is put forward, it must always be considered and will often be very valuable. However, it is the duty of the sentencer to make their own decision, and the court is not bound to follow expert opinion if there are compelling reasons to set it aside.
15. The sentencer must state clearly their assessment of whether the offender's culpability was reduced and, if it was, the reasons for and extent of that reduction. The sentencer must also state, where appropriate, their reasons for not following an expert opinion.
16. Courts may find the following questions a useful starting point. They are not exhaustive, and they are not a check list as the range of offenders, impairments and disorders is wide.
 - At the time of the offence did the offender's impairment or disorder impair his or her ability:
 - to exercise appropriate judgement,
 - to make rational choices,
 - to understand the nature and consequences of his or her actions?
 - At the time of the offence, did the offender's impairment or disorder cause them to behave in a disinhibited way?
 - Are there other factors related to the offender's impairment or disorder which reduce culpability?
 - Medication. Where an offender was failing to take medication prescribed to them at the time of the offence, the court will need to consider the extent to which that

failure was wilful or arose as a result of the offender's lack of insight into his or her impairment or disorder,

- "Self-medication". Where an offender made his or her impairment or disorder worse by "self-medicating" with alcohol or non-prescribed or illicit drugs at the time of the offence, the court will need to consider the extent to which the offender was aware that would be the effect,
- Insight. Courts need to be cautious before concluding that just because an offender has some insight into his or her impairment or disorder and/or insight into the importance of taking his or her medication, that insight automatically increases the culpability for the offence. Any insight, and its effect on culpability, is a matter of degree for the court to assess.

Determining the sentence

17. Impairments or disorders experienced by the offender are factors which sentencers are required to consider.
18. Impairments or disorders may be relevant to the decision about the type of sentence imposed, in particular a disposal involving treatment,
19. Impairments or disorders may be relevant to an assessment of risk.

Fines/discharge

20. Many offences committed by an offender with an impairment or disorder may not require any therapeutic intervention or the offence may be so minor that the appropriate disposal is a fine or discharge.

Community orders

21. When passing a community order (only available if the offence is imprisonable), it will be important to ensure that the conditions of any order are bespoke to the offender, taking account of any practical barriers to compliance that his or her condition or disorder may create. Community orders can fulfil all the purposes of sentencing and consideration should be given to all of the options for community orders, including treatment.
22. For offenders with mental health issues, such orders may result in reductions in offending compared with short custodial sentences. Where the offender's culpability is reduced by his or her mental state and/or the public interest is served by ensuring they receive appropriate treatment, a community order may be more appropriate than custody. Even where the custody threshold is crossed, a community order may be a

proper alternative to a short or moderate custodial sentence. A community order is not suitable for an offender who is unlikely to comply with the requirements, for example if he or she has a chaotic lifestyle.

23. Where the offender is dependent on or has a propensity to misuse drugs or alcohol and there is sufficient prospect of success, a community order may be a proper alternative to a short or moderate custodial sentence. Courts should be mindful that where an offender has failed to comply with an order in the past, that does not necessarily mean that he or she will fail now. Courts will need a thorough assessment about the offender's current motivation and ability to tackle his or her addiction in a pre-sentence report.

Custodial sentences

24. Where an offender is on the cusp of custody or detention, the court may consider that the impairment or disorder may make a custodial sentence disproportionate to achieving the aims of sentencing and that the public are better protected and crime reduced by a rehabilitative approach.
25. Where custody or detention is unavoidable, consideration of the impact on the offender of the impairment or disorder may be relevant to the length of sentence and to the issue of whether any sentence may be suspended. This is because an offender's impairment or disorder may mean that a custodial sentence weighs more heavily on them and/or because custody can exacerbate the effects of impairments or disorders.
26. As with cases of physical ill-health, impairments or disorders can only be taken into account in a limited way so far as the impact of custody is concerned. Nonetheless, the court must have regard both to any additional impact of a custodial sentence on the offender because of an impairment or disorder, and to any personal mitigation to which his or her impairment or disorder is relevant.

Main classes of mental disorders and presenting features

27. In order to assist sentencers, Annex Four sets out some of the main classes of mental disorders and presenting features.

Children and Young People

Youth Court

1. Part 33 of the Criminal Procedure and Evidence Ordinance 2014 governs the approach to young offenders. When sitting for the purpose of hearing any charge against a child or young person (those aged under 18 at the date of the finding of guilt), the Summary Court and the Magistrate's Court sit as the Youth Court.

General approach

2. When sentencing children or young people the court **must** have regard to:
 - the principal aim of the youth justice system (to prevent offending by children and young people); and
 - the welfare of the child or young person (including taking steps for removing the youth from undesirable surroundings, and for securing that proper provision is made for his or her education and training).³³
3. While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focused on the child or young person, as opposed to offence focused. For a child or young person the sentence should focus on rehabilitation where possible. A court should also consider the effect the sentence is likely to have on the child or young person (both positive and negative) as well as any underlying factors contributing to the offending behaviour.
4. Domestic and international laws dictate that a custodial sentence should always be a measure of last resort for children and young people, and statute provides that a custodial sentence may only be imposed when the offence is so serious that no other sanction is appropriate³⁴.
5. It is important to avoid "criminalising" children and young people unnecessarily; the primary purpose of the youth justice system is to encourage children and young people to take responsibility for their own actions and promote re-integration into society rather than to punish. Restorative justice disposals may be of particular value for children and young people as they can encourage them to take responsibility for their actions and understand the impact their offence may have had on others.

³³ Section 720 Criminal Procedure and Evidence Ordinance 2014

³⁴ Section 726 Criminal Procedure and Evidence Ordinance 2014

6. It is important to bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking behaviour.
7. It is important to consider the extent to which the child or young person has been acting impulsively, and whether his or her conduct has been affected by inexperience, emotional volatility or negative influences. The child or young person may not fully appreciate the effect his or her actions can have on other people, and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences, and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age, his or her emotional and developmental age is of at least equal importance to their chronological age (if not greater).
8. For these reasons, children and young people are likely to benefit from being given an opportunity to address their behaviour, and may be receptive to changing their conduct. They should, if possible, be given the opportunity to learn from their mistakes without undue penalisation or stigma, especially as a court sanction might have a significant effect on the prospects and opportunities of the child or young person and hinder their re-integration into society.
9. Offending by a child or young person is often a phase which passes fairly rapidly, and so the sentence should not result in the alienation of the child or young person from society if that can be avoided.
10. The impact of punishment is likely to be felt more heavily by a child or young person in comparison to an adult, as any sentence will seem longer due to his or her young age. In addition, penal interventions may interfere with a child or young person's education, and this should be considered by a court at sentencing.
11. Any restriction on liberty must be commensurate with the seriousness of the offence. In considering the seriousness of any offence, the court must consider the child or young person's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.

Welfare

12. The statutory obligation to have regard to the welfare of a child or young person includes the obligation to secure proper provision for education and training, to remove the child or young person from undesirable surroundings where appropriate,

and the need to choose the best option for the child or young person taking account of the circumstances of the offence³⁵.

13. In having regard to the welfare of the child or young person, a court should ensure that it is alert to:
 - any mental health problems or learning difficulties/disabilities;
 - any experiences of brain injury or traumatic life experience (including exposure to drug and alcohol abuse) and the developmental impact this may have had;
 - any speech and language difficulties and the effect this may have on the ability of the child or young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed, or to fulfil the obligations resulting from that sanction;
 - the vulnerability of children and young people to self-harm, particularly within a custodial environment; and
 - the effect on children and young people of experiences of loss and neglect and/or abuse.
14. Factors regularly present in the background of children and young people that come before the court include deprived homes, poor parental employment records, low educational attainment, early experience of offending by other family members, experience of abuse and/or neglect, negative influences from peer associates and the misuse of drugs and/or alcohol.
15. The court should always seek to ensure that it has access to information about how best to identify and respond to these factors and, where necessary, that a proper assessment has taken place in order to enable the most appropriate sentence to be imposed.
16. The court should consider the reasons why, on some occasions, a child or young person may conduct themselves inappropriately in court (e.g. due to nervousness, a lack of understanding of the system, a belief that he or she will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity etc.) and take this into account.
17. When dealing with a child or young person who is looked after by the Government, the court should also bear in mind the additional complex vulnerabilities that are likely

³⁵ Section 720 Criminal Procedure and Evidence Ordinance 2014

to be present in his or her background. For example, looked after children and young people may have no or little contact with their family and/or friends, they may have special educational needs and/or emotional and behavioural problems, they may be heavily exposed to peers who have committed crime and they are likely to have accessed the care system as a result of abuse, neglect or parental absence due to bereavement, imprisonment or desertion. The court should also bear in mind that the level of parental-type support that a looked after child or young person receives throughout the criminal justice process may vary, and may be limited. For example, while parents are required to attend court hearings, this is not the case for social workers responsible for looked after children and young people.

18. In some instances, a looked after child or young person (including those placed in foster homes and independent accommodation, as well as in care homes) may be before the court for a low-level offence that the police would not have been involved in, if it had occurred in an ordinary family setting.
19. For looked after children and young people who have committed an offence that crosses the custody threshold, sentencers will need to consider any impact a custodial sentence may have on their care arrangements, and whether this impact is proportionate to the seriousness of the offence. For other young people who are in the process of leaving care or have recently left care, sentencers should bear in mind any effect this often-difficult transition may have had on the young person's behaviour.
20. Black and minority ethnic children and young people can be over-represented in the youth justice system. The factors contributing to this are complex. One factor may be the experience of such children and young people in terms of discrimination and negative experiences of authority. When having regard to the welfare of the child or young person to be sentenced, the particular factors which arise in the case of black and minority ethnic children and young people need to be taken into account.
21. The requirement to have regard to the welfare of a child or young person is subject to the obligation to impose only those restrictions on liberty that are commensurate with the seriousness of the offence; accordingly, a court should not impose greater restrictions because of other factors in the child or young person's life.
22. When considering a child or young person who may be particularly vulnerable, sentencers should consider which available disposal is best able to support the child or young person and which disposals could potentially exacerbate any underlying issues. This is particularly important when considering custodial sentences as there are concerns about the effect on vulnerable children and young people of being in closed conditions, with significant risks of self-harm, including suicide.

23. The vulnerability factors that are often present in the background of children and young people should also be considered in light of the offending behaviour itself. Although they do not alone cause offending behaviour – there are many children and young people who have experienced these circumstances but do not commit crime – there is a correlation and any response to criminal activity amongst children and young people will need to recognise the presence of such factors in order to be effective.
24. These principles do not undermine the fact that the sentence should reflect the seriousness of the offence.

Parental responsibilities

25. For any child or young person aged under 16 appearing before court there is a statutory requirement that parents/guardians attend during all stages of proceedings, unless the court is satisfied that this would be unreasonable having regard to the circumstances of the case. The court may also enforce this requirement for a young person aged 16 and above if it deems it desirable to do so³⁶.
26. Although this requirement can cause a delay in the case before the court it is important it is adhered to. If a court does find exception to proceed in the absence of a parent or guardian then extra care must be taken to ensure the outcomes are clearly communicated to and understood by the child or young person.
27. In addition to this responsibility there are also orders that can be imposed on parents and guardians:
 - Parent or guardian to pay fine, costs or compensation³⁷
 - Binding over of a parent or guardian³⁸
 - Attendance of parent or guardian at court³⁹
28. If the child or young person is aged under 16 then the court has a duty to make appropriate parental orders, if it would be desirable in the interest of preventing the commission of further offences. There is a discretionary power to make these orders where the young person is aged 16 or 17. If the court chooses not to impose a parental order then it must state its reasons for not doing so in open court⁴⁰.

Determining the sentence

29. In determining the sentence, the key elements to consider are:

³⁶ Section 738 Criminal Procedure and Evidence Ordinance 2014

³⁷ Section 734 Criminal Procedure and Evidence Ordinance 2014

³⁸ Section 737 Criminal Procedure and Evidence Ordinance 2014

³⁹ Section 738 Criminal Procedure and Evidence Ordinance 2014

⁴⁰ Section 737 Criminal Procedure and Evidence Ordinance 2014

- the principal aim of the youth justice system (to prevent re-offending by children and young people);
- the welfare of the child or young person;
- the age of the child or young person (chronological, developmental and emotional);
- the seriousness of the offence;
- the likelihood of further offences being committed; and
- the extent of harm likely to result from those further offences.

The seriousness of the offence

30. The seriousness of the offence is the starting point for determining the appropriate sentence; the sentence imposed and any restriction on liberty must be commensurate with the seriousness of the offence.
31. The approach to sentencing children and young people should always be individualistic and the court should always have in mind the principal aims of the youth justice system.
32. In order to determine the seriousness of the offence the court should assess the culpability of the child or young person and the harm that was caused, intended to be caused or could foreseeably have been caused.
33. In assessing culpability, the court will wish to consider the extent to which the offence was planned, the role of the child or young person (if the offence was committed as part of a group), the level of force that was used in the commission of the offence, and the awareness that the child or young person had of his or her actions and its possible consequences. There is an expectation that in general a child or young person will be dealt with less severely than an adult offender. In part, this is because children and young people are unlikely to have the same experience and capacity as an adult to understand the effect of his or her actions on other people or to appreciate the pain and distress caused, and because a child or young person may be less able to resist temptation, especially where peer pressure is exerted.
34. Children and young people are inherently more vulnerable than adults due to their age, and the court will need to consider any mental health problems and/or learning disabilities they may have, as well as their emotional and developmental age. Any

external factors that may have affected the child or young person's behaviour should be taken into account.

35. In assessing harm the court should consider the level of physical and psychological harm caused to the victim, the degree of any loss caused to the victim and the extent of any damage caused to property. (This assessment should also include a consideration of any harm that was intended to be caused or could foreseeably have been caused in the committal of the offence.)
36. The court should also consider any aggravating or mitigating factors that may increase or reduce the overall seriousness of the offence. If any of these factors are included in the definition of the committed offence they should not be taken into account when considering the relative seriousness of the offence before the court.

Factors increasing seriousness

(Factors are not listed in any particular order and are not exhaustive)

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity
- Steps taken to prevent the victim reporting or obtaining assistance
- Steps taken to prevent the victim from assisting or supporting the prosecution
- Victim is particularly vulnerable due to factors including but not limited to age, mental or physical disability
- Restraint, detention or additional degradation of the victim
- Prolonged nature of offence
- Attempts to conceal/dispose of evidence
- Established evidence of community/wider impact
- Failure to comply with current court orders
- Attempt to conceal identity
- Involvement of others through peer pressure, bullying, coercion or manipulation
- Commission of offence whilst under the influence of alcohol or drugs
- History of antagonising or bullying the victim
- Deliberate humiliation of victim, including but not limited to filming of the offence, deliberately committing the offence before a group of peers with the intention of causing additional distress, or circulating details/photos/videos etc. of the offence on social media or within peer groups

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

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Unstable upbringing including but not limited to:
 - time spent looked after
 - lack of familial presence or support
 - disrupted experiences in accommodation or education
 - exposure to drug/alcohol abuse, familial criminal behaviour or domestic abuse
 - victim of neglect or abuse, or exposure to neglect or abuse of others
 - experiences of trauma or loss
- Participated in offence due to bullying, peer pressure, coercion or manipulation
- Limited understanding of effect on victim
- Serious medical condition requiring urgent, intensive or long-term treatment
- Communication or learning disabilities or mental health concerns
- In education, work or training
- Particularly young or immature child or young person (where it affects his or her responsibility)
- Determination and/or demonstration of steps taken to address addiction or offending behaviour

Age and maturity of the child or young person

37. There is a statutory presumption that no child under the age of 10 can be guilty of an offence.
38. With a child or young person, the consideration of age requires a different approach to that which would be adopted in relation to the age of an adult. Even within the category of child or young person the response of a court to an offence is likely to be very different depending on whether the child or young person is at the lower end of the age bracket, in the middle or towards the top end.
39. The developmental and emotional age of the child or young person should always be considered and it is of at least equal importance as his or her chronological age. It is important to consider whether the child or young person has the necessary maturity to appreciate fully the consequences of his or her conduct, the extent to which the child or young person has been acting on an impulsive basis, and whether his or her

conduct has been affected by inexperience, emotional volatility or negative influences.

Attaining the age of 18 during the proceedings

40. The Youth Court has the power to remit a defendant to the adult court if the defendant attains the age of 18 at any time after conviction and before sentence.
41. It is intended that the Youth Court will deal with all offenders who are under the age of 18 at the time of the finding of guilt. The Youth Court should therefore retain jurisdiction even in cases where the defendant reaches the age of 18 before sentence is passed. The reason for this is that the defendant will only just have attained the age of 18 and the Youth Court will remain the appropriate court to hear the case.

Absolute or conditional discharge

42. An absolute discharge is appropriate in the least serious cases when, despite a finding of guilt, the court considers that no punishment should be imposed.
43. A conditional discharge is appropriate when, despite a finding of guilt, the offence is not serious enough to warrant an immediate punishment. The fixed period of conditional discharge must not exceed three years.

Financial order

44. Sentencers should avoid imposing financial penalties directly on children and young people unless there is a clearly identified income or sum of money available to the child or young person that is not relied upon to meet basic needs or for educational purposes.
45. Where the child or young person is under the age of 16 the court must order that any fine, compensation or costs be paid by the parent or guardian of the youth instead of by the youth, unless the court is satisfied that the parent or guardian cannot be found or it would be unreasonable to make an order for payment, having regard to the circumstances of the case.
46. Where a young person is aged 16 or over the court may order that the parent or guardian of the young person pay the fine, compensation or costs instead of the young person⁴¹.

Reparation orders

⁴¹ Section 734 Criminal Procedure and Evidence Ordinance 2014

47. Reparation orders can be made in relation to a person or persons identified by the court as a victim of the offence, or a person otherwise affected by it, or to the community at large.
48. Reparation orders cannot be combined with a custodial sentence or a youth rehabilitation order.
49. Before making a reparation order a court must obtain and consider a written report by the probation officer indicating the type of work that is suitable for the offender and the attitude of the victim or victims to the requirements proposed to be included in the order.

Youth rehabilitation orders (YRO)

50. A YRO is a community sentence within which a court may include one or more requirements designed to provide for punishment, protection of the public, reducing re-offending and reparation.
51. When imposing a YRO, the court must fix a period within which the requirements of the order are to be completed; this must not be more than three years from the date on which the order comes into effect.
52. The offence must be 'serious enough' in order to impose a YRO. Even if an offence is deemed 'serious enough' the court is not obliged to make a YRO.
53. The requirements included within the order (and the subsequent restriction on liberty) and the length of the order must be proportionate to the seriousness of the offence and suitable for the child or young person. The court should take care to ensure that the requirements imposed are not too onerous so as to make breach of the order almost inevitable.
54. When determining the nature and extent of the requirements the court should primarily consider the likelihood of the child or young person re-offending and the risk of the child or young person causing serious harm. A higher risk of re-offending does not in itself justify a greater restriction on liberty than is warranted by the seriousness of the offence; any requirements should still be commensurate with the seriousness of the offence and regard must still be had for the welfare of the child or young person.
55. The probation service will assess the child or young person as part of their report and recommend an intervention level to the court for consideration. It is possible for the court to ask the probation service to consider a particular requirement.

	Child or young person profile	Requirements of order
Standard	Low likelihood of re-offending and low risk of serious harm	Primarily seek to repair harm caused through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • unpaid work; • activity requirement
Enhanced	Medium likelihood of re-offending or medium risk of serious harm	Seek to repair harm caused and to enable help or change through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • unpaid work; • requirement to address behaviour e.g. drug treatment, offending behaviour programme, education programme; and/or • a combination of the above.
Intensive	High likelihood of re-offending or high risk of serious harm	Seek to ensure the control of the child or young person and enable help or change through, for example: <ul style="list-style-type: none"> • supervision; • reparation; • unpaid work; • requirement to address behaviour; • requirement to monitor or restrict movement, e.g. prohibited activity, curfew or exclusion • a combination of the above.

56. If a child or young person is assessed as presenting a high risk of re-offending or of causing serious harm but the offence that was committed is of relatively low seriousness then the appropriate requirements are likely to be primarily rehabilitative or for the protection of the public.

57. Likewise, if a child or young person is assessed as presenting a low risk of re-offending or of causing serious harm but the offence was of relatively high seriousness then the appropriate requirements are likely to be primarily punitive.

Custodial sentence

58. A custodial sentence should always be used as a last resort. The court will need to assess whether custody is the most appropriate disposal. A custodial sentence must only be imposed as a measure of last resort.
59. A court must not impose a custodial sentence unless it is satisfied that the circumstances, including the nature and gravity of the offence, are such that if the offender were aged 21 or over the court would pass a sentence of imprisonment.
60. The court must also be satisfied that the child or young person is a qualifying offender. A child or young person is a qualifying offender if:
- he or she has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; or
 - only a custodial sentence would be adequate to protect the public from serious harm from the offender; or
 - the offence of which the offender has been convicted or found guilty was so serious that a non-custodial sentence for it cannot be justified.
61. The term of a custodial sentence must be the shortest commensurate with the seriousness of the offence. The court should take account of the circumstances, age and maturity of the child or young person.
62. In determining whether an offence has crossed the custody threshold the court will need to assess the seriousness of the offence, in particular the level of harm that was caused, or was likely to have been caused, by the offence. The risk of serious harm in the future must also be assessed. The pre-sentence report will assess this criterion and must be considered before a custodial sentence is imposed. A custodial sentence is most likely to be unavoidable where it is necessary to protect the public from serious harm.
63. If the court is satisfied that the offence crosses the custody threshold, and that no other sentence is appropriate, the court may, as a preliminary consideration, consult the equivalent adult guideline in order to decide upon the appropriate length of the sentence.

64. When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the adult sentence for those aged 15 – 17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as his or her chronological age.
65. The individual factors relating to the offence and the child or young person are of the greatest importance, and may present good reason to impose a sentence outside of this range. The court should bear in mind the negative effects a short custodial sentence can have; short sentences disrupt education and/or training and family relationships and support which are crucial stabilising factors to prevent re-offending.
66. There is an expectation that custodial sentences will be particularly rare for a child or young person aged 14 or under.
67. The welfare of the child or young person must be considered when imposing any sentence, but is especially important when a custodial sentence is being considered. A custodial sentence could have a significant effect on the prospects and opportunities of the child or young person, and a child or young person is likely to be more susceptible than an adult to the contaminating influences that can be expected within a custodial setting.
68. There is a high reconviction rate for children and young people that have had custodial sentences. There have been many studies profiling the effect on vulnerable children and young people, particularly the risk of self-harm and suicide, and so it is of utmost importance that custody is a last resort.

Breaches and the commission of further offences

69. If a child or young person is found guilty of breaching an order, or commits a further offence during the period of an order, the primary aim of the court should be to encourage compliance and seek to support the rehabilitation of the child or young person.

Annex One: General Principles Guideline

1. When sentencing offences for which there is no offence specific sentencing guideline these general principles should be applied.

Stages Two and Three – Determining the offence category and starting point

2. Throughout the sentencing process sentencers should consider which of the five purposes of sentencing (below) they are seeking to achieve through the sentence that is imposed. More than one purpose might be relevant and the importance of each must be weighed against the particular offence and offender characteristics when determining sentence.
 - The punishment of offenders
 - The reduction of crime (including its reduction by deterrence)
 - The reform and rehabilitation of offenders
 - The protection of the public
 - The making of reparation by offenders to persons affected by their offences
3. Where there is no definitive sentencing guideline for the offence, to determine the starting point and complete stages one, two and three of the stages of sentencing, sentencers should take account of all of the following (if they apply):
 - the statutory maximum sentence for the offence;
 - relevant case law; and
 - definitive sentencing guidelines for analogous offences.
4. For the avoidance of doubt sentencers should not take account of any draft sentencing guidelines.
5. When considering definitive guidelines for analogous offences sentencers must apply these carefully, making adjustments for any differences in the statutory maximum sentence and in the elements of the offence. This will not be a merely arithmetical exercise.
6. The seriousness of the offence is assessed by considering the culpability of the offender and the harm caused by the offending. The initial assessment of harm and culpability should take no account of plea or previous convictions.

Stage Four – Aggravating and mitigating factors

7. Once the starting point has been determined sentencers should take into account factors that may make the offence more serious and factors which may reduce seriousness or reflect personal mitigation.

8. Sentencers should identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the starting point.
9. It is for the sentencer to determine how much weight should be assigned to the aggravating and mitigating factors taking into account all of the circumstances of the offence and the offender. Not all factors that apply will necessarily influence the sentence.

Factors increasing seriousness

(Factors are not listed in any particular order and are not exhaustive)

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail
- Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation, or transgender identity
- Offence was committed against an emergency worker acting in the exercise of functions as such a worker
- Commission of offence whilst under the influence of alcohol or drugs
- Offence was committed as part of a group
- Offence involved use or threat of a weapon
- Planning of an offence
- Commission of the offence for financial gain
- High level of profit from the offence
- Abuse of trust or dominant position
- Restraint, detention or additional degradation of the victim
- Vulnerable victim
- Victim was providing a public service or performing a public duty at the time of the offence
- Other(s) put at risk of harm by the offending
- Offence committed in the presence of other(s) (especially children)
- Actions after the event including but not limited to attempts to cover up/conceal evidence
- Blame wrongly placed on other(s)
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed on licence or while subject to court order(s)
- Offence committed in custody

- Offences taken into consideration
- Offence committed in a domestic context
- Offence committed in a terrorist context
- Location and/or timing of offence
- Established evidence of community/wider impact
- Prevalence (see guidance)

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

- No previous convictions or no relevant/recent convictions
- Good character and/or exemplary conduct
- Remorse
- Self-reporting
- Cooperation with the investigation/early admissions
- Little or no planning
- The offender was in a lesser or subordinate role if acting with others/performed limited role under direction
- Involved through coercion, intimidation or exploitation
- Limited awareness or understanding of the offence
- Little or no financial gain
- Delay since apprehension
- Activity originally legitimate
- Age and/or lack of maturity
- Sole or primary carer for dependent relatives
- Physical disability or serious medical condition requiring urgent, intensive or long-term treatment
- Mental disorder or learning disability
- Determination and/or demonstration of steps having been taken to address addiction or offending behaviour

Stage Five – Reduction for guilty pleas

10. Sentencers should take account of any potential reduction for a guilty plea in accordance with this guideline.

Stage Six – Reduction in sentence – bail conditions (curfew)

11. The court should consider whether to give credit for time spent on bail with a curfew condition.

Stage Seven – Consider totality

12. If sentencing an offender for more than one offence, or where the offender is already serving a sentence, sentencers should consider whether the total sentence is just and proportionate to the overall offending behaviour in accordance with this guideline.

Stage Eight – Consider ancillary orders

13. In all cases sentencers should consider whether to make compensation and/or other ancillary orders.

Stage Nine – Reasons

14. Sentencers should give reasons for, and explain the effect of, the sentence and any ancillary orders.

Annex Two: Examples relating to totality

The tables below set out some common sets of circumstances and provide guidance on the approach to be adopted when applying the principles of totality.

Existing determinate sentence, where determinate sentence to be passed

Circumstance	Approach
Offender serving a determinate sentence <i>(Offence(s) committed <u>before</u> original sentence imposed)</i>	Consider what the sentence length would have been if the court had dealt with the offences at the same time and ensure that the totality of the sentence is just and proportionate in all the circumstances. If it is not, an adjustment should be made to the sentence imposed for the latest offence
Offender serving a determinate sentence <i>(Offence(s) committed <u>after</u> original sentence imposed)</i>	Generally, the sentence will be consecutive as it will have arisen out of an unrelated incident. The court must have regard to the totality of the offender's criminality when passing the second sentence, to ensure that the total sentence to be served is just and proportionate. Where a prisoner commits acts of violence in prison custody, any reduction for totality is likely to be minimal.
Offender serving a determinate sentence but released from custody	The new sentence should start on the day it is imposed. The sentence for the new offence will take into account the aggravating feature that it was committed on licence. However, it must be commensurate with the new offence and cannot be artificially inflated with a view to ensuring that the offender serves a period in custody additional to the recall period (which will be an unknown quantity in most cases); this is so even if the new sentence will in consequence add nothing to the period actually served.
Offender sentenced to a determinate term and subject to an existing suspended sentence order	Where an offender commits an additional offence during the operational period of a suspended sentence and the court orders the suspended sentence to be activated, the additional sentence will generally be consecutive to the activated suspended sentence, as it will arise out of unrelated facts.

Multiple fines for non-imprisonable offences

Circumstance	Approach
<p>Offender convicted of more than one offence where a fine is appropriate</p>	<p>The total is inevitably cumulative. The court should determine the fine for each individual offence based on the seriousness of the offence and taking into account the circumstances of the case including the financial circumstances of the offender so far as they are known, or appear, to the court. The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate total is not just and proportionate the court should consider how to reach a just and proportionate fine. There are a number of ways in which this can be achieved:</p> <ul style="list-style-type: none"> • Where an offender is to be fined for two or more offences that arose out of the same incident or where there are multiple offences of a repetitive kind, especially when committed against the same person, it will often be appropriate to impose for the most serious offence a fine which reflects the totality of the offending where this can be achieved within the maximum penalty for that offence. No separate penalty should be imposed for the other offences. • Where an offender is to be fined for two or more offences that arose out of different incidents, it will often be appropriate to impose a separate fine for each of the offences. The court should add up the fines for each offence and consider if they are just and proportionate. If the aggregate amount is not just and proportionate the court should consider whether all of the fines can be proportionately reduced. Separate fines should then be passed. <p>Where separate fines are passed, the court must be careful to ensure that there is no double-counting.</p> <p>Where compensation is being ordered, that will need to be attributed to the relevant offence as will any necessary ancillary orders.</p>
<p>Multiple offences attracting fines – crossing the community threshold</p>	<p>If the offences being dealt with are all imprisonable, then the community threshold can be crossed by reason of multiple offending, when it would not be crossed for a single offence. However, if the offences are non-imprisonable the threshold cannot be crossed.</p>

Fines in combination with other sentences

Circumstance	Approach
Fines and community orders	If the community order does not contain a requirement that is punitive then a fine may be imposed in addition to the order (see above guidance on imposition of community orders).
Fines and determinate custodial sentences	<p>A fine should not generally be imposed in combination with a custodial sentence because of the effect of imprisonment on the means of the defendant. However, exceptionally, it may be appropriate to impose a fine in addition to a custodial sentence where:</p> <ul style="list-style-type: none"> • the sentence is suspended; • a confiscation order is not contemplated; • there is no obvious victim to whom compensation can be awarded; and • the offender has, or will have, resources from which a fine can be paid.

Community orders

Circumstance	Approach
Multiple offences attracting community orders – crossing the custody threshold	If the offences are all imprisonable and none of the individual sentences merit a custodial sentence, the custody threshold can be crossed by reason of multiple offending. If the custody threshold has been passed, the court should refer to the offence ranges in sentencing guidelines for the offences and to the general principles.
Multiple offences, where one offence would merit immediate custody and one offence would merit a community order	A community order should not be ordered to run consecutively to or concurrently with a custodial sentence. Instead the court should generally impose one custodial sentence that is aggravated appropriately by the presence of the associated offence(s). The alternative option is to impose no separate penalty for the offence of lesser seriousness.
Offender convicted of more than one offence where a community order is appropriate	A community order is a composite package rather than an accumulation of sentences attached to individual counts. The court should generally impose a single community order that reflects the overall criminality of the offending behaviour. Where it is necessary to impose more than one community order, these should be ordered to run concurrently and for ease of administration, each of the orders should be identical.
Offender convicted of an offence while serving a community order	<p>If an offender, in respect of whom a community order is in force, is convicted of an additional offence, the court should ordinarily revoke the previous community order and sentence afresh for both the original and the additional offence.</p> <p>The sentencing court should consider the overall seriousness of the offending behaviour taking into account the additional offence and the original offence. The court should consider whether the combination of associated offences is sufficiently serious to justify a custodial sentence.</p> <p>If the court does not consider that custody is necessary, it should impose a single community order that reflects the overall totality of criminality. The court must take into account the extent to which the offender complied with the requirements of the previous order.</p>

Disqualifications from driving

Circumstance	Approach
Two or more offences involving discretionary disqualification	As orders of disqualification take effect immediately, it is generally desirable for the court to impose a single disqualification order that reflects the overall criminality of the offending behaviour.

Compensation orders

Circumstance	Approach
Multiple victims	The court should not fix a global compensation figure unless the offences were committed against the same victim. Where there are competing claims for limited funds, the total compensation available should normally be apportioned on a pro rata basis.
Compensation orders and fines	Priority is given to the imposition of a compensation order over a fine. This does not affect sentences other than fines. This means that the fine should be reduced or, if necessary, dispensed with altogether, to enable the compensation to be paid.
Compensation orders and confiscation orders	A compensation order can be combined with a confiscation order where the amount that may be realised is sufficient. If such an order is made, priority should be given to compensation.
Compensation orders and community orders	A compensation order can be combined with a community order.
Compensation orders and suspended sentence orders	A compensation order can be combined with a suspended sentence order.
Compensation orders and custody	A compensation order can be combined with a sentence of immediate custody where the offender is clearly able to pay or has good prospects of employment on his or her release from custody.

Annex Three: Compensation starting points

The starting points are suggestions based on the tariffs set by the Criminal Injuries Compensation Authority (England and Wales).

Physical injury

Type of injury	Description	Starting point
Graze	Depending on size	£75
Bruise	Depending on size	£100
Cut: no permanent scar	Depending on size and whether stitched	£100 - £300
Black eye	-	£125
Eye	Blurred or double vision lasting up to 6 weeks	£500
	Blurred or double vision lasting 6 to 13 weeks	£1000
	Blurred or double vision lasting for more than 13 weeks (recovery expected)	£1500
Brain	Concussion lasting one week	£1500
Nose	Undisplaced fracture of nasal bone	£1000
	Displaced fracture requiring manipulation	£2000
	Deviated nasal septum requiring septoplasty	£2000
Loss of non-front teeth	Depending on cosmetic effect	£750 per tooth
Loss of front teeth	Depending on cosmetic effect	£1500 per tooth
Facial scar	Minor disfigurement (permanent)	£1000

Arm	Fractured humerus, radius, ulna (substantial recovery)	£1500
Shoulder	Dislocated (substantial recovery)	£900
Wrist	Dislocated/fractured – including scaphoid fracture (substantial recovery)	£2400
	Fractured – colles type (substantial recovery)	£2400
Sprained wrist, ankle	Disabling for up to 6 weeks	£500
	Disabling for 6 to 13 weeks	£800
	Disabling for more than 13 weeks	£1000
Finger	Fractured finger other than index finger (substantial recovery)	£300
	Fractured index finger (substantial recovery)	£1200
	Fractured thumb (substantial recovery)	£1750
Leg	Fractured fibula (substantial recovery)	£1000
	Fractured femur, tibia (substantial recovery)	£1800
Abdomen	Injury requiring laparotomy	£1800

Mental Injury

Description	Starting point
Temporary mental anxiety (including terror, shock, distress) not medically verified	£500
Disabling mental anxiety, lasting more than 6 weeks, medically verified *	£1000
Disabling mental illness, lasting up to 28 weeks, confirmed by psychiatric diagnosis *	£1500

* mental injury is disabling if it has a substantial adverse effect on a person's ability to carry out normal day-to-day activities for the time specified (e.g. impaired work or school performance or effects on social relationships or sexual dysfunction).

Physical and Sexual Injury

Type of injury	Description	Starting point
Physical abuse of adult	Intermittent physical assaults resulting in accumulation of healed wounds, burns or scalds, but with no appreciable disfigurement	£2000
Physical abuse of child	Isolated or intermittent assault(s) resulting in weals, hair pulled from scalp etc.	£1000
	Intermittent physical assaults resulting in accumulation of healed wounds, burns or scalds, but with no appreciable disfigurement	£1000
Sexual abuse of adult	Non-penetrative sexual acts over clothing	£1000
	Non-penetrative sexual act(s) under clothing	£2000
Sexual abuse of child (under 18)	Non-penetrative indecent physical act(s) over clothing	£1000
	Non-penetrative frequent assaults over clothing or non-penetrative indecent act under clothing	£1500 or £2000
	Repetitive indecent acts under clothing	£3300

Annex Four: Main classes of mental disorders and presenting features

This information is only intended as general assistance to sentencers in understanding common impairments and mental disorders and is not intended to cover every situation.

1. Mental disorder is a catch-all term for illnesses and developmental disorders. Mental disorder is a collection of symptoms (the person's experiences) and signs (features that may be observed by an outside observer). For categorisation as a disorder, these problems should be associated with distress and/or interference with personal functions.
2. Broadly the concept of illness is used for disorders which start after a sustained period – often a lifetime – of health or average/normal psychological function e.g. schizophrenia, depression.
3. Developmental disorders are conditions which may be apparent at birth, but always have early enough onset that the individual never quite fitted within the average behavioural range. Behaviour has three main components – thinking (cognitions), feeling (emotions, affect) and actions. Autism, generalised or specific intellectual (learning) disabilities, and personality disorders are examples.
4. Other disorders which may be relevant in court lie at the interface between psychiatry and neurology. Epilepsy in its various forms is an example, Acquired Brain Injury (ABI) is another example. ABI is an injury caused to the brain since birth, most often as a result of trauma, tumour, stroke, illness or infection.
5. Brief descriptions of some of the more common disorders likely to be relevant in court:

Psychotic illnesses

6. These affect cognitions, emotional capacities and actions.
7. There are two main groups – those which are associated with more generalised illness or bodily problems, often called 'delirium', and those which are not – often referred to as 'primary psychosis', which include schizophrenia and bipolar disorders.
8. **Delirium** is likely to present with some impairment in consciousness. It may occur as an acute phase of a dementing process, but also with serious infections or generalised problems with bodily functions, such as hormonal disturbances. Delirium

may also occur in the context of drug (including alcohol) taking or withdrawal from such substances.

9. People may misinterpret sensory input in any of its main forms (sight, hearing, smell, taste, touch), thus having 'illusions'; their sensory experiences may be so disturbed that they see or hear or smell or taste or feel things which are not there at all to the external observer (hallucinations). Their thinking may be disturbed in its own right, or following from these perceptual problems, such that they have pathological beliefs (delusions).
10. Delirium is likely to resolve as the underlying condition is treated.
11. **Schizophrenia and bipolar disorders** are disorders in which consciousness is unimpaired, but sensory (illusions, hallucinations) and cognitive (delusions, formal thought disorder) disturbances occur.
12. In schizophrenia, serious disturbances of emotion also occur in which the person either cannot experience or express emotions accurately, or both, and may be unaware of the difficulty. Terms like 'incongruous affect', when the emotional experience or expression is the opposite from what a healthy observer might expect for the situation, or 'flattened affect', when the person seems to have little or no emotion at all, are quite common. Tests for empathy may show that this is reduced.
13. People may also present with 'formal thought disorder' – when the form of thought, and thus speech is hard to follow and may include nonsensical, made-up words. Hallucinations most commonly take the form of 'third person hallucinations' when the person hears others talking about them, but when no-one is doing so.
14. Delusions are beliefs which, in full form, are wholly impervious to reason, generally, but not always based on a false premise. Persecutory/paranoid delusions are probably the most common. Passivity delusions – when the individual 'knows' that his/her thoughts, feelings or actions are controlled by another person or an external system – may be particularly associated with violence. If hypochondriacal delusions occur, they tend to be bizarre and may be dangerous – for example a belief in a machine causing all the problems implanted in his/her eye. Many aspects of schizophrenia are treatable, but 'cure' is unlikely and deterioration over years quite common. Nevertheless, people with the condition can attain a good quality of life and safety if a full range of relevant treatments can be sustained.
15. **Delusional disorder** is sometimes diagnosed when the only abnormality appears to be the presence of a single delusion and can be easily missed. Apart from the impact of the delusion or its ramifications, functioning is not markedly impaired, and behaviour is not obviously bizarre or odd.

16. **Bipolar illness** – also referred to by the older, now less used term ‘manic depression’ – is characterised by repeated episodes of depression (low mood and low activity levels) and (hypo)mania (high mood and high activity levels). Psychotic symptoms are not invariably present at either extreme, but depressive psychotic symptoms include hypochondriacal delusions of a kind that the person believes his/her body is rotting away, or delusions of catastrophe; suicidal ideas are common and the rare situation of family killings with suicide of the perpetrator may occur in such states. In a manic phase, the individual may have grandiose or omnipotent delusions, accompanied by reckless and/or disinhibited acts.
17. **Unipolar affective illnesses** – people may have recurrent depressions or recurrent manic episodes, but not both.
18. **Schizoaffective illness** looks like a hybrid of schizophrenia and bipolar disorder; it may not be a distinct disorder.

Non-psychotic illnesses

19. These include depression (seriously low mood and perhaps suicide related behaviours, but without delusions) and anxiety disorders. The latter include a range of conditions; the more common include phobic disorders (people recognise that their fear is not well founded in fact, but experience fear anyway which may interfere with their everyday life), obsessive compulsive disorders (again, the fear recognised for what it is, but still thoughts and fears intrude and maybe rituals must be performed), panic attacks and post-traumatic stress disorders [PTSD].
20. **PTSD** can only be diagnosed if it follows a seriously traumatic event which happened directly to the person, which the person witnessed as it happened to others and/or had to deal with the aftermath (emergency service workers may be as vulnerable as the general population), or which the person learned about soon afterwards but it affected someone very close to him/her. Generally, the scale of the event is taken to be life-threatening or life-changing and/or that the person affected unquestionably thought it so. Guidance is that the condition must emerge within six months of this – it may not be immediately apparent. It is important to have evidence that the condition did follow the event. Most people will get some of the symptoms or signs in such circumstances; guidance is that these may be collectively regarded as a disorder if they persist to a degree that they are disruptive to the individual’s usual lifestyle for over a month. There are people who have experienced multiple traumas and the presenting features may therefore represent a worsening/exacerbation of PTSD which started after a previous event rather than a completely new presentation.

21. As well as mental and physiological symptoms and signs (like racing heartbeat, tight chest, uncomfortable sensations in the gut), and of anxiety, and often some depressive features, typical features are:
- extremely distressing intrusions of memories or experiences of the event which disrupt waking life (flashback memories) and/or sleep (nightmares), dissociative reactions (if the surroundings are perceived as unreal this is called 'derealisation'. If the person him-or herself feels detached, outside him/herself and/or more as an observer of self than a real person this is called 'depersonalisation'), when the individual is not very aware of his/her real surroundings but living again in the trauma; sometimes specific real experiences may trigger this (for example if an assailant had been wearing a particular perfume/aftershave chance contact with a perfectly harmless person who happens to use the same may trigger a flashback and reaction more appropriate to the traumatic experience than the reality);
 - persistent, active avoidance of any reminders of the trauma – including unwillingness to talk about it or inability to read documents relating to it;
 - persistent negative feelings about self and others – many have no concept of a future;
 - alterations in arousal – so, irritability, reckless behaviour, being over-watchful, problems with concentrating, exaggerated 'startle responses' to actually non-threatening events, various difficulties with sleep.

Developmental disorders

22. **Intellectual disability [ID] (learning disability)** – names for these conditions keep changing over time in a constant effort to reduce stigma. Problems may be generalised (probably most relevant in court) or specific – for example relating to a particular language function. As the labels suggest, the core problem is cognitive – those affected may have a lower than average ability to learn at all and to acquire language. Inevitably, this is an over-simplification as there are often problems with emotions and actions too, and it is hard to distinguish the extent to which these are part of the primary condition and the extent to which they follow from difficulties in learning. A tested 'intelligence quotient' (IQ) is often used to indicate severity – mild, moderate, severe. Average intelligence is taken as 80-120. A person with severe generalised intellectual disability will have a tested IQ under 35, and cannot live independently. In varying degrees those with moderate (IQ 35-49), mild (IQ 50-69) or borderline ID (IQ 70-80) can live independently, but are particularly vulnerable if they enter the criminal justice system.

23. **Autism and autistic spectrum disorder** (the latter sometimes referred to as Asperger's syndrome, but this term is falling out of use) are pervasive developmental disorders in which intelligence may or may not be impaired, but emotional and relationship capacities, often with aspects of speech development, are. In recognition that these conditions encompass many shades of disorder and disability, and sometimes extraordinary but atypical abilities, there is a growing tendency to use the term 'autistic spectrum disorder' with indications of the specific behaviours affected and the severity. As understanding of some of the more specific underlying mechanisms in their development grows, identification of such disorders is increasingly being made for the first time in adulthood. The American DSM-5 no longer uses the term autism at all. It is still used in the UK, generally to indicate the most pervasive and extreme incapacity to understand or empathise with others, to show any emotional reciprocity and to develop or maintain relationships. Generally, the individual seeks 'sameness' and so is inflexible in routines or repeated, simple actions and may become very aggressive if interrupted.
24. 'Autism'/autistic behaviours were once seen as one of the core sets of features of schizophrenia, and may still be referred to in this context. The underlying neurological/brain difficulties may well be similar in some respects, but these are distinct conditions. Most people with autism/autistic spectrum disorders do not become psychotic.
25. **Attention deficit hyperactivity disorder [ADHD]** is similarly apparent from a very early age, although may not be completely recognised until the individual starts school. It is not uncommonly associated with other developmental disorders, but also occurs alone, when it is characterised by profound difficulties in concentrating in ordinary social situations or on tasks (many can focus on computer based activities) and very high levels of physical activity. Children are seen as 'disruptive' and can easily be made worse under conventional behavioural control efforts. As with all developmental disorders, it may persist into adult life.

Substance misuse disorders

26. Substance misuse disorders arise when the individual no longer has significant personal control over intake and/or he or she has signs and symptoms of secondary disease. Substances of abuse affect the nervous system, often altering its activity so that the experience of the consumer is that when he or she does not have the substance they have very unpleasant symptoms or signs ranging from intense anxiety through to psychotic symptoms (withdrawal symptoms/signs), and so the consumer has to keep taking the substance in order to feel almost normal. Secondary disease may affect any part of the body, although most commonly those areas that process the substances – like the gut or the liver – and the brain.

27. **Conduct disorders**, if unresolved, are the childhood precursors of personality disorders. Emphasis is on repeated patterns of extreme dissocial, aggressive or defiant behaviours, persistent through childhood, which cannot be completely explained by one of the other developmental disorders.
28. **Personality disorders**. The personality is not considered to be fully formed until adulthood, so, by definition these are conditions which can affect only adults. Although adulthood is often taken as 18 years old, there isn't a set time threshold when the brain and physiology is one day that of a child and the next of an adult. For a diagnosis of personality disorder, there must be evidence of continuity with problems such as conduct disorder throughout childhood and adolescence. Similar conditions may arise in adulthood after, say, brain injury or disease, but this would be personality change.
29. Specific personality disorder labels are generally descriptive, following from their most prominent characteristics. Treatment needs mean that is probably most helpful to think of the personality disorder clusters rather than specific disorders – thus:

Cluster A – the paranoid, eccentric, schizoid

Cluster B – the emotionally unstable, histrionic, narcissistic, antisocial

Cluster C – the anxious, avoidant, obsessional (anankastic), dependent
30. 'Psychopathic disorder' is not a recognised diagnosis; its use should be avoided as pejorative and unscientific. 'Psychopathy' is similarly not a diagnosis, but rather a term that has been introduced to indicate whether a person had crossed a threshold on one of a number of possible psychopathy scales. Generally, these scales measure two things – the extent to which antisocial behaviours are widespread and have been repeated through the life course, and the extent to which the individual has capacity for empathy.
31. Both these elements have, correctly, been used as indicators of risks or repetition of unwanted behaviours. It is obvious that established behaviour patterns are likely to continue unless deliberately disrupted; on the other hand, it is always easier to tell if progress has been made when a previously repeated behaviour ceases over a substantial period of time under a range of circumstances.
32. If empathy is severely impaired – for example the capacity to recognise distress in others and make appropriate use of that information – this may severely impair capacity to desist from harming others.
33. Risk of harm to self is very high among people with personality disorder.

The dementias

34. Dementia follows from brain damage. Each aspect of behaviour may be affected. The most obvious is the cluster of cognitive problems, with forgetfulness, difficulties in following a train of thought and making judgements prominent. There are commonly also directly related emotional problems, as the brain can no longer control emotions, and also secondary emotional problems when the person retains insight and is aware of progressively losing his or her mental abilities. Capacity for control of actions may also be impaired, resulting in what is often referred to as 'disinhibited behaviour'.
35. Evidence for dementia will come in several forms – the clinical examination, which should include asking the affected person about his/her experiences and for a history of the development of the condition; for obvious reasons it is more than usually important to get a history from relatives and friends too. People with dementia may retain the capacity to give a long and fascinating account of their problems which has little basis in reality (referred to as confabulation).
36. Simple tests of memory and other cognitive functions may be enough for basic diagnosis and to help the court, but it is generally best to map cognitive functions with detailed psychological testing, and there may be some very specific deficits which are relevant in court – for example difficulties in recognising people or experience of perceptual distortions. Brain imaging techniques may have particular value in verifying the nature and extent of the brain damage underpinning the problems.
37. The dementias are progressive. People may be helped to manage their difficulties, sometimes the progress may be slowed, and sometimes worsening of some aspects of the condition may render other aspects less problematic or risky, but these are not conditions from which people recover.
38. The most common dementias are a function of unhealthy aging. There has been an increase in offending among older people, so these are conditions increasingly likely to be seen in the courts. A few of the dementias, usually those with early onset, have a clear genetic cause; there is evidence that there is a genetic contribution to most.
39. **Alzheimer's disease/dementia** is among the commonest given a name. The pattern of destruction of brain tissue is more-or-less specific to this dementia, and there is a genetic component to it. Where the genetic component is strong, onset may be at a younger age (50, occasionally younger) but more typically onset is around 65-70. The characteristics are more-or-less as described above. Variations in presentation often indicate which parts of the brain are most affected at any particular time, but this is a generalised condition.

40. One of the more difficult dementias to recognise in relation to offending is fronto-temporal dementia (referring to the lobes of the brain most affected). Compared with other dementias, memory is spared for longer, but behavioural problems may be prominent. It is also less common than Alzheimer's or dementia of old age, and more often missed. It should be considered if a well socialised person becomes aggressive or antisocial for the first time in later adulthood (onset generally 45-65).
41. Dementias may also, however, follow from brain damage from external causes, for example a serious head injury, in relation to other disorders affecting the whole body, like diabetes, or from having taken noxious substances – especially excessive alcohol, but a range of other drugs too.

Acquired brain injury (ABI)

42. ABI is an injury to the brain which has occurred since birth. Causes include: tumour, stroke, haemorrhage, encephalitis, carbon monoxide poisoning, hypoxic injury or trauma. Principal causes of trauma resulting in ABI are falls, road traffic collisions, workplace injuries, violent assault and sporting injuries. Even after a minor head injury, brain function can be impaired temporarily (concussion). Effects include headaches, dizziness, fatigue, depression, irritability and memory problems, lasting for weeks, months or even years.
43. Survivors of more severe brain injury are likely to have long term problems affecting their personality, relationships and ability to live independently. Issues can be compounded as the effects of ABI are often hidden and may fluctuate. The cognitive, psychological, emotional and behavioural effects of brain injury can be difficult to detect by those without specialist training.

Multi-morbidity and comorbidity (dual diagnosis)

44. These terms are often used interchangeably to mean that the individual has more than one disorder although, strictly, comorbidity means that the conditions arose simultaneously. This is a very common situation among people who have a disorder of mental health. It is generally very hard to disentangle which disorder came first or whether they arose simultaneously. Psychiatrists and other clinicians still sometimes use the term 'dual diagnosis'. The term 'dual diagnosis' was invented to describe people who had a psychosis and a substance misuse disorder, but sometimes people use it for other pairs of disorders (e.g. psychosis and personality disorder) and, in practice, it is quite usual for people who come to court and have more than one disorder to have several – so a psychotic illness and more than one substance misuse disorder and a personality disorder and sometimes also a learning disability.
45. Where focus is on psychosis and substance misuse disorder, it is not clear that it matters clinically, except insofar as the idea that a psychotic condition is 'drug

induced' may, in the context of scarce service resources, be used to deny services. In addition to having several mental disorders – for example schizophrenia, personality disorder, cannabis use disorder and reactive depression – an individual is likely to be multiply disadvantaged socially – for example homeless or disconnected from family – and some clinicians will include these social disadvantages in the sum of comorbidities. They are certainly relevant to outcomes.

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