

# Mitigating 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.

### *Factors relating to the offending*

- State of mind (para 9)
- Motive (para 11)
- Duress, domination, coercion, or influence (para 12)
- Conduct of the victim (para 14)
- Limited involvement in the offending (para 17)
- Post-offending behaviour (para 21)

### *Factors personal to the offender*

- Age (para 22)
- Diminished intellectual capacity or understanding, or mental impairment (para 23)
- Remorse (para 27)
- Previous good character (para 29)
- Cooperation with the authorities (para 31)
- Sentence would have a disproportionately severe impact on the offender or the offender's family (para 34)
- Rehabilitative prospects (para 36)
- Custodial remand (para 40)
- Restrictive bail conditions (para 42)
- Other mitigating factors (para 45):
  - Participation in restorative justice
  - Victim has advocated merciful sentence
  - The making of an ancillary order

### *Factors not to be regarded as mitigating (para 46)*

- Absence of an aggravating factor
- The offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol, drugs, or other substances
- The victim is, or was, in a domestic relationship with the offender
- The offender committed a less serious offence than was intended due to the victim's resistant actions
- The inevitability of the offender's deportation at the end of the sentence
- Substantial costs incurred by the offender in defending the criminal charges
- Absence of ejaculation in sexual offending
- Cultural practices that may constitute or endorse criminal offending
- The victim was unconscious at the time of the offending
- The offender's added stress due to conducting his or her own defence
- The bad character of the victim
- Not destroying evidence of the offending

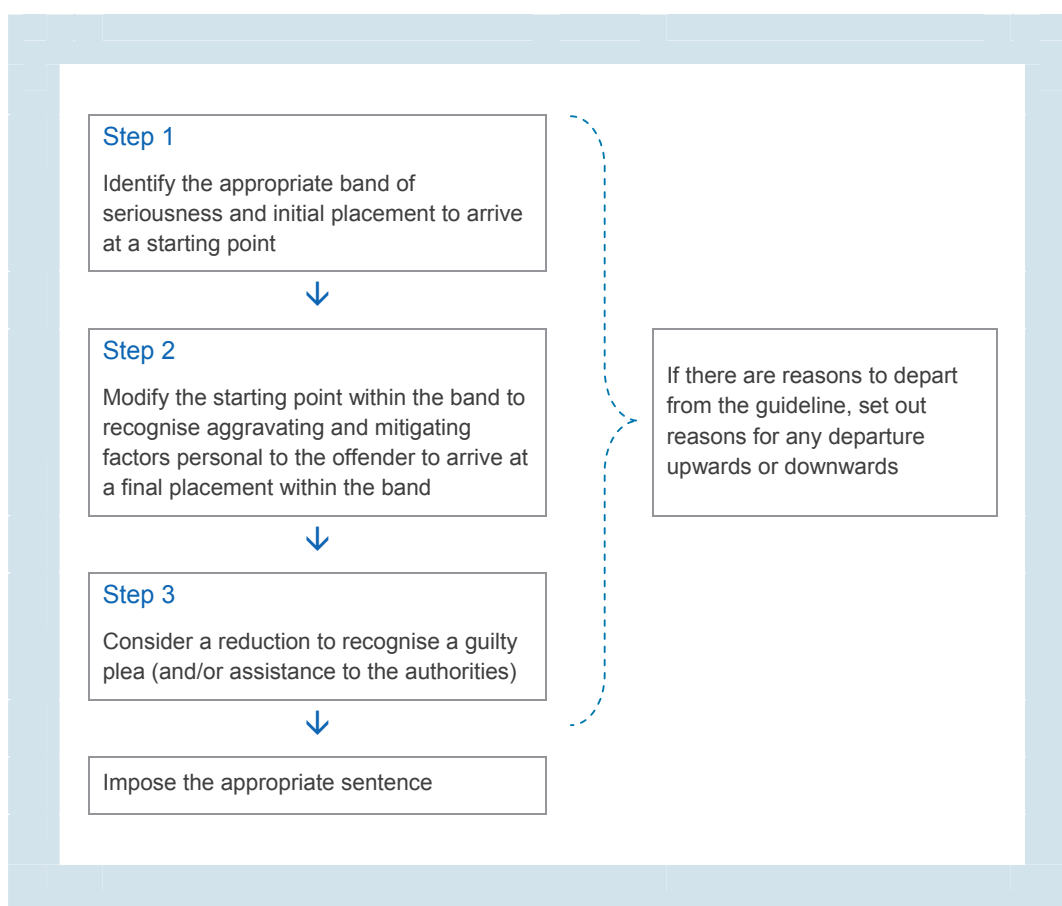
## Introduction

### 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 mitigating 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. “Mitigating factor” should be read broadly to include any factor that decreases seriousness and therefore justifies a lesser 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.

### Mitigating factors and the sentencing methodology

3. Mitigating 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 mitigating factors relating to the offending and mitigating 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 they indicate the appropriate sentence range. All relevant mitigating 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 mitigating 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 mitigating 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 mitigating 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 a mentally impaired offender has committed an offence, the potential increased impact of penalty on the offender should not mitigate separately under both “diminished intellectual capacity or understanding, or mental impairment” and “sentence would have a disproportionately severe impact on the offender or the offender’s family”.
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 a mitigating factor in this guideline. For example, “voluntary repayment of loss or return of property” is a band placement factor in the offence-based guideline on [Theft, receiving, or deception](#), but it should not mitigate separately as “post-offending behaviour” under this guideline.

## Factors relating to the offending

### State of mind

9. Many offences require proof of a particular state of mind such as intention or recklessness. State of mind is on a spectrum from negligence (least serious) through to intention (most 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 low degree of harm is less serious than an intention to cause a high degree of harm.
10. If a state of mind short of intention (such as recklessness or negligence) is sufficient to establish liability, the fact that an offender did not intend to commit the offence is a mitigating factor.

## Motive

11. The offender's motive (his or her reason for committing the offence) may decrease 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 decreases if:
  - (a) A mother of young children committed theft because her abusive husband controlled the finances of the family and refused to give her sufficient money for basic household items;
  - (b) An offender possessed illegal drugs for use as a means of pain relief.

## Duress, domination, coercion, or influence

12. Seriousness decreases if participation in the offending was the result of duress (short of constituting a defence), domination, or coercion by another person (often a co-offender).
13. A claim of influence, as distinct from duress, domination, or coercion, should only be considered mitigating if a vulnerable or young offender was under the influence of an older or more experienced person.

## Conduct of the victim

14. Seriousness may decrease if the conduct of the victim caused or contributed to the offending. This includes:
  - (a) If the victim had previously abused the offender (physically, mentally, or in any other way), whether on a single occasion or over a period of time, and there was a connection between the abuse and the offending;
  - (b) If the victim provoked the offender, whether by an act of violence, other actions, or words;
  - (c) If the offender acted against the victim in self-defence or in defence of another but used a level of force that was excessive in all of the circumstances (so as to not constitute a defence);
  - (d) If the victim was truly complicit in the offending, whether by way of agreement, genuine consent, a request, or actions.
15. The level of mitigation will depend on the nature and degree of the victim's conduct and the nature and degree of the offender's response. This includes whether the conduct was perceived (rather than actual) or exaggerated in the offender's mind. The timing of the conduct and the nature of any prior relationship between the offender and the victim may also be relevant.
16. The bad character of a victim is not in itself a mitigating factor. However, it may be relevant to assessing the nature and degree of a victim's conduct and the offender's response.

## Limited involvement in the offending

17. This factor will commonly arise where an offender acted with co-offenders. The guidelines on [Parties](#), [Accessories after the fact](#), and [Conspiracies](#) should be referred to where appropriate.

18. Seriousness decreases as an offender's level of involvement in the offending decreases. For example, it is less serious to have been the courier in a drug importation than to have been the mastermind. 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 gunman in an aggravated robbery may not be the one who planned and organised the offending.
19. 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.
20. Seriousness also decreases if an offender discouraged or prevented a co-offender from escalating or continuing the offending.

### Post-offending behaviour

21. An offender's conduct after the offending may decrease seriousness in limited circumstances. This may include situations where an offender immediately took steps to make his or her offending known to the authorities (for example, by calling the police) or to ameliorate the effect of the offending on the victim (for example, by seeking medical treatment for a victim after an assault, or voluntarily repaying loss or returning property).

### Factors personal to the offender

#### Age

22. See the generic guideline on [Age \(young offenders and elderly offenders\)](#).

### Diminished intellectual capacity or understanding, or mental impairment

23. If an offender has at the time of sentencing, or had at the time the offence was committed, diminished intellectual capacity or understanding, or mental impairment, seriousness may decrease if:
  - (a) It indicates a lesser degree of culpability; or
  - (b) It indicates that the penalty will have a greater impact on the offender.
24. It will be appropriate to give greater weight to this factor if an offender's rehabilitative prospects are not diminished by any risk of reoffending. If the diminished capacity or understanding, or mental impairment, indicates a risk of reoffending, protection of the public and deterrence will reduce the weight that can be given to these matters, and will sometimes outweigh them altogether.
25. The concepts of diminished intellectual capacity or understanding and mental impairment are not limited by statutory definitions in relevant legislation such as the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and the Mental Health (Compulsory Assessment and Treatment) Act 1992. A broader assessment is appropriate.

26. This factor may also be relevant to justifying a departure from the guidelines – see ground (g) of the generic guideline on [Departure from the guidelines](#) (if the sentence indicated by the guidelines would have a disproportionately severe impact on the offender or his or her family), and ground (n) (if the judge imposes an order under section 34(1)(a) or (b) of the Criminal Procedure (Mentally Impaired Persons) Act 2003).

## Remorse

27. An offender's remorse is a mitigating factor provided that the judge is satisfied that the remorse is genuine. Genuineness may be indicated by the existence of various factors, including:
- (a) A prompt confession to investigators coupled with either an early guilty plea or an early offer to plead guilty to the offence(s) of which an offender is eventually convicted;
  - (b) Admitting to other offending, especially if that other offending may not have otherwise come to light (regardless of whether charges are laid);
  - (c) Disclosing the whereabouts of proceeds or benefits of the offending;
  - (d) An apology to the victim;
  - (e) Voluntarily paying compensation, repaying loss, or returning property;
  - (f) Willingness to participate in a restorative justice or similar process (see the generic guideline on [Restorative justice and similar processes](#));
  - (g) Immediately rendering assistance to the victim;
  - (h) Accepting counselling and help for any issues relating to the offending.
28. Expressions of remorse that follow conviction at trial will merit little or no weight unless the offender made an early offer to plead guilty to the offence(s) of which he or she was eventually convicted.

## Previous good character

29. An offender's previous good character may be a mitigating factor. Typically, evidence of previous good character comes from two sources:
- (a) Absence of criminal history (see the generic guideline on [Criminal history](#)); or
  - (b) Character references.
30. Character is not a one-dimensional factor. It is possible that an offender might be of good character in some respects but not others. An evaluative assessment will be required in each case of the aspects of good character relied upon by an offender. A claim of good character may be given limited weight if the offending was serious, if it was facilitated by an offender's status or position, or if it occurred over a prolonged period of time.

## Cooperation with the authorities

31. An offender's cooperation with the authorities over his or her own offending is a mitigating factor. If an offender has provided information or evidence about other offenders, the generic guideline on [Assistance to the authorities](#) applies.
32. There are a number of ways that an offender may cooperate with the authorities over his or her own offending. These include:
  - (a) Disclosing other offences that he or she may have committed, resulting in convictions for further offences;
  - (b) Resolving problems that his or her offending has created. For example, in fraud cases, an offender may provide valuable cooperation in untangling a company's affairs or interwoven transactions that may have required a heavy deployment of resources to investigate without the offender's assistance;
  - (c) Providing valuable information and insight about methods of his or her offending.
33. The weight to be given to cooperation will depend on the gravity of the offending being sentenced, the gravity of the offending about which cooperation was given, the context in which the cooperation was given, and the nature and value of the cooperation.

## Sentence would have a disproportionately severe impact on the offender or the offender's family

34. It is appropriate to reduce a sentence that would otherwise be appropriate if that sentence would have a disproportionately severe impact on the offender or the offender's family. For example, a lengthy sentence of imprisonment may have a disproportionately severe impact on an offender who is seriously injured, has a significant or permanent disability, or who is chronically or terminally ill.
35. This factor may also be relevant to justifying a departure from the guidelines – see ground (g) of the generic guideline on [Departure from the guidelines](#) (if the sentence would have a disproportionately severe impact on the offender or his or her family).

## Rehabilitative prospects

36. An offender's rehabilitative prospects are a mitigating factor. When assessing the weight to be given to this factor, relevant considerations include the offender's previous responses to rehabilitative programmes or similar courses of action, the offender's criminal history, the proposed (or completed) rehabilitative measures, the likelihood of the offender completing those measures, and the nature of the offending. Support for an offender by his or her family, whanau, or the community may be indicative of the offender's rehabilitative prospects and the likelihood of successful reintegration into the community.
37. This factor may have greater weight if an offender voluntarily started a programme or similar course of action prior to sentencing. Sentencing may be adjourned to enable this to occur or to enable the judge to assess the genuineness of the offender's desire to rehabilitate (see section 25(1) of the Sentencing Act 2002).
38. This factor should be given limited weight if the offending was particularly grave.

39. Under the generic guideline on [Departure from the guidelines](#), a departure may be justified if there are strong rehabilitative prospects (ground (e)), or if the offender has already been substantially rehabilitated (ground (f)).

### **Custodial remand**

40. Time spent by an offender remanded in custody must not affect the length of a sentence of imprisonment that is imposed. This is because the time spent on custodial remand is automatically deducted from the length of sentence that the offender serves (see section 90 of the Parole Act 2002). In other cases, a reduction in the otherwise appropriate sentence to recognise time spent on custodial remand is appropriate.
41. A key consideration in determining whether and to what extent a reduction is appropriate is the length of time an offender spent on custodial remand. It is also appropriate to consider the length or type of sentence that would otherwise be imposed, and the extent to which the time spent on custodial remand has achieved relevant purposes of sentencing such as denunciation and accountability.

### **Restrictive bail conditions**

42. Restrictive bail conditions that lead to a real curtailment of liberty may be taken into account in mitigation. The judge should not infer curtailment of liberty from the presence of a restrictive bail condition, but should undertake an overall assessment of the circumstances, including the degree of restriction imposed, the length of time the bail condition was in place, and the impact of the restriction on the offender. There should not be an equal correspondence between how long an offender was subject to a restrictive bail condition and the level of reduction in sentence (in particular, one day spent subject to a restrictive bail condition should not equal one day of a sentence of imprisonment).
43. Restrictive bail conditions can include, without limitation, 24-hour curfews (whether or not electronically monitored), non-association with a close family member, and geographical constraints.
44. This factor may also justify a departure from the guidelines – see ground (h) of the generic guideline on [Departure from the guidelines](#) (if the applicable band of seriousness does not enable the time spent by an offender subject to custodial remand or restrictive bail conditions to be adequately taken into account).

### **Other mitigating factors**

45. Some other common mitigating factors include:
- Participation in restorative justice: see the generic guideline on [Restorative justice and similar processes](#);
  - A victim has advocated a merciful sentence: see the generic guideline on [Victim interests](#);
  - The making of an ancillary order: see the generic guideline on [Ancillary orders](#).

## Factors not to be regarded as mitigating

46. Some matters are not mitigating factors and cannot be used to justify a lesser penalty or other outcome than might otherwise be appropriate. Examples of matters that are not mitigating factors include:

- Absence of an aggravating factor;
- The offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol, drugs, or other substance (other than a drug or other substance used for bona fide medical purposes);
- The victim is, or was, in a domestic relationship with the offender;
- The offender committed a less serious offence than was intended due to the victim's resistant actions;
- The inevitability of the offender's deportation at the end of the sentence;
- Substantial costs incurred by the offender in defending the criminal charges;
- Absence of ejaculation in sexual offending;
- Cultural practices that may constitute or endorse criminal offending;
- The victim was unconscious at the time of the offending;
- The offender's added stress due to conducting his or her own defence;
- The bad character of the victim;
- Not destroying evidence of the offending.