



# **CAYMAN ISLANDS SENTENCING GUIDELINES**



## **CAYMAN ISLANDS SENTENCING GUIDELINES**

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# **CAYMAN ISLANDS**

## **SENTENCING GUIDELINES**

### **General Principles**

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## 1. Aims of Sentencing

In sentencing an offender, the Court has to balance a number of competing interests and objectives, tailoring the punishment to the individual circumstances of the offender whilst ensuring that the punishment is commensurate with the seriousness of the offence.

A number of aims govern the sentencing process and it will be rare for them all to be met; the task of the Court is to consider which of these aims will be best served by the sentence to be passed on an individual offender.

The following are the principal aims of sentencing:

- (a) Incapacitation
- (b) Deterrence
- (c) Punishment
- (d) Rehabilitation,
- (e) Restitution

These aims are reflected in statute law in the Cayman Islands:

### **Section 4 Alternative Sentencing Law 2008**

4. A court shall, in imposing a punishment under this Law, take into account the following principles:

(a) that the fundamental purpose of punishment is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives-

- (i) to denounce unlawful conduct;
- (ii) to deter the convicted person and other persons from committing offences;
- (iii) to separate convicted persons from society, where necessary;
- (iv) to assist in rehabilitating convicted persons;
- (v) to provide reparations for harm done to victims or to the community; and
- (vi) to promote a sense of responsibility in convicted persons, and acknowledgment of the harm done to victims and to the community;

## 2. Seriousness of the Offence: the principles of culpability and harm

In considering the seriousness of any offence, the court will consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.

### 2.1 Culpability

Four levels of criminal culpability can be identified for sentencing purposes (in descending order of culpability/seriousness):

Where the offender:

Category	Culpability
Category 1	Has the intention to cause harm, this carries the highest culpability level of culpability especially when an offence is planned. The worse the harm intended, the greater the seriousness.
Category 2	Is reckless as to whether harm is caused, that is, where the offender appreciates at least some harm would be caused but proceeds giving no thought to the consequences even though the extent of the risk would be obvious to most people.
Category 3	has knowledge of the specific risks entailed by his actions even though he does not intend to cause the harm that results.
Category 4	is guilty of negligence.

### 2.2 Harm

Harm may include physical harm, economic loss, harm to public health, or interference with the administration of justice. In some cases no actual harm may have resulted but the court will consider the relative dangerousness of the offender's conduct e.g. dangerous driving or supplying dangerous drugs.

#### To Individual Victims

The types of harm caused or risked by different types of criminal activity are diverse and victims may suffer physical injury, sexual violation, financial loss, damage to health or psychological distress. There are gradations of harm within all of these categories.

The nature of harm will depend on personal characteristics and circumstances of the victim and the court's assessment of harm will be an effective and important way of taking into consideration the impact of a particular crime on the victim.

The Court may consider any victim impact statement in assessing the actual harm in each case.

In some cases no actual harm may have resulted and the court will be concerned with assessing the relative dangerousness of the offender's conduct; it will consider the likelihood of harm occurring and the gravity of the harm that could have resulted.

#### To the Community

Some offences cause harm to the community at large (instead of or as well as to an individual victim) and may include economic loss, harm to public health or safety, or interference with the administration of justice. This may be particularly relevant where the offence has a potential impact on the tourist or financial industries of the Islands or is committed at a time of community vulnerability such as during, or in the aftermath of a hurricane, or during a period of widespread public disorder.

### **Other Types of harm**

There are other types of harm that are more difficult to define or categorise. For example, cruelty to animals certainly causes significant harm to the animal but there may also be a human victim who also suffers psychological distress and/or financial loss.

## **2.3 The link between harm and culpability**

Harm must always be judged in the light of culpability. Culpability will be greater if:

- an offender deliberately causes more harm than is necessary for the commission of the offence, or
- where an offender targets a vulnerable person.

Where unusually serious harm results and was unintended and beyond the control of the offender, culpability will be significantly influenced by the extent to which the harm could have been foreseen.

If much **more** harm, or much **less** harm has been caused by the offence than the offender intended or foresaw, the culpability of the offender, depending on the circumstances, may be regarded as carrying greater or lesser weight as appropriate.

**The culpability of the offender in the particular circumstances of an individual case should be the initial factor in determining the seriousness of an offence.**

### 3. The custody threshold

#### 3.1 Custodial sentences

A custodial sentence is any sentence of imprisonment whether effective immediately (s.23 Penal Code), fully suspended (s.22(4) Penal Code) or partially suspended (s.27 Penal Code).

#### 3.2 The Principle:

The court must not pass a custodial sentence unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was so serious that no other sentence can be justified for the offence.

The purpose of the custody threshold test is to reserve custody as a punishment for the most serious offences.

#### Section 4 Alternative Sentencing Law 2008

A court shall, in imposing a punishment under this Law, take into account the following principles

...

(f) a convicted person should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances; and

(g) all available sanctions other than imprisonment that are reasonable in the circumstances of each case should be considered for all convicted persons

#### 3.3 The approach of the Court to the imposition of a custodial sentence

In applying the threshold test, sentencers should note:

- the clear intention of the threshold test is to reserve prison as a punishment for the most serious offences;
- it is impossible to determine definitively which features of a particular offence make it serious enough to merit a custodial sentence;
- passing the custody threshold does *not* mean that a custodial sentence should be deemed inevitable, and custody can still be avoided in the light of personal mitigation or where there is a suitable intervention in the community which provides sufficient restriction (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime. For example, a prolific offender who currently could expect a short custodial sentence might more appropriately receive a suitable community sentence.

The approach of the Court should be as follows:



- |      |   |
|------|---|
| i)   | Has the custody threshold been passed?  |
| ii)  | If so, is it unavoidable that a custodial sentence should be imposed?   |
| iii) | If so, can that sentence be suspended? (A suspended sentence of imprisonment is a custodial sentence so the Court should be clear that it would have imposed a custodial sentence if the power to suspend had not been available) |
| iv)  | If not, impose a sentence which takes immediate effect for the shortest term commensurate with the seriousness of the offence.  |

### **3.4 Guidance on the Custody Threshold**

There is a thin dividing line between a case which ‘passes the custody threshold’ and one which does not. Where an individual case lies on the custody threshold the Court must determine whether a sentence of imprisonment is the only sentence justified for the offence in question. As individual cases vary enormously, there is no set formula for deciding if the custody threshold has been met in any individual case. Factors should be derived from the guidelines for individual offences which provide more detailed guidance on what features within that offence point to a custodial sentence, and also to deal with issues such as sentence length, the appropriate requirements for a community sentence or the use of appropriate ancillary orders.

## 4. The Principle of Proportionality

### 4.1 The Principle

The principle of proportionality provides that the severity of the punishment inflicted should be proportional to the gravity of the offence, that is, that 'the punishment should fit the crime'. The Court should ensure that the sentence passed is commensurate with the seriousness of the offence, so, less serious crimes should attract a lower sentence and serious crimes a stronger sentence.

The principle of proportionality is found in the Alternative Sentencing Law Section 4(b):

#### **Section 4 Alternative Sentencing Law 2008**

4. A court shall, in imposing a punishment under this Law, take into account the following principles:

..

- (b) that a punishment must be proportionate to the gravity of the offence and the degree of responsibility of the convicted person;

### 4.2 Parity of sentences

A linked principle is that of parity of sentences. This requires that, notwithstanding the individualized nature of the sentencing process, there should be parity of sentences between those who have been convicted of similar offences committed in similar circumstances.

#### **Section 4 Alternative Sentencing Law 2008**

A court shall, in imposing a punishment under this Law, take into account the following principles

..

- (d) a sentence should be similar or proportionate to sentences imposed on similar convicted persons for similar offences committed in similar circumstances;

## 5 The Totality Principle

The Court, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behaviour before it and at the same time, is a sentence which is just and proportionate. This is so whether the sentences are concurrent or consecutive (see 6 below). Thus, 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.

The Alternative Sentencing law reflects the totality principle :

### **Section 4 Alternative Sentencing law 2008**

A court shall, in imposing a punishment under this Law, take into account the following principles

..

(e) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

## 6. Concurrent/Consecutive sentences

When an offender has committed more than one offence for which he is to be sentenced, the Court may structure the sentences to be either consecutive or concurrent. In accordance with the totality principle, the overriding principle is that the overall sentence must be just and proportionate. This can be achieved whether the sentences are structured as concurrent or consecutive, as to which there is no inflexible rule, simply guideline principles.<sup>1</sup>

The Cayman Law provides for the imposition of consecutive sentences, unless the court directs that such punishments shall run concurrently:

### Section 8 Criminal Procedure Code 2014 Revision

8(1) When a person is convicted at one trial of two or more distinct offences the court may sentence him, for such offences, to the several punishments prescribed therefor, which such court is competent to impose; such punishments when consisting of imprisonment to commence the one after the expiration of the other, unless the court directs that such punishments shall run concurrently.

#### 6.1 Concurrent Sentences

It is wrong in principle to impose sentences to run consecutively where those offences, though distinct in law, arose out of a single act so that the overall criminality for the offender can be represented by concurrent sentences.

Concurrent sentences will ordinarily be appropriate where:

- (a) Offences arise out of a related incident or facts
- (b) There is a series of offences of the same or similar kind especially when committed against the same victim

Where concurrent sentences are passed, the sentence should reflect the overall criminality involved. The sentence should be appropriately aggravated by the presence of the associated offences and thus the court may increase sentence for the principal offence to reflect the gravity of conduct:<sup>2</sup>

#### 6.2 Consecutive Sentences

Consecutive sentences will ordinarily be appropriate where:

- (a) Offences arise out of unrelated facts or incidents
- (b) Offences are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences for example:
  - I. Where offences are committed against different victims
  - II. Where sexual offences or domestic violence are committed against the same individual<sup>3</sup>
  - III. Where the offender commits the same or similar offence after being arrested for the original offence

<sup>1</sup> AG ref No28 of 2010 [2010] EWCA Crim 1996; Ebanks v R 1990-91 CILR N22

<sup>2</sup> Ebanks v. R. (Grand Ct.), 1990-91 CILR N-22

<sup>3</sup> AG ref No28 of 2010 [2010] EWCA Crim 1996

- IV. Where the maximum penalty available for the most serious offence is too low to enable the court to reflect the overall seriousness of the offences taken as a whole
- (c) Offences committed during arrest including assault whilst resisting arrest.<sup>4</sup>
  - (d) Offences involving the use of a firearm.<sup>5</sup>
  - (e) A Bail Law offence
  - (f) An offence related to perverting the course of justice or interference with the administration of justice
  - (g) Any offence committed in a prison context
  - (h) Sentences are imposed in default of payment of fines (to run consecutively to substantive sentences of imprisonment imposed at same time):<sup>6</sup>

#### **Section 4 Alternative Sentencing Law 2008**

A court shall, in imposing a punishment under this Law, take into account the following principles

..

(e) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

### **6.3 Clarity upon sentencing**

Where the court passes on a defendant more than one term of imprisonment, the court should state in the presence of the defendant whether the terms are to be concurrent or consecutive. This should include, in the record, the overall effect of the sentence(s) in terms of the actual period of incarceration which the convicted person faces.<sup>7</sup>

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<sup>4</sup> Ebanks v R 1990-91 CILR N22

<sup>5</sup> Ebanks v R 1990-91 CILR N22

<sup>6</sup> Sudeen v. R. (Grand Ct.), 1980-83 CILR 391

<sup>7</sup> Ebanks v R [1989] 1 CILR ; Nixon (D.) v. R. (Grand Ct.), 1988-89 CILR N-21

## 7. The sentencing process

The following is a guide as to the appropriate decision making phases in the sentencing process:

	STAGE	GUIDANCE
A	Assessment of the seriousness of the offence (see 2 above)	When deciding the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused
B	Identify the entry point sentence	see individual offence guidelines – x ref
C	Consider Aggravating factors (including any arising from a victim impact statement)	see 8 below
D	Consider Mitigating Factors (including any arising from a victim impact statement)	see 9 below
E	Consider a reduction for a guilty plea	see 10 below
F	Consider Ancillary Orders	See Penal Code and/or Alternative Sentencing Law
G	Decide sentence and give reasons	

## 8. Aggravating factors

In sentencing an offender the Court should take into account aggravating factors relevant to both the offence itself and the offender.

Section 4 of the Alternative Sentencing Law sets out a number of potential aggravating factors to be taken into account, where relevant, by the sentencer. However, the statutory provision expressly states that it does not purport to set out an exhaustive list of aggravating factors, which by their very nature, can manifest in as many varied forms as there are variations in offender and modes of committing offences.

The list below illustrates a number of aggravating features (including those in the Law but also not an exhaustive list) with potential application to more than one offence or class of offences.

Potential Aggravating factors:

**Potential Aggravating Factors**  
**(references are to s.4(c) Alternative Sentencing Law)**  
**Factors indicating a higher culpability (blameworthiness)**

- Offence committed whilst on bail for other offences
- Failure to respond to previous sentences (v)
- Offence was racially or religiously aggravated (i)
- Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) (i)
- Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability) (i)
- Previous conviction(s), particularly where a pattern of repeat offending is disclosed (v)
- Offence is a prevalent offence (iii)
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- "Professional" offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it (i)
- Deliberate targeting of vulnerable victim(s) (ii)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Offence committed in domestic context (vi)
- Abuse of power (vii)
- Abuse of a position of trust (vii)

- Offence committed for the benefit of, at the direction of or in association with a criminal organisation (viii)
- Offence was a terrorism offence (ix)

**Factors indicating a more than usual degree of harm**

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim (iv)
- Victim is particularly vulnerable (i), (ii), (vi)
- Location of the offence (for example, in an isolated place)
- Offence is committed against those working in the public sector or providing a service to the public (ii)
- Offence is committed against a tourist or is likely to negatively impact confidence in the tourist industry
- Offence is likely to negatively impact confidence in the finance industry
- Presence of others e.g. relatives, especially children or partner of the victim (vi)
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss e.g. where the theft of equipment causes serious disruption to a victim's life or business)



## 9. Mitigating factors

In sentencing an offender, the Court should take into account mitigating factors relevant to both the offence itself and the offender.

### **Section 4 Alternative Sentencing Law 2008:**

A court shall, in imposing a punishment under this Law, take into account the following principles

...

(c) that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the convicted person,.....

Mitigating factors are those factors which reduce the seriousness of the offence or the culpability of the offender. They relate either to the offence itself or the offender.

The following factors may indicate significantly lower culpability:

- A greater degree of provocation than would be usual in a situation
- Mental illness or disability of the offender<sup>8</sup>
- Youth or age of the offender, where it affects the responsibility of the individual defendant<sup>9</sup>
- The fact that the offender played only a minor role in the offence
- A show of contrition, remorse and a willingness to compensate<sup>10</sup>
- The offence was out of character/ spontaneous (not pre-meditated)
- Personal factors such as the defendant suffering from depression/illness

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<sup>8</sup> For example See R v Creed 2006 CILR 474

<sup>9</sup> For example see R v Gallego 2004-5 CILR N36; R v Bush 1980-83 CILR N8

<sup>10</sup> For example R v Ebanks (DK) 1984-95 CILR 432; R v Scott 2006 CILR N22

## **10. Reduction in Sentence for a Guilty Plea**

### **10.1 The reduction principle**

Once the court has determined the sentence to be imposed, the court is required to give consideration to a reduction in the sentence for any guilty plea. The reduction principle is employed because a guilty plea avoids the need for a trial, saves considerable costs and resources, and in the case of an early plea, saves victims and witnesses from the ordeal of giving evidence. It also acts as an encouragement to others to plead guilty where appropriate.<sup>11</sup>

### **10.2 The Court's approach**

The reduction principle is not an aspect of mitigation and therefore the Court should address separately the issue of remorse, together with any other mitigating features before calculating the reduction for the guilty plea. Similarly, assistance to the prosecuting or enforcement authorities is a separate issue and may attract a separate reduction (see 11 below).

### **10.3 The process**

**The court decides sentence for the offence(s) taking into account aggravating and mitigating factors and any other offences that have been formally admitted**



**The court selects the amount of the reduction by reference to the sliding scale (below)**



**The court applies the reduction**



**When pronouncing sentence the court should usually state what the sentence would have been if there had been no reduction as a result of the guilty plea**

### **10.4 Relevance to Ancillary Orders**

A reduction in sentence for a guilty plea should not be applied to ancillary orders including compensation orders or disqualification from driving where they are not primarily punitive but imposed for some other purpose (e.g. reparation or public safety).

### **10.5 Determining the Level of Reduction**

In order to determine the appropriate reduction in sentence for a guilty plea, the court should take into account:

- (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty and
- (b) the circumstances in which this indication was given.

The level of reduction should be expressed as a proportion of the total sentence imposed, with the proportion calculated by reference to the above factors. The amount of reduction is to be gauged

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<sup>11</sup> R v Robinson (A) CA 2011 (2) CILR N1

according to a sliding scale (see diagram below) ranging from a recommended one third (where the guilty plea was entered at the first reasonable opportunity in relation to the offence for which sentence is being imposed), reducing to a recommended one quarter (where a trial date has been set) and to a recommended one tenth (for a guilty plea entered at the 'door of the court' or after the trial has begun).

<b>SLIDING SCALE</b>		
<b>First Reasonable Opportunity</b>	<b>After a trial date is set</b>	<b>Door of Court / after a trial has begun</b>
-----Recommended 1/3-----	-----Recommended ¼-----	-----Recommended 1/10-----

**In each category, there is a presumption that the recommended reduction will be given unless there are good reasons for a lower amount.**

The level of reduction should reflect the stage at which the offender indicated a willingness to admit guilt to the offence for which he is eventually sentenced:

- (i) the largest recommended reduction will not normally be given unless the offender indicated willingness to admit guilt at the first reasonable opportunity; when this occurs will vary from case to case;
- (ii) where the admission of guilt comes later than the first reasonable opportunity, the reduction for guilty plea will normally be less than one third;
- (iii) where the plea of guilty comes very late, it is still appropriate to give some reduction;
- (iv) if after pleading guilty there is a Newton hearing and the offender's version of the circumstances of the offence is rejected, this should be taken into account in determining the level of reduction;
- (v) if the not guilty plea was entered and maintained for tactical reasons (such as to retain privileges whilst on remand), a late guilty plea should attract very little, if any, discount.

## **10.6 Determining the 'First Reasonable Opportunity'**

The critical time for determining the reduction for a guilty plea is the first reasonable opportunity for the defendant to have indicated a willingness to plead guilty. This opportunity will vary with a wide range of factors and the Court will need to make a judgment on the particular facts of the case before it.

The key principle is that the purpose of giving a reduction is to recognise the benefits that come from a guilty plea not only for those directly involved in the case in question but also in enabling Courts more quickly to deal with other outstanding cases.

The Court should adopt a consistent approach where a determination has to be made as to the 'first reasonable opportunity' to plead guilty. Guidance may be derived from the following:

- (a) the first reasonable opportunity may be the first time that a defendant appears before the court and has the opportunity to plead guilty;
- (b) but the court may consider that it would be reasonable to have expected an indication of willingness even earlier, perhaps whilst under interview;

**Note:** For a) and b) to apply, the Court will need to be satisfied that the defendant (and any legal adviser) would have had sufficient information about the allegations

- (c) where an offence is triable only on indictment, it may well be that the first reasonable opportunity would have been during the police station stage; where that is not the case, the first reasonable opportunity is likely to be at the first hearing in the Grand Court;
- (d) where a defendant is convicted after pleading guilty to an alternative (lesser) charge to that to which he/she had originally pleaded not guilty, the extent of any reduction will be determined by the stage at which the defendant first formally indicated to the court willingness to plead guilty to the lesser charge, and the reason why that lesser charge was proceeded with in preference to the original charge.<sup>12</sup>

## **10.7 With-holding a Reduction**

### **10.7.1 Where the prosecution case is overwhelming**

The purpose of giving credit is to encourage those who are guilty to plead at the earliest opportunity. Any defendant is entitled to put the prosecution to proof and so every defendant who is guilty should be encouraged to indicate that guilt at the first reasonable opportunity.

Where the prosecution case is overwhelming, it may not be appropriate to give the full reduction that would otherwise be given. Whilst there is a presumption in favour of the full reduction being given where a plea has been indicated at the first reasonable opportunity, the fact that the prosecution case is overwhelming without relying on admissions from the defendant may be a reason justifying departure from the guideline.<sup>13</sup>

Where a court is satisfied that a lower reduction should be given for this reason, a recommended reduction of 20% is likely to be appropriate where the guilty plea was indicated at the first reasonable opportunity. For guidance on this principle from the Cayman Islands Court of Appeal see *Dilbert (C) v R (CA) 2010 (1) CILR 10*

A Court departing from a guideline must state the reasons for doing so.

### **10.7.2 Where the maximum penalty for the offence is thought to be too low**

The sentencer is bound to sentence for the offence with which the offender has been charged, and to which he has pleaded guilty. The sentencer cannot remedy perceived defects (for example an inadequate charge or maximum penalty) by refusal of the appropriate discount.

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<sup>12</sup> See *Watson v R* 2000 CILR N-16

<sup>13</sup> See *Hylton v R (Grand Court)* 2000 CILR 257; *Dilbert (C) v R (CA) 2010 (1) CILR 10*

## **10.8 Court to indicate reduction given**

The court should clearly indicate that level of reduction given for a guilty plea upon sentencing the offender. Where a Court has departed from these guidelines, the Court must state the reasons for doing so.<sup>14</sup>

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<sup>14</sup> Terry v R 2012 (2) CILR 119 – the Court should not pass the maximum sentence for an offence on a plea of guilty without giving reasons for refusing a discount.

## 11. Reduction in Sentence for assistance to the prosecuting or enforcement authorities

The Court may give credit to an offender for ready co-operation with the prosecuting or enforcement authorities. Unlike credit for a guilty plea, this credit cannot be calculated in terms of a sliding scale related to timeline of the earliest opportunity and will, as with other mitigating factors, depend on the particular circumstances of the individual case and any discount should reflect the extent and nature of the assistance given or offered.<sup>15</sup>

In exceptional circumstances the cooperation and assistance with authorities could justify the imposition of a non-custodial sentence.<sup>16</sup>

In the case of *R v Blackburn* [2007] EWCA Crim 2290,<sup>17</sup> the Court of Appeal (E&W) held that only in the most exceptional case, would the appropriate level of reduction exceed three quarters of the total sentence which would otherwise be passed, and the normal level would be a reduction of somewhere between one half and two thirds of that sentence.

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<sup>15</sup> *Burrell v R* 2012 (1) CILR N13; *McNulty v R* 1990-91 CILR 235; *Campbell v R* 1997 CILR N15

<sup>16</sup> *R v Scott* (CA) 2007 CILR 175

<sup>17</sup> (albeit interpreting Sections 71 to 75 of the Serious Organised Crime and Police Act 2005 which give statutory foundation to discounts for assistance to authorities) **Applied in *R v Carter, Ebanks, Liberal* (Unreported Grand Court) Indictment 85/13 per Quin J para 93-100**

## **12. Reduction in sentence for time spent on remand subject to conditions curtailing liberty**

### **12.1 Principle**

When passing a determinate custodial sentence the court should consider whether credit should be given for time spent on bail where conditions have been imposed which curtail the liberty of the defendant. This is most likely to be relevant where a defendant has been subject to a curfew, especially where compliance with that curfew can be verified through electronic monitoring.

### **12.2 Factors to be taken into account**

In deciding what, if any, credit should be given for time spent on curfew, the court will consider the following factors:

- The total length of time the defendant has been subject to a curfew
- The number of hours each day that curfew was imposed during the curfew period
- Whether the curfew included daytime hours or was solely a night time curfew (recognising that being indoors at night during, for example, normal sleeping hours may be less of a curtailment of liberty than being indoors during the day).
- Any breach of the conditions of the curfew

### **12.3 Caution to avoid double counting**

A Court will ensure that there is no double counting of benefit as a result of a curfew or other conditions restricting liberty; where a defendant is sentenced on the same occasion for all the offences to which a curfew or other condition has related, there should be a single deduction from the total sentence. Where a defendant is sentenced on different occasions, care will need to be taken to ensure that credit is only given once.

### **12.4 Calculation of credit to be given**

When exercising its discretion whether to give credit, a Court will require the attorneys to provide it with a calculation of the days when the defendant was subject to curfew (or other condition). The Court will then determine what proportion of those days will count towards the sentence.

In deciding how to exercise its discretion in the absence of statutory provision in the Cayman Islands, the Court will bear in mind the statutory provisions applicable in England & Wales (as set out in CJA 2003 s.240A (as amended by LASPO 2012 s.109) in relation to electronically monitored curfew).

A Court giving credit should include in its reason the basis for its calculation. A Court deciding not to give credit should also give brief reasons for the exercise of its discretion.

## **13. Sentencing for offences occurring in a domestic context**

### **13.1 ‘Domestic Context’**

This guideline covers issues which are relevant across the range of offences that might be committed in a domestic context. A domestic context includes relationships involving intimate partners who are living together, intimate partners who do not live together and former intimate partners. It is also wide enough to include relationships between family members, for example between a father and a daughter, or a mother and a daughter.

### **13.2 Seriousness in the domestic context**

As a starting point for sentence, offences committed in a domestic context should be regarded as being no less serious than offences committed in a non-domestic context. Thus, the starting point for sentencing should be the same irrespective of whether the offender and the victim are known to each other (whether by virtue of being current or former intimate partners, family members, friends or acquaintances) or unknown to each other.

### **13.3 Aggravating and Mitigating Factors within a domestic context**

As an offence within a domestic context takes place within the context of a current or past relationship, the history of the relationship will often be relevant in assessing the gravity of the offence. The Court is therefore entitled to take into account anything occurring within the relationship as a whole, which may reveal aggravating or mitigating factors.

The following list of aggravating and mitigating factors (which are not intended to be exhaustive) are of particular relevance to offences committed in a domestic context, and should be read alongside the general factors set out in this ‘General Principles’ Guide.

#### **13.3.1 Aggravating Factors**

- (a) Abuse of trust and abuse of power
- (b) Victim is particularly vulnerable
- (c) Impact on children
- (d) Using contact arrangements with a child to instigate the offence
- (e) A proven history of violence or threats by the offender in a domestic setting
- (f) A history of disobedience to court orders
- (g) Victim forced to leave home

#### **13.3.2 Mitigating Factors**

##### **(a) 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 violence to continue unnoticed for lengthy periods is the ability of the perpetrator to have two personae. In respect of an offence of violence within a domestic context, an offender’s good character in relation to conduct outside of the home would generally be of no relevance where there is a



proven pattern of behavior.

Positive good character is of a greater relevance in the rare cases where the court is satisfied that the offence was an isolated incident.

#### **(b) Provocation**

It may be asserted that the offence, at least in part, has been provoked by the conduct of the victim. Such assertions need to be treated with great care, both in determining whether they have a factual basis and in considering whether in the circumstances the alleged conduct amounts to provocation sufficient to mitigate the seriousness of the offence.

For provocation to be a mitigating factor, it will usually involve actual or anticipated violence including psychological bullying. Provocation is likely to have more of an effect as mitigation if it has taken place over a significant period of time.

### **13.4 Other factors influencing sentence**

#### **13.4.1 Wishes of the victim and effect of the sentence**

As a matter of general principle, a sentence imposed for an offence of violence should be determined by the seriousness of the offence, not by the expressed wishes of the victim.

There are a number of reasons why it may be particularly important that this principle is observed in a case of domestic violence:

- it is undesirable that a victim should feel a responsibility 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.

Nonetheless, there may be circumstances in which the court can properly mitigate a sentence to give effect to the expressed wish of the victim that the relationship be permitted to continue. The court must, however, be confident that such a wish is genuine, and that giving effect to it will not expose the victim to a real risk of further violence. Critical conditions are likely to be the seriousness of the offence and the history of the relationship. It is important that the court has up-to-date pre-sentence report and victim personal statement.

## **14.1 Taking offences into consideration (TICs)**

### **14.1 Principle**

This guideline applies where an offender admits the commission of other offences in the course of sentencing proceedings and requests those other offences to be taken into consideration.

When sentencing an offender who requests offences to be taken into consideration (TICs), courts should pass a total sentence which reflects *all* the offending behavior. The sentence must be just and proportionate and must not exceed the statutory maximum for the conviction offence.

### **14.2 Jurisdiction**

- (a) The Summary Court cannot take into consideration an indictable only offence.
- (b) The Grand Court can take into account summary only offences provided that the TICs are founded on the same facts or evidence as the indictable charge, or are part of a series of offence of the same or similar character as the indictable conviction offence. (Section 88A Criminal Procedure Code 2014)

### **14.3 Discretion**

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 been detected) and avoided the need for further proceeding demonstrates a genuine determination by the offender to wipe the slate clean.

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 or endorsement and the offence(s) for which the defendant is to be sentenced does not.
- Where the TIC constitutes 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).

### **14.4 Procedural safeguards**

The Court should generally only take offences into consideration if the following procedural provisions have been satisfied:

- The relevant prosecuting authority has prepared a schedule of offences to be taken into consideration (TIC schedule) that they consider is 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 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 sentencing hearing. The defendant should sign the TIC schedule to provisionally admit the offences;
- At the sentencing 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 Grand Court for sentence, this procedure must take place again at the Grand Court even if the defendant has agreed to the schedule in the Summary Court.

#### **14.5 Application**

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:

1. Determine the sentencing starting point for the conviction offence, referring to the relevant definitive guidelines. No regard should be had to the presence of TICs at this stage.
2. 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 (see Part 5 of the Sentencing Guideline : General Principles). The court is limited to the statutory maximum for the conviction offence.
3. 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 behavior:
  - Any reduction for a guilty plea should be applied to the overall sentence
  - The principle of totality

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# ROBBERY (4(g)(iv))

## A. **PENAL CODE (2013 REVISION) – section 242**

(1) A person commits robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.

(2) A person who commits robbery is liable to imprisonment for life.

The guideline makes clear that robbery will usually merit a custodial sentence but that exceptional circumstances may justify a non-custodial penalty for an adult and, more frequently, for a young offender.

## B. **FORMS OF ROBBERY AND STRUCTURE OF THE GUIDELINE**

For the purposes of this guideline, three categories of robbery have been identified.

### 1. **Street robbery or 'mugging'**

Street robberies will usually involve some physical force (or threat) to steal modest sums, although in some cases there is significant intimidation or violence. The victim may or may not be physically injured.

### 2. **Commercial robberies**

This category includes:

- robberies of small businesses, such as a small shop or post office, petrol station or public transport/taxi facility which may well lack the physical and electronic security devices available to banks or building societies and larger businesses;
- less sophisticated commercial robberies (which will encompass a wide range of locations, extent of planning and degree of violence) including less sophisticated bank robberies or where larger commercial establishments are the target but without detailed planning or high levels of organisation;
- sophisticated commercial robberies (which will encompass a high degree of planning and may also encompass a high degree of premeditated force, actual or threatened).

### 3. **Robbery in a dwelling**

The harm caused in robberies of dwellings includes the long term effect on the victim, especially in diminishing their sense of security. There is also a particular risk of further violence in circumstances where the robber may be confronted by an occupant.

## C. STREET ROBBERY

### STEP ONE - Determining the offence category

#### Culpability

Particularly demonstrated by one or more of the following:

##### A – High culpability

- Production and use of a weapon to **inflict** violence
- Production of a bladed article or firearm or imitation firearm to threaten violence
- Use of very significant force in the commission of the offence

##### B – Medium culpability

- Production and use of a weapon to **threaten** violence
- Threat of violence by a bladed article or firearm or imitation firearm (but which is not produced)
- Other cases where characteristics for categories A or C are not present

##### C – Lesser culpability

- Played limited role in offence acting under the direction of others
- Involved through coercion, intimidation or exploitation
- Threat or use of minimal force
- Very little or no planning

#### Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

**Category 1**     Serious physical and/or psychological harm caused to the victim

**Category 2**     Some physical and/or psychological harm caused to the victim above the level of harm inherent in the offence of robbery

**Category 3**     Factors in categories 1 and 2 not present

**Where the goods stolen are of more than low value, whether economic, sentimental or personal, this is considered as an aggravating factor at step two.**

## STEP TWO - Starting point and category range

HARM	CULPABILITY		
	A	B	C
Category 1	<b>Starting point</b>  8 years' custody	<b>Starting point</b>  5 years' custody	<b>Starting point</b>  3 years' 6 months' custody
	<b>Category Range</b>  7 – 12 years' custody	<b>Category Range</b>  3 – 8 years' custody	<b>Category Range</b>  18 months' – 5 years' custody
Category 2	<b>Starting point</b>  5 years' custody	<b>Starting point</b>  3 years' 6 months' custody	<b>Starting point</b>  2 years' custody
	<b>Category Range</b>  3 – 8 years' custody	<b>Category Range</b>  2 – 5 years' custody	<b>Category Range</b>  12 months' – 3 years' 6 months' custody
Category 3	<b>Starting point</b>  4 years' custody	<b>Starting point</b>  2 years' custody	<b>Starting point</b>  1 years' custody
	<b>Category Range</b>  2 – 5 years' custody	<b>Category Range</b>  18 months' – 3 years' 6 months' custody	<b>Category Range</b>  Community Based Sentence – 2 years' custody

## D. COMMERCIAL ROBBERY

### STEP ONE - Determining the offence category

#### Culpability

Particularly demonstrated by one or more of the following:

##### A – High culpability

- Production and use of a weapon to **inflict** violence
- Production of a bladed article or firearm or imitation firearm to threaten violence
- Use of very significant force in the commission of the offence

##### B – Medium culpability

- Production and use of a weapon to **threaten** violence
- Threat of violence by a bladed article or firearm or imitation firearm (but which is not produced)
- Other cases where characteristics for categories A or C are not present

##### C – Lesser culpability

- Played limited role in offence acting under the direction of others
- Involved through coercion, intimidation or exploitation
- Threat or use of minimal force
- Very little or no planning

#### Harm

The level of harm is determined by weighing up all the factors of the case to determine the harm that has been caused or was intended to be caused to the victim. The victim relates both to the commercial organisation that has been robbed and any individual(s) who has suffered the use or threat of force during the commission of the offence.

- |                   |  |
|-------------------|--|
| <b>Category 1</b> | <ul style="list-style-type: none"><li>• Serious physical and/or psychological harm caused to the victim</li><li>• Serious detrimental effect on business</li><li>• Very high value goods or sums</li></ul> |
|-------------------|--|

- |                   |  |
|-------------------|--|
| <b>Category 2</b> | <ul style="list-style-type: none"><li>• Some physical and/or psychological harm caused to the victim above the level of harm inherent in this offence</li><li>• Some detrimental effect on business</li><li>• High or medium value goods or sums</li></ul> |
|-------------------|--|

- |                   |   |
|-------------------|---|
| <b>Category 3</b> | Factors in categories 1 and 2 not present |
|-------------------|---|



## STEP TWO - Starting point and category range

HARM	CULPABILITY		
	A	B	C
Category 1	<b>Starting point</b>  16 years' custody	<b>Starting point</b>  9 years' custody	<b>Starting point</b>  5 years' custody
	<b>Category Range</b>  12 – 20 years' custody	<b>Category Range</b>  7 – 14 years' custody	<b>Category Range</b>  4 -8 years' custody
Category 2	<b>Starting point</b>  9 years' custody	<b>Starting point</b>  5 years' custody	<b>Starting point</b>  3 years' custody
	<b>Category Range</b>  7 – 14 years' custody	<b>Category Range</b>  4 – 8 years' custody	<b>Category Range</b>  2 – 5 years' custody
Category 3	<b>Starting point</b>  5 years' custody	<b>Starting point</b>  3 years' custody	<b>Starting point</b>  1 years' custody
	<b>Category Range</b>  4 – 8 years' custody	<b>Category Range</b>  2 – 5 years' custody	<b>Category Range</b>  Community Based Sentence – 3 years' custody

## E. Robbery in a Dwelling

### STEP ONE - Determining the offence category

#### Culpability

Particularly demonstrated by one or more of the following:

##### A – High culpability

- Production and use of a weapon to **inflict** violence
- Production of a bladed article or firearm or imitation firearm to threaten violence
- Use of very significant force in the commission of the offence
- Abuse of position of trust

##### B – Medium culpability

- Production and use of a weapon to **threaten** violence
- Threat of violence by a bladed article or firearm or imitation firearm (but which is not produced)
- Other cases where characteristics for categories A or C are not present

##### C – Lesser culpability

- Played limited role in offence acting under the direction of others
- Involved through coercion, intimidation or exploitation
- Threat or use of minimal force
- Very little or no planning

#### Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

- Category 1**
- Serious physical and/or psychological harm caused to the victim
  - Very high value of goods (whether economic, sentimental or personal)
  - Soiling, ransacking or vandalism of property

- Category 2**
- Some physical and/or psychological harm caused to the victim above the level of harm inherent in this offence
  - Some detrimental effect on business
  - High or medium value goods or sums

- Category 3** Factors in categories 1 and 2 not present

## STEP TWO - Starting point and category range

HARM	CULPABILITY		
	A	B	C
Category 1	<b>Starting point</b>  11 years' custody	<b>Starting point</b>  7 years' custody	<b>Starting point</b>  5 years' custody
	<b>Category Range</b>  9 – 13 years' custody	<b>Category Range</b>  5 – 10 years' custody	<b>Category Range</b>  4 – 8 years' custody
Category 2	<b>Starting point</b>  7 years' custody	<b>Starting point</b>  5 years' custody	<b>Starting point</b>  3 years' custody
	<b>Category Range</b>  5 – 10 years' custody	<b>Category Range</b>  4 – 8 years' custody	<b>Category Range</b>  2 – 6 years' custody
Category 3	<b>Starting point</b>  5 years' custody	<b>Starting point</b>  3 years' custody	<b>Starting point</b>  18 months' custody
	<b>Category Range</b>  4 – 8 years' custody	<b>Category Range</b>  2 – 6 years' custody	<b>Category Range</b>  1 – 3 years' custody

**See the laminated insert for the Sentencing Process to be followed. Offence specific guidelines only set out those aspects of particular relevance to the offence but all other appropriate information must also be considered.**

### **Factors increasing seriousness**

The potential aggravating and mitigating factors (see laminated insert) outlined below should only affect the sentence if they have not already been incorporated in the assessment of culpability.

- Victim is particularly vulnerable due to factors including but not limited to age, mental or physical disability
- High value of goods (whether economic, sentimental or personal)
- Involvement of others through coercion, intimidation or exploitation
- Restraint, detention or additional degradation of the victim
- Sophisticated organised nature of offence/significant planning
- A leading role where offending is part of a group activity
- Attempts to conceal/dispose of evidence
- Established evidence of community/wider impact
- Timing of the offence
- Location of the offence
- Attempt to conceal identity (for example, wearing a balaclava or hood)

# BURGLARY (4(g)(v))

## A. PENAL CODE (2013 REVISION)

### Burglary

243. (1) A person who -

(a) enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2); or

(b) having entered any building or part of a building as a trespasser steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm,

commits the offence of burglary and **is liable to imprisonment for fourteen years.**

### Aggravated Burglary

244. (1) A person who commits any burglary and at the same time has with him any firearm or imitation firearm, any offensive weapon or any explosive commits the offence of aggravated burglary and **is liable to imprisonment for life.**

(2) For the purposes of subsection (1) -

“explosive” means an article manufactured for the purpose of producing a practical effect by explosion, or intended by the person having it with him for that purpose;

“firearm” includes an airgun or air pistol;

“imitation firearm” means anything which has the appearance of being a firearm, whether capable of being discharged or not; and

“offensive weapon” has the meaning ascribed to it in section 78.

***The guideline makes clear that Burglary will usually merit a custodial sentence but that exceptional circumstances may justify a non-custodial penalty for an adult and, more frequently, for a young offender.***

## B. Forms of Burglary

For the purposes of this guideline, two categories of Burglary have been identified.

1. **Burglary in a Dwelling**
2. **Burglary in a Building other than a Dwelling**

## C. BURGLARY IN A DWELLING

### STEP ONE - Determining the offence category

#### Culpability

Demonstrated by one or more of the following:

##### A – High culpability

- Production and use of a weapon to inflict violence
- Production of a bladed article or firearm or imitation firearm to threaten violence
- Use of very significant force in the commission of the offence

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##### B – Medium culpability

- Production and use of a weapon to threaten violence
- Threat of violence by a bladed article or firearm or imitation firearm (but which is not produced)
- Other cases where characteristics for categories A or C are not present

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##### C – Lesser culpability

- Performed limited role in offence acting under the direction of others
- Involved through coercion, intimidation or exploitation
- Threat or use of minimal force
- Very little or no planning

#### Harm

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

<b>Category 1</b>	Serious physical and/or psychological harm caused to the victim Theft of/damage to property causing a significant degree of loss to the victim (whether economic, commercial or personal value) Victim on the premises (or returns) while offender present
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<b>Category 2</b>	Some physical and/or psychological harm caused to the victim Soiling, ransacking or vandalism of property
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<b>Category 3</b>	Factors in categories 1 and 2 not present
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## STEP TWO - Starting point and category range

**NOTE:** Where the offence is aggravated burglary, the maximum sentence increases from 14 years imprisonment to life imprisonment. The starting points and ranges below are for those offences where the maximum is 14 years. Where the higher maximum applies, all starting points and ranges will increase; this increase will be considerable where significant physical or psychological injury or other significant trauma is inflicted within a home

HARM	CULPABILITY		
	A	B	C
Category 1	<b>Starting point</b>  7 years' custody	<b>Starting point</b>  6 years' custody	<b>Starting point</b>  5 years' custody
	<b>Category Range</b>  5 – 14 years' custody	<b>Category Range</b>  4 – 8 years' custody	<b>Category Range</b>  3 -7 years' custody
Category 2	<b>Starting point</b>  5 years' custody	<b>Starting point</b>  4 years' custody	<b>Starting point</b>  3 years' custody
	<b>Category Range</b>  3 – 7 years' custody	<b>Category Range</b>  2 – 6 years' custody	<b>Category Range</b>  1 – 5 years' custody
Category 3	<b>Starting point</b>  3 years' custody	<b>Starting point</b>  2 years' custody	<b>Starting point</b>  1 years' custody
	<b>Category Range</b>  1 years' custody – 5 years' custody	<b>Category Range</b>  Community Based Sentence – 4 years' custody	<b>Category Range</b>  Community Based Sentence – 3 years' custody

## D. Burglary of a Building other than a Dwelling

### STEP ONE - Determining the offence category

#### Culpability

Demonstrated by one or more of the following:

##### A – High culpability

- Production and use of a weapon to inflict violence
- Production of a bladed article or firearm or imitation firearm to threaten violence
- Use of very significant force in the commission of the offence
- Sophisticated organised nature of offence/significant planning
- A leading role where offending is part of a group activity
- Abuse of position

##### B – Medium culpability

- Production and use of a weapon to threaten violence
- Threat of violence by a bladed article or firearm or imitation firearm (but which is not produced)
- A significant role where offending is part of a group activity
- Other cases where characteristics for categories A or C are not present

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##### C – Lesser culpability

- Performed limited role in offence acting under the direction of others
- Involved through coercion, intimidation or exploitation
- Threat or use of minimal force
- Very little or no planning

#### Harm

The level of harm is determined by weighing up all the factors of the case to determine the harm that has been caused or was intended to be caused to the victim. The victim relates both to the commercial organisation that has been robbed and any individual(s) who has suffered the use or threat of force during the commission of the offence.

- 
- |                   |  |
|-------------------|--|
| <b>Category 1</b> | <ul style="list-style-type: none"><li>• Serious physical and/or psychological harm caused to the victim</li><li>• Serious detrimental effect on business</li><li>• Very high value goods or sums</li></ul> |
|-------------------|--|

- 
- |                   |  |
|-------------------|--|
| <b>Category 2</b> | <ul style="list-style-type: none"><li>• Some physical and/or psychological harm caused to the victim above the level of harm inherent in this offence</li><li>• Some detrimental effect on business</li><li>• High or medium value goods or sums</li></ul> |
|-------------------|--|

- 
- |                   |   |
|-------------------|---|
| <b>Category 3</b> | Factors in categories 1 and 2 not present |
|-------------------|---|



## STEP TWO - Starting point and category range

**NOTE:** Where the offence is aggravated burglary, the maximum sentence increases from 14 years imprisonment to life imprisonment. The starting points and ranges below are for those offences where the maximum is 14 years. Where the higher maximum applies, all starting points and ranges will increase; this increase will be considerable where significant physical or psychological injury or other significant trauma is inflicted

HARM	CULPABILITY		
	A	B	C
Category 1	<b>Starting point</b>  6 years' custody	<b>Starting point</b>  5 years' custody	<b>Starting point</b>  4 years' custody
	<b>Category Range</b>  4 – 14 years' custody	<b>Category Range</b>  3 – 7 years' custody	<b>Category Range</b>  2 -6 years' custody
Category 2	<b>Starting point</b>  4 years' custody	<b>Starting point</b>  3 years' custody	<b>Starting point</b>  2 years' custody
	<b>Category Range</b>  2 – 6 years' custody	<b>Category Range</b>  1 – 5 years' custody	<b>Category Range</b>  Community Based Sentence – 4 years' custody
Category 3	<b>Starting point</b>  2 years' custody	<b>Starting point</b>  1 years' custody	<b>Starting point</b>  Community Based Sentence
	<b>Category Range</b>  Community Based Sentence – 4 years' custody	<b>Category Range</b>  Community Based Sentence – 3 years' custody	<b>Category Range</b>  Community Based Sentence – 1 years' custody

**See the laminated insert for the Sentencing Process to be followed. Offence specific guidelines only set out those aspects of particular relevance to the offence but all other appropriate information must also be considered.**

The potential aggravating and mitigating factors (see laminated insert) outlined below should only affect the sentence if they have not already been incorporated in the assessment of culpability above.

#### **Factors increasing seriousness**

- Victim is particularly vulnerable due to factors including but not limited to age, mental or physical disability
- High value of goods (whether economic, sentimental or personal)
- Involvement of others through coercion, intimidation or exploitation
- Restraint, detention or additional degradation of the victim
- Sophisticated organised nature of offence/significant planning
- A leading role where offending is part of a group activity
- Attempts to conceal/dispose of evidence
- Established evidence of community/wider impact
- Timing of the offence
- Location of the offence
- Attempt to conceal identity (for example, wearing a balaclava or hood)
- Abuse of a position of trust

## THE SENTENCING DECISION MAKING PROCESS

The Guidelines are designed to provide consistency of approach. Sentencing is often a complex and fluid process and this structure ensures that all relevant factors are taken into account.

Each offence specific guideline contains steps one and two. The court should then move to steps three to nine of the general guidance. Starting points and ranges are based on an offender found guilty after a trial since the reduction for a guilty plea is considered at step 4.

### **STEP ONE - Determining the offence category**

Identify the description that most nearly matches the particular facts of the offence for which sentence is being imposed.

### **STEP TWO - Starting point**

Having determined the category, the court should use the starting point provided and then reach a sentence taking into account aggravating and mitigating factors not already considered in deciding the category of the offence in step one. Generally this provisional sentence should be within the range but the combination of aggravating factors may take it into the range above or the combination of mitigating factors may take it into the range below.

### **STEP THREE - Consider factors supporting a reduction for assistance to the prosecution**

### **STEP FOUR - Reduction for guilty pleas**

Consider whether the sentence should be reduced to take account of a guilty plea and by how much, in accordance with Part 10 of the General Principles.

### **STEP FIVE - Dangerousness**

Where a life sentence is available, consider whether that should be imposed either because of the extreme seriousness of the offence or the risk of the offender committing a serious offence if released.

### **STEP SIX - Totality principle**

If more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behaviour.

### **STEP SEVEN - Ancillary orders**

In all cases the court should consider whether to make a relevant ancillary order. Ancillary orders of particular significance to an offence will be noted in the offence specific guideline.

### **STEP EIGHT - Reasons**

The court should give reasons for, and explain the effect of, the sentence including noting any offences taken into consideration.

### **STEP NINE - Allowance for time spent on bail subject to conditions restricting liberty**

The court must consider whether to give credit for time spent on bail in accordance with Part 12 of the General Principles.

# Mitigating Factors

In sentencing an offender, the Court should take into account mitigating factors relevant to both the offence itself and the offender.

## **Section 4 Alternative Sentencing Law 2008:**

A court shall, in imposing a punishment under this Law, take into account the following principles

... (c) that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the convicted person,.....

Mitigating factors are those factors which reduce the seriousness of the offence or the culpability of the offender. They relate either to the offence itself or the offender. The following factors may indicate significantly lower culpability:

- **A greater degree of provocation than would be usual in a situation**
- **Mental illness or disability of the offender<sup>18</sup>**
- **Youth or age of the offender, where it affects the responsibility of the individual defendant<sup>19</sup>**
- **The fact that the offender played only a minor role in the offence**
- **A show of contrition, remorse and a willingness to compensate<sup>20</sup>**
- **The offence was out of character/ spontaneous (not pre-meditated)**
- **Personal factors such as the defendant suffering from depression/illness**

# Aggravating Factors

In sentencing an offender the Court should take into account aggravating factors relevant to both the offence itself and the offender. Section 4 of the Alternative Sentencing Law expressly states that it does not purport to set out an exhaustive list of aggravating factors, which by their very nature, can manifest in as many varied forms as there are variations in offender and modes of committing offences. The list below illustrates a number of aggravating features (including those in the Law but also not an exhaustive list) with potential application to more than one offence or class of offences.

**(References are to s.4(c) Alternative Sentencing Law)**

## **Factors indicating a higher culpability (blameworthiness)**

- **Offence committed whilst on bail for other offences**
- **Failure to respond to previous sentences (v)**
- **Offence was racially or religiously aggravated (i)**
- **Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation) (i)**
- **Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability) (i)**

<sup>18</sup> For example See R v Creed 2006 CILR 474

<sup>19</sup> For example see R v Gallego 2004-5 CILR N36; R v Bush 1980-83 CILR N8

<sup>20</sup> For example R v Ebanks (DK) 1984-95 CILR 432; R v Scott 2006 CILR N22

- Previous conviction(s), particularly where a pattern of repeat offending is disclosed (v)
- Offence is a prevalent offence (iii)
- Planning of an offence
- An intention to commit more serious harm than actually resulted from the offence
- Offenders operating in groups or gangs
- “Professional” offending
- Commission of the offence for financial gain (where this is not inherent in the offence itself)
- High level of profit from the offence
- An attempt to conceal or dispose of evidence
- Failure to respond to warnings or concerns expressed by others about the offender's behaviour
- Offence committed whilst on licence
- Offence motivated by hostility towards a minority group, or a member or members of it (i)
- Deliberate targeting of vulnerable victim(s) (ii)
- Commission of an offence while under the influence of alcohol or drugs
- Use of a weapon to frighten or injure victim
- Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence
- Offence committed in domestic context (vi)
- Abuse of power (vii)
- Abuse of a position of trust (vii)
- Offence committed for the benefit of, at the direction of or in association with a criminal organization (viii)
- Offence was a terrorism offence (ix)

#### Factors indicating a more than usual degree of harm

- Multiple victims
- An especially serious physical or psychological effect on the victim, even if unintended
- A sustained assault or repeated assaults on the same victim (iv)
- Victim is particularly vulnerable (i), (ii), (vi)
- Location of the offence (for example, in an isolated place)
- Offence is committed against those working in the public sector or providing a service to the public (ii)
- Offence is committed against a tourist or is likely to negatively impact confidence in the tourist industry
- Offence is likely to negatively impact confidence in the finance industry
- Presence of others e.g. relatives, especially children or partner of the victim (vi)
- Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)
- In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss e.g. where the theft of equipment causes serious disruption to a victim's life or business)