

Aggravating factors

Summary

This guideline deals with those factors that may not be specifically identified in the applicable offence-based guideline, but may still be relevant to sentence depending on the circumstances of an individual case. Any factor relevant to assessing seriousness must be taken into account, even if it is not mentioned in the applicable offence-based guideline, or in this guideline.

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- Absence of a mitigating factor (such as an absence of remorse)
- Plea of not guilty
- Continued assertion of innocence after conviction
- Conduct that is disputed and not proved following a disputed facts hearing under section 24 of the Sentencing Act 2002

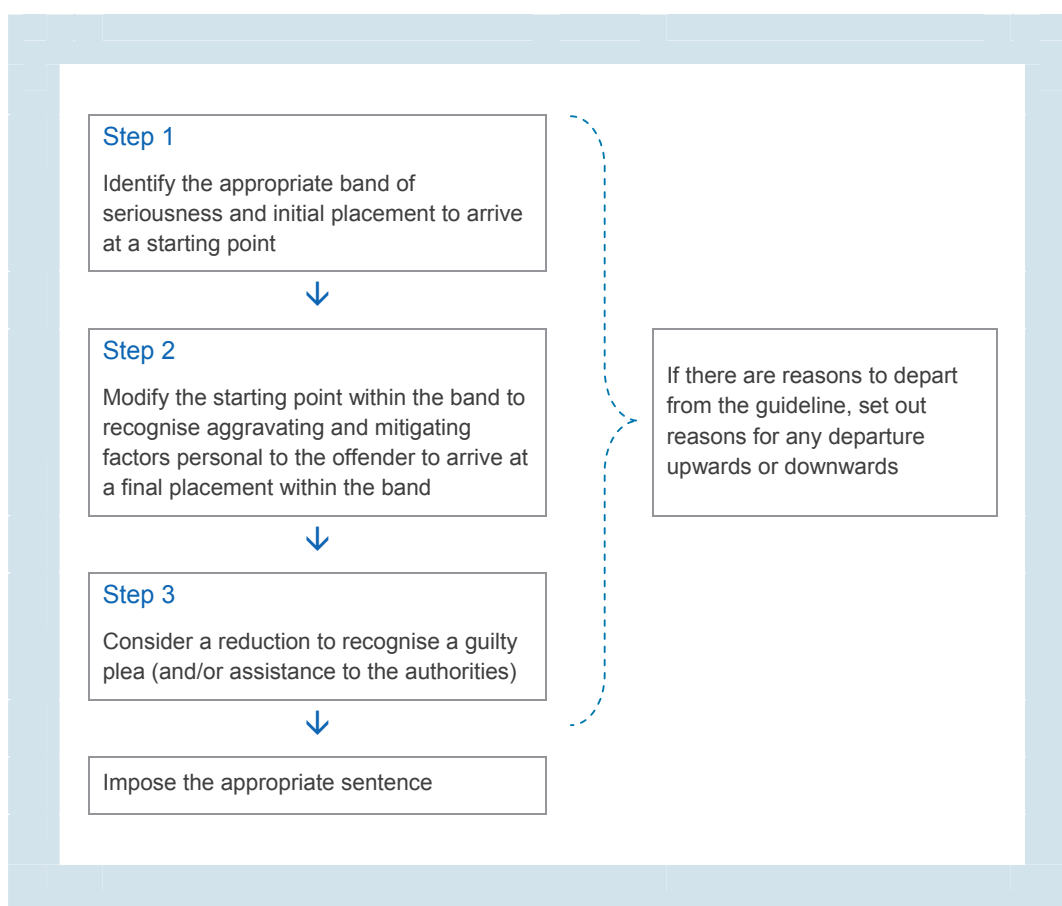
Introduction

Purpose of this guideline

1. All offence-based guidelines contain commentary on the band choice and band placement factors that are particularly relevant to that guideline. However, the [Sentencing methodology](#) requires a judge to consider all aggravating factors, whether or not they are specifically identified in the applicable offence-based guideline as band choice or band placement factors. This guideline deals with those factors that may not be specifically identified in the offence-based guideline, but may still be relevant to sentence depending on the circumstances of an individual case.
2. “Aggravating factor” should be read broadly to include any factor that increases seriousness and therefore justifies a greater penalty or other outcome than might otherwise be appropriate. “Seriousness” for the purposes of this guideline includes the intrinsic seriousness of the conduct, the harm that results from it, and the culpability of the offender.

Aggravating factors and the sentencing methodology

3. Aggravating factors are relevant at steps 1 and 2 of the [Sentencing methodology](#) and when considering whether there are reasons to depart from a guideline:



4. Generally, factors relevant to the offending are considered at step 1 and factors personal to the offender are considered at step 2. The distinction between aggravating factors relating to the offending and aggravating factors personal to the offender is reflected in this guideline.
5. Band choice factors, as identified in each offence-based guideline, are the primary indicators of seriousness and indicate the appropriate sentence range. All relevant aggravating factors influence band placement, although their respective weight depends on the circumstances of each case. In particular, no inferences about the relative weight to be given to aggravating factors should be drawn from:
 - (a) Whether or not particular factors are identified in an offence-based guideline as band placement factors;
 - (b) Whether or not particular factors are identified in this guideline; or
 - (c) The order in which factors are listed in an offence-based guideline, or in this guideline.
6. The guidelines do not exhaustively list all aggravating factors. Any factor relevant to assessing seriousness must be taken into account, even if it is not mentioned in the applicable offence-based guideline, or in this guideline.

Caution

7. There are inter-relationships between many aggravating factors. Occasionally, the same feature of an offence or an offender may be described under more than one factor heading. Care should be taken not to double count particular features. For example, if several offenders have committed an offence, any increased psychological or emotional harm resulting from that feature should not aggravate separately under both “victim impact” and “acting with co-offenders”.
8. Equally, a particular feature of an offence or an offender cannot be double-counted just because it is described as a band choice or band placement factor in an offence-based guideline as well as an aggravating factor in this guideline. For example, “grooming” is a band choice and band placement factor in the offence-based guideline for [Sexual connection with a child or young person](#), and it should not aggravate separately as “premeditation” under this guideline.

Factors relating to the offending

Victim impact

9. Seriousness increases as the impact on the victim from the offending increases. This factor should be considered in a broad manner by reference to any physical, psychological, financial, or other loss, damage, harm, or adverse consequence resulting from an offence.
10. Loss, damage or harm may affect:
 - (a) Victims as defined in section 4 of the Sentencing Act 2002;
 - (b) People who witness the offending (for example, young children who witness serious violence);
 - (c) People who are exposed to danger as a result of the offending;

- (d) A group of people or a particular community (for example, a school community where a school is intentionally damaged);
 - (e) The community at large (for example, large-scale benefit fraud may undermine the integrity of the social security system).
11. Victim impact is likely to be greater if the victim was particularly vulnerable (for example, due to age or health), regardless of whether the victim's vulnerability was known to the offender.
 12. Matters arising after the offending may also increase victim impact (for example, if a victim of sexual offending has been alienated from family members).

Violence (threatened or actual)

13. Seriousness increases according to the nature, severity, and duration of any threatened or actual violence. Use of a particular degree of violence is generally more serious than a threat (which was not carried into effect) to use that same degree of violence. However, a threat to use a high degree of violence may in some cases be more serious than the actual use of a lower level of violence.

Use of a weapon (threatened or actual)

14. Seriousness increases if an offence was facilitated by the threatened or actual use of a weapon. The extent to which seriousness increases depends on the intrinsic capability of the weapon, the purpose of its use, and the risk of harm (with regard to the weapon's location, its readiness, the circumstances of its use, and the potential for escalated or uncontrolled violence). Seriousness increases as the number of weapons increases.
15. All other things being equal, discharging a weapon is more serious than presenting a weapon. However, this will not always be the case – for example, presenting a weapon at a crowded concert may be more serious than discharging a weapon on a remote farm.

Particular cruelty

16. Seriousness increases if there was particular cruelty in the commission of an offence.

State of mind

17. Many offences require proof of a particular state of mind such as intention or recklessness. State of mind is on a spectrum from intention (most serious) through to negligence (least serious). Recklessness (that is, where an offender knew the risk of his or her actions but carried on regardless) lies in between intention and negligence. An intention to cause a high degree of harm is more serious than an intention to cause a low degree of harm.
18. If a state of mind short of intention (such as recklessness or negligence) is sufficient to establish liability, the fact that an offender intended to commit the offence is an aggravating factor. For example, if an offender is being sentenced for causing grievous bodily harm with reckless disregard for the safety of others (section 188(2) of the Crimes Act 1961), seriousness increases if it is established that the offender did intend to cause some injury to the victim.

Motive

19. The offender's motive (his or her reason for committing the offence) may increase seriousness. Although motive overlaps with state of mind and premeditation, it is a distinct concept that the judge should take into account. For example, seriousness increases if:
- (a) The offending was to advance an improper purpose (for example, to exact revenge on a victim or to avoid detection of criminal offending);
 - (b) An offender committed the offence partly or wholly because of hostility towards the race, colour, nationality, religion, gender identity, sexual orientation, age, or disability of the victim (see section 9(1)(h) of the Sentencing Act 2002);
 - (c) The offending was committed as part of, or involved, a terrorist act (see section 9(1)(ha) of the Sentencing Act 2002).

Premeditation

20. The greater the premeditation, the greater the criminality and the more serious the offending. Indicators of premeditation include:
- (a) Planning and preparation for offending;
 - (b) Persistent offending over a period of time, if this indicates that an intention to break the law has been fixed in the offender's mind;
 - (c) Grooming a child or young person in the context of sexual offending.

Sophistication

21. Seriousness increases with the sophistication of the offending. The methods used by an offender are useful indicators of the level of sophistication. Sophisticated offending is often marked by an offender having used methods to avoid detection, or who is skilled at the particular kind of offending.

Targeting a vulnerable victim

22. Seriousness increases if an offender targeted a vulnerable victim. Particular circumstances or characteristics of a victim that may indicate vulnerability include: the victim's age, health, or disability; where the victim is residing (for example, in an isolated rural area); or the existence of a protection order or an order of a similar type in place to protect the victim from the offender.

Breach of trust

23. A breach of trust generally arises from a pre-existing relationship between an offender and his or her victim. Relationships of trust may be familial, employment-based or other (such as doctor–patient, teacher–student, babysitter–child or caregiver–patient).
24. A breach of trust may also arise if an offender has exploited a position carrying a high degree of inherent trust that others are expected and entitled to rely on (for example, a solicitor or an accountant).

25. Seriousness increases with the degree of trust that was vested in the offender.

Victim's occupation or public position

26. Seriousness may increase if an offender targeted a victim because of the victim's occupation or public position. This recognises that a person's occupation or position can expose him or her to greater risk of becoming a victim of crime, and that certain positions are public ones requiring particular protection. Examples include a taxi driver, prison officer, police officer, or bailiff.

Unlawful entry or presence in a dwelling place

27. Seriousness increases if the offending involved unlawful entry into or unlawful presence in a dwelling place.

Scale of offending

28. Seriousness increases as the scale of offending increases. The scale of offending is indicated by the number of offences, their frequency, and the period of time over which the offences were committed. The number of victims is also relevant to the scale of offending.

29. The number of offences for which an offender is being sentenced at one time may also indicate the scale of offending. If an offender is being sentenced for multiple offences, the generic guideline on [Multiple offences \(totality principle\)](#) applies. If there are representative charges, the judge should assess the scale of offending in accordance with the considerations identified above.

Acting with co-offenders

30. Seriousness increases if an offender acted with co-offenders. Offending committed by weight of numbers may have a greater impact on victims because of the additional fear and intimidation that such offending can generate. In addition, acting with co-offenders may increase offenders' ability to effect an unlawful purpose.

31. When assessing the weight to be given to this factor, relevant considerations include the number of offenders and the role that each offender played.

32. The guidelines on [Parties](#), [Accessories after the fact](#), and [Conspiracies](#) should be referred to where appropriate.

Organised criminal groups or gangs

33. The fact that an offender is a member of an organised criminal group or gang does not on its own increase the seriousness of his or her offending. However, the fact that an offence was committed by a member or members of an organised criminal group or gang may be taken into account if:

- (a) There is a background of offending of a similar type by the organised criminal group or gang to which the offender belongs. For example, seriousness increases if, against a background of violence by a particular group, a member of that group was discovered unlawfully in possession of a firearm; or

- (b) An offender relied on the reputation of his or her group or gang to facilitate the offending – for example, to intimidate the victim.

Significant involvement in the offending

34. This factor will commonly arise if an offender acted with co-offenders. The guidelines on [Parties](#), [Accessories after the fact](#), and [Conspiracies](#) should be referred to where appropriate.
35. Seriousness increases as an offender's level of involvement in the offending increases. For example, it is more serious to have masterminded a drug importation than to have been the courier of the drugs. An offender's actual role in the offending may indicate his or her overall level of involvement, but this will not always be the case – for example, the mastermind of an aggravated robbery may be the look-out.
36. It will not always be possible to assess an offender's involvement, particularly if the offending occurred in a group context. It might be unrealistic to draw fine distinctions between offenders in a joint enterprise, especially if the offenders were acting in concert and if each was essential to the enterprise.

Recruiting others

37. Seriousness increases if an offender recruited others into criminal offending, or involved others in some other way. Generally, this is exacerbated if the person recruited or involved was young, vulnerable, or criminally inexperienced.

Post-offending behaviour

38. An offender's conduct after the offending may increase seriousness in limited circumstances. In particular, seriousness increases if an offender acted unlawfully after his or her offending to avoid detection, prosecution, or conviction for the offending – for example, by using threats or other intimidation to prevent the offending coming to the attention of the authorities, or destroying stolen property.

Prevalence

39. An increase in the prevalence of an offence (nationally or locally) may justify a higher band placement but not a sentence outside the otherwise appropriate band of the applicable offence-based guideline. Cogent evidence regarding the prevalence of the particular offence (such as statistics from an objective source) must be placed before the judge before any alteration of sentence or approach may occur on this basis. Paragraph 2.2(e) of the *Sentencing Practice Note 2003* [2003] 2 NZLR 575 applies.

Factors personal to the offender

Offender on bail or subject to a sentence

40. Seriousness increases if an offence was committed while the offender was on bail, or subject to a sentence (including on parole).
41. The fact that an offender has offended while on bail or subject to a sentence indicates that the previous arrest and criminal proceedings have not deterred him or her from criminal offending, and that there is a heightened risk of further reoffending.

42. When assessing the weight to be given to this factor, relevant considerations include the offender's criminal history, and the nature and seriousness of both the original offending and the offending committed while on bail or subject to a sentence. The period of time between the original offending and that committed while on bail or subject to a sentence is also relevant. Generally, the shorter the period of time between the original and fresh offending, and the greater the similarity between the charges, the greater the risk of offending in a similar way in the future, and the greater the aggravation. Aggravation is heightened further if the offender has a history of similar offending or a history of breaching court orders. However, the degree of similarity between the charges is not determinative. Any offending on bail or while subject to a sentence demonstrates that the offender has not been deterred from offending.
43. If offending occurs on parole, the judge should also consider the length of time between release from prison and the offending. The shorter the period of time, the greater the aggravation. If offending on parole results in recall to prison, the judge is not precluded from taking into account as an aggravating factor the fact that the offending was committed while on parole.

Offender subject to an order

44. Seriousness increases if the offence was committed while the offender was subject to an order, and the offence is of the kind that the order was designed to prevent.
45. For example, seriousness increases if:
 - (a) An offender subject to an extended supervision order has sexually offended against children;
 - (b) An offender subject to a protection order has assaulted his or her partner.
46. This factor does not apply if the breach of the order is itself the offence being sentenced.

Offender's criminal history

47. See the generic guideline on [Criminal history](#).

Offender's response to previous sentences

48. An offender's response to previous sentences may indicate that he or she is unlikely to comply with the otherwise appropriate sentence, particularly if the offender has a history of breaching sentences and court orders. This may justify the imposition of a more serious type of sentence if one is available.
49. This factor has statutory recognition in the Sentencing Act 2002 (section 17 in relation to imprisonment and sections 56(1)(b) and (2)(b) in relation to community work). It may also justify a departure from the guidelines in some circumstances (see ground (I) of the generic guideline on [Departure from the guidelines](#), under which a departure is justified if the sentence indicated by the guidelines is impracticable).

Factors not to be considered aggravating

50. Some matters are not aggravating factors and cannot be used to justify a greater penalty or other outcome than might otherwise be appropriate. Examples of matters that are not aggravating factors are listed below:

- Absence of a mitigating factor (such as an absence of remorse);
- Plea of not guilty;
- Continued assertion of innocence after conviction;
- Conduct that is disputed and not proved following a disputed facts hearing under section 24 of the Sentencing Act 2002.