

**Assessment of the Health and safety
guideline, and overview of upcoming
guidelines**

Presented by Caroline Nauth-Misir and Ruth Pope

19 June 2019

Guideline assessment

- Introduction
- Health and safety
- Food safety and hygiene
- Corporate manslaughter
- Conclusion

Upcoming guidelines

- Guideline came into force on 1 February 2016
- Separate guidelines for organisations and individuals
- Two-stage approach to assessing harm: **risk** and **likelihood** of harm

Resource assessment anticipated the following:

- For health and safety offences and food safety and hygiene offences, an increase in fine levels for larger organisations
- No change in the use of disposal types or average custodial sentence lengths (ACSLs) for individuals
- For corporate manslaughter, a potential increase in fine levels, particularly for large organisations

Volumes in 2017

Health and safety offences

- Around 340 organisations sentenced; just over half in Crown Court
- 200 individuals sentenced; around three quarters in magistrates' courts

Food safety and hygiene offences

- 130 organisations sentenced; almost all in magistrates' courts
- 260 individuals sentenced; most in magistrates' courts

Corporate manslaughter

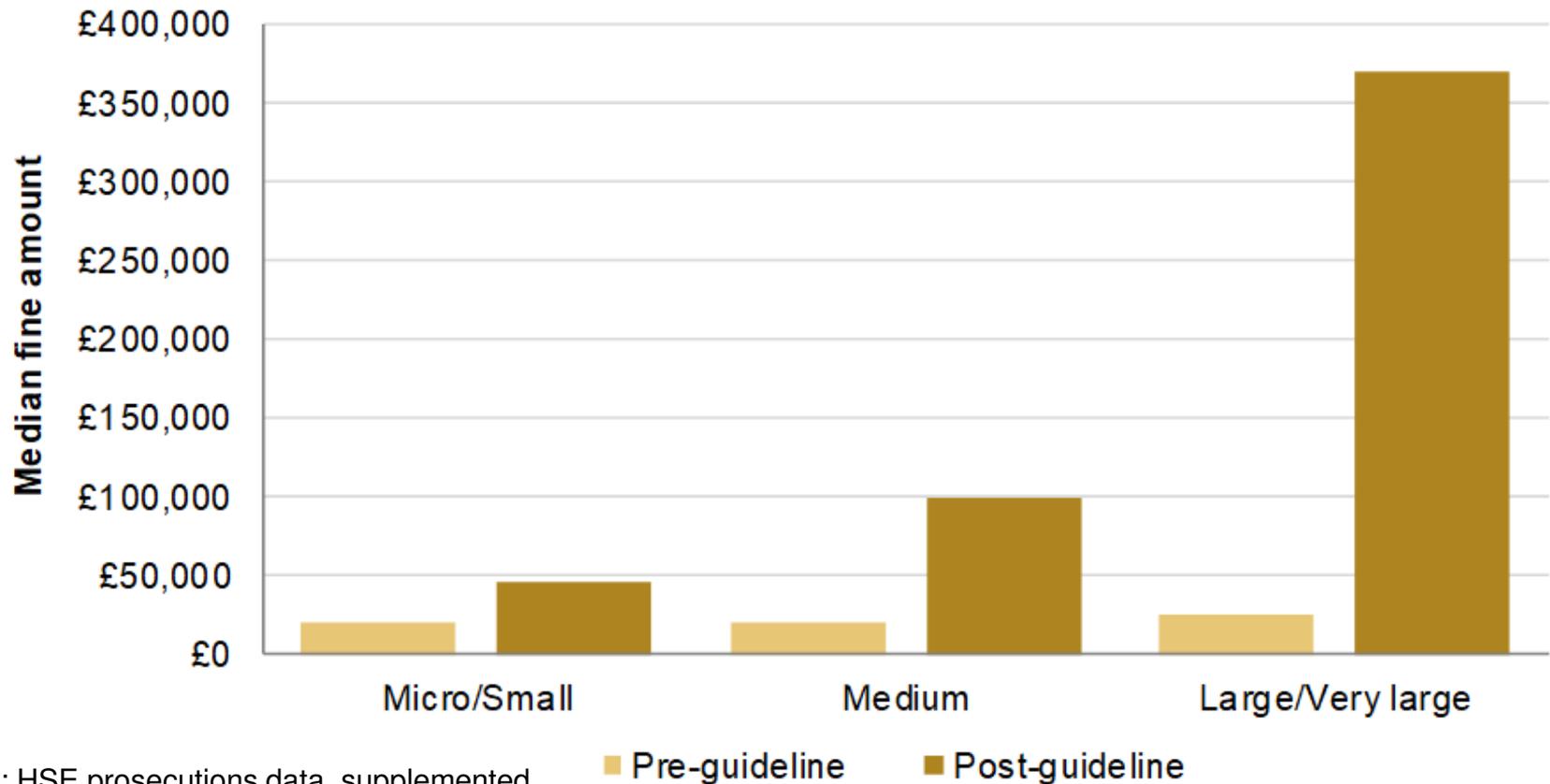
- Fewer than 10 organisations sentenced each year

Fine amounts imposed on organisations sentenced for health and safety offences covered by the guideline, Jan-Oct 2015 ('Pre-guideline') vs Feb-Nov 2016 ('Post-guideline')



Source: MoJ CPD data

Median fine amounts imposed on organisations prosecuted by the Health and Safety Executive, Jul 2014-Oct 2015 ('Pre-guideline') vs Feb 2016-May 2017 ('Post-guideline')

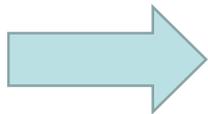


Source: HSE prosecutions data, supplemented with information from Companies House

Transcript analysis (53 cases)

- Half categorised as large/ very large organisations

Harm model



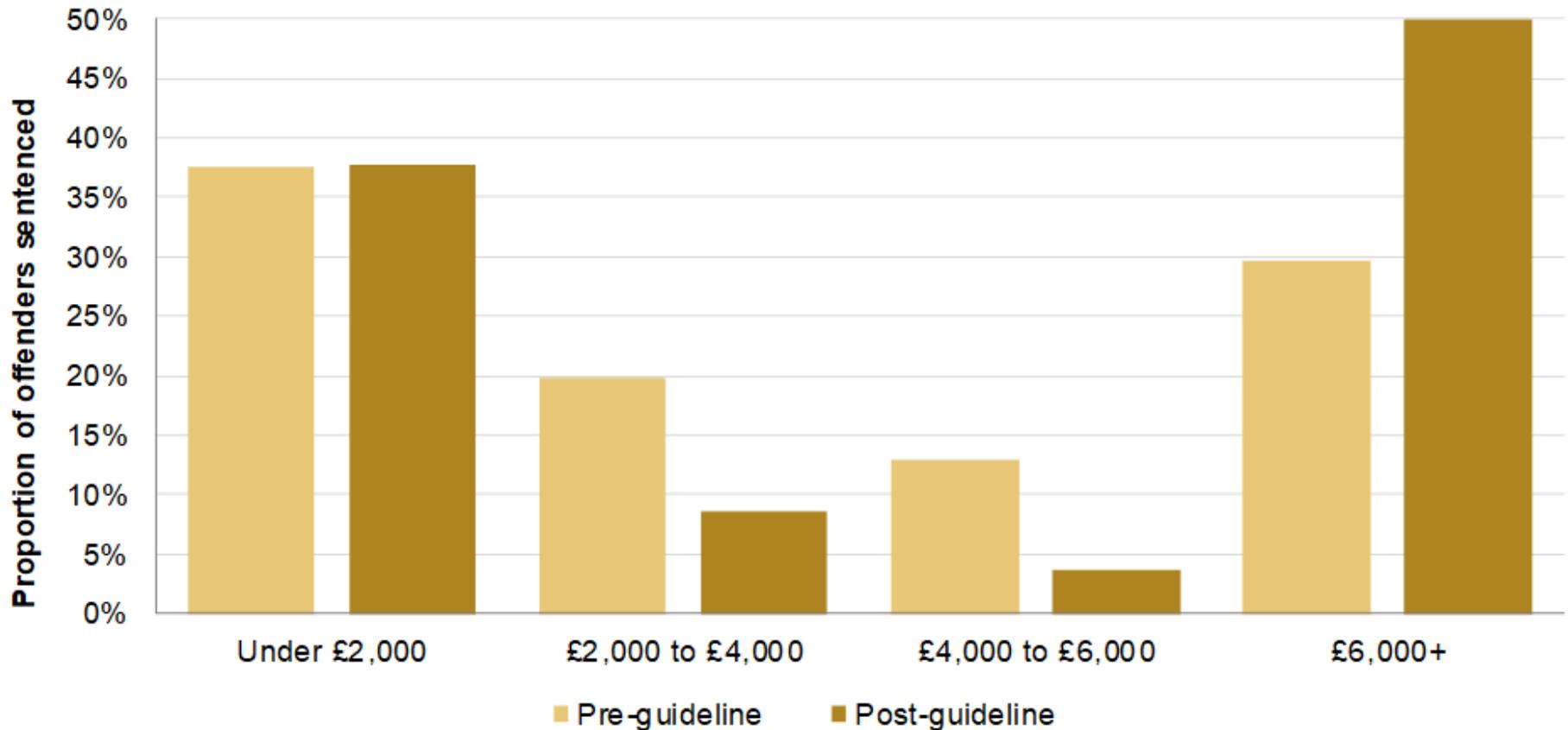
Seriousness of harm risked			
	Level A • Death • Physical or mental impairment resulting in lifelong dependency on third party care for basic needs • Significantly reduced life expectancy	Level B • Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work • A progressive, permanent or irreversible condition	Level C • All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

- Seriousness of harm risked and likelihood of harm mentioned in majority of cases
- “Level A: Death” - most common risk factor cited, likelihood often either medium or high
- All Level A assessments of harm were valid

Transcript analysis (53 cases)

- Majority placed in either medium or high culpability
- Mitigating factors cited much more frequently than aggravating factors (94% of cases compared with 28%, respectively)
- Each mitigating factor in guideline cited on over 10 occasions
- Our assessment is that generally sentencers did not appear to experience any issues when using the guideline

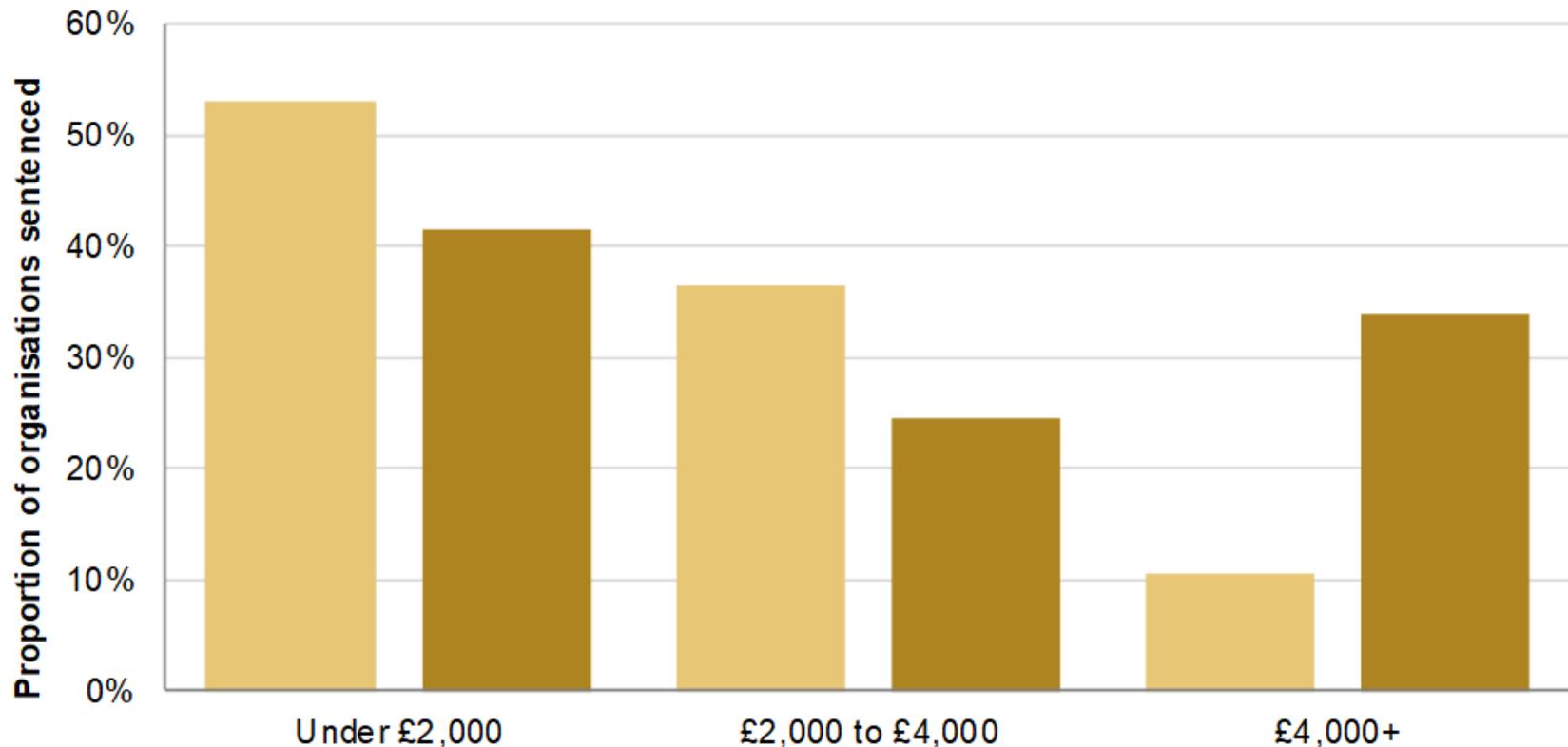
Fine amounts imposed on individuals sentenced for health and safety offences covered by the guideline, Jan-Oct 2015 ('Pre-guideline') vs Feb-Nov 2016 ('Post-guideline')



Transcript analysis (20 cases)

- Fairly even split between medium/ high/ very high culpability
- “Level A: Death” - most common risk factor cited, likelihood (when mentioned) tended to be high
- All Level A assessments of harm were valid
- Mitigating factors cited much more frequently than aggravating factors (90% of cases compared with 50%, respectively)
- Our assessment is that generally sentencers did not appear to experience any issues when using the guideline

Fine amounts imposed on organisations sentenced for food safety and hygiene offences covered by the guideline, Jan-Oct 2015 ('Pre-guideline') vs Feb-Nov 2016 ('Post-guideline')

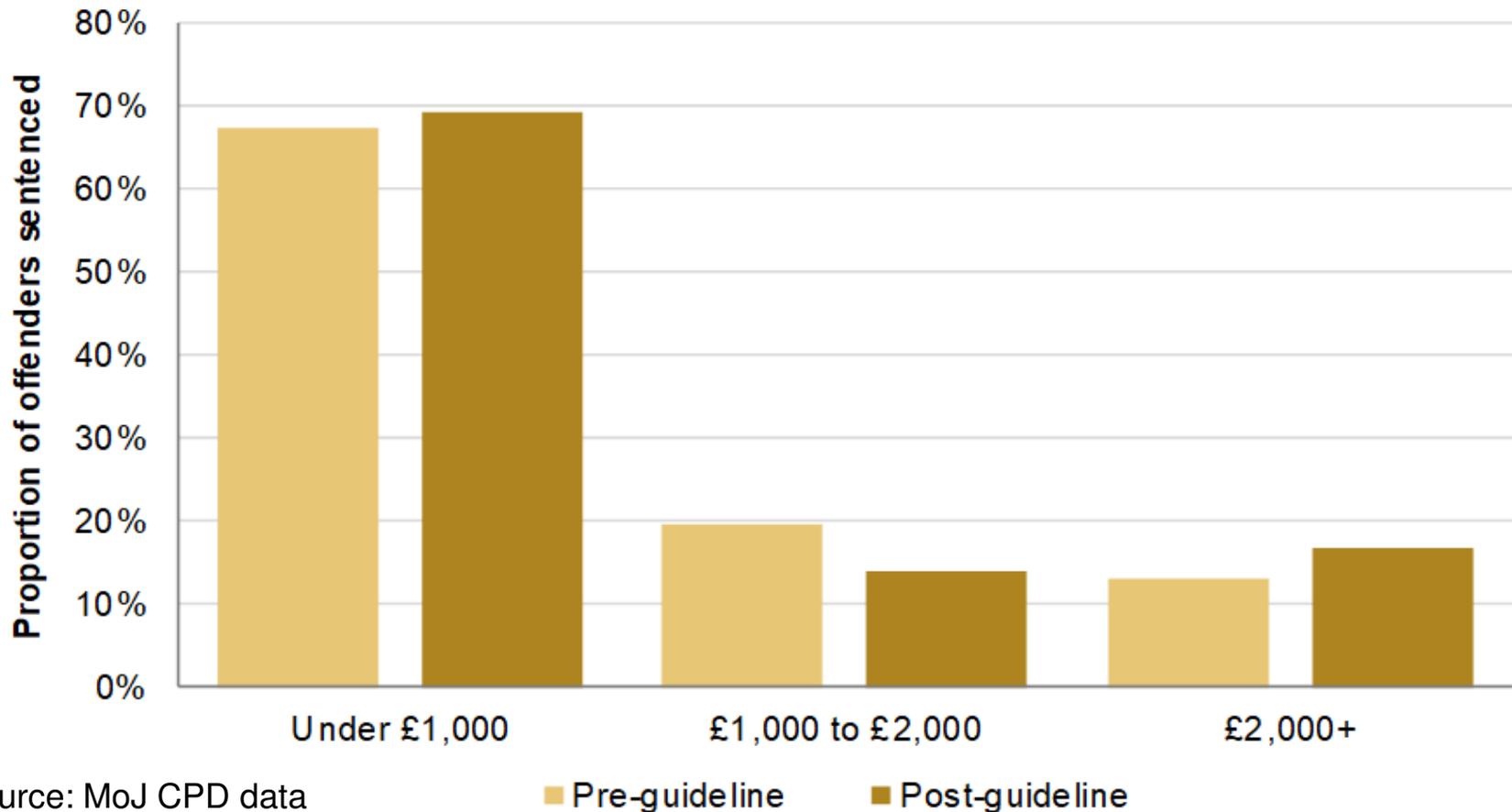


Source: MoJ CPD data

■ Pre-guideline

■ Post-guideline

Fine amounts imposed on individuals sentenced for food safety and hygiene offences covered by the guideline, Jan-Oct 2015 ('Pre-guideline') vs Feb-Nov 2016 ('Post-guideline')



- SC guideline is fairly similar to the previous SGC guideline, but has a different approach to assessing fines (based on turnover)
- Transcript analysis (10 cases pre-guideline, 6 cases post-guideline) found that there was a greater emphasis on the organisation's turnover in the cases sentenced post-guideline
- Our assessment of the post-guideline cases indicated that sentencers appeared to use the guideline without any issues
- Fines appeared to increase after the guideline came into force (but volumes are very low so this finding should be treated with caution)

- The guideline has caused an increase in fines for organisations
- For health and safety, fines have increased considerably for larger organisations, as anticipated. Fines also appear to have increased (to a lesser degree) for smaller organisations, which was not anticipated
- For individuals, there has been an unanticipated increase in higher fines (primarily for health and safety offences), and an unanticipated change in the use of some disposal types, however the shift in disposals appears to be a short-term change which only affected a relatively small number of offenders
- Fine amounts for corporate manslaughter may have increased since the guideline came into force (as anticipated), however this finding should be treated with caution due to low volumes
- The Council intends to investigate further the operation of the guideline in due course, and will consider at that stage whether any revision of the guideline is necessary

- On 24 July 2019 the Council will be publishing a new General Guideline and also expanded explanations in offence specific guidelines
- This will replace the 2004 Sentencing Guidelines Council *Seriousness* Guideline
- The General guideline will serve two functions:
 - It will provide a structure and principles for sentencing offences for which there is no offence specific guideline; and
 - It will provide a source of overarching guidance to be used in conjunction with offence specific guidelines.
- The expanded explanations in offence specific guidelines take advantage of the fact that guidelines are now digital to provide additional information on commonly used aggravating and mitigating factors

- What will this mean for H&S offences?
 - Expanded explanations will be provided for the following factors

Aggravating Factor	Corp MS	H&S ind	H&S org
Previous convictions	X	X	X
Offence committed on bail	X		
Cost cutting at the expense of safety		X	X
Exploited /Targeting vulnerable victim	X	X	X
Obstruction of justice	X	X	X
Breach of any court order		X	X
Mitigating Factor			
No previous convictions	X	X	X
Good character		X	
Self-reporting	X	X	X
High level of co-operation	X	X	X
Age and/or lack of maturity		X	
Sole or primary carer		X	
Serious medical conditions		X	
Mental disorder or learning disability		X	

From the H&S – individuals guideline

Factors increasing seriousness

Statutory aggravating factors

- Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
- Offence committed whilst on bail

Other aggravating factors include:

- Cost-cutting at the expense of safety
- Deliberate concealment of illegal nature of activity
- Breach of any court order
- Obstruction of justice
- Poor health and safety record
- Falsification of documentation or licences
- Deliberate failure to obtain or comply with relevant licences in order to avoid scrutiny by authorities
- Targeting vulnerable victims

Factors reducing seriousness or reflecting personal mitigation

- No previous convictions or no relevant/recent convictions
- Evidence of steps taken voluntarily to remedy problem
- High level of co-operation with the investigation, beyond that which will always be expected
- Good health and safety record
- Effective health and safety procedures in place
- Self-reporting, co-operation and acceptance of responsibility
- Good character and/or exemplary conduct
- Inappropriate degree of trust or responsibility
- Mental disorder or learning disability, where linked to the commission of the offence
- Serious medical conditions requiring urgent, intensive or long term treatment
- Age and/or lack of maturity where it affects the responsibility of the offender
- Sole or primary carer for dependent relatives

- For example, the explanation for the aggravating factor ‘cost-cutting at the expense of safety’ has the following explanation:

Care should be taken to avoid double counting factors including those already taken into account in assessing culpability or harm or those inherent in the offence

- Where an offence (which is not one which by its nature is an acquisitive offence) has been committed wholly or in part for financial gain or the avoidance of cost, this will increase the seriousness.
- Where the offending is committed in a commercial context for financial gain or the avoidance of costs, this will normally indicate a higher level of culpability.
 - examples would include, but are not limited to, dealing in unlawful goods, failing to disclose relevant matters to an authority or regulator, failing to comply with a regulation or failing to obtain the necessary licence or permission in order to avoid costs.
 - offending of this type can undermine legitimate businesses.
- See the guidance on fines if considering a financial penalty

- The explanations are generic – the same explanation is used in all guidelines where the equivalent factor appears.
- The explanations are also provided for aggravating and mitigating factors in the General Guideline (the example on the previous slide is attached to the factor ‘Commission of the offence for financial gain’).
- The explanations are designed to reflect best practice and do not introduce new concepts.
- However, particularly in relation to some mitigating factors (e.g. immaturity, sentencing parents of dependent children) the explanations may highlight matters that currently are not always considered
- In addition the General Guideline provides a framework for sentencing offences where there is no offence specific guideline.

An extract from the General guideline:
(this is the draft version – there will be a few changes in the final version)

Step 1 Reaching a provisional sentence

a) Where there is no definitive sentencing guideline for the offence, to arrive at a provisional sentence the court should take account of all of the following (if they apply):

- the statutory maximum sentence (and if appropriate minimum sentence) for the offence;
- sentencing judgments of the Court of Appeal (Criminal Division) for the offence; and
- definitive sentencing guidelines for analogous offences

For the avoidance of doubt the court should **not** take account of any draft sentencing guidelines or definitive guidelines that are not yet in force.

b) When considering definitive guidelines for analogous offences the court must make adjustments for any differences in the statutory maximum sentence and in the elements of the offence:

- Where possible the court should follow the stepped approach of sentencing guidelines to arrive at the sentence.
- The seriousness of the offence is assessed by considering:
 - the **culpability** of the offender, and
 - the **harm** caused by the offending.
- The initial assessment of harm and culpability should take no account of plea or previous convictions.

Definitive guidelines

- Arson and Criminal damage – publish definitive 3 July, in force 1 October 2019
- General and expanded explanations – publish 24 July, in force 1 October 2019
- Public Order – publish early October, in force 1 January 2020

Consultations

- Overarching guideline on mental health – consultation closes 9 July 2019
- Firearms – September to December 2019
- Drugs (revision and additions) – November 2019 to January 2020
- Terrorism (amendments to take account of statutory changes) – autumn 2019
- Assault & attempted murder (revision and additions) – January 2020
- Immigration / Modern slavery – spring 2020
- Burglary (revision) – spring 2020
- Cyber crime – autumn 2020
- Dates subject to change

Feedback welcome!

info@sentencingcouncil.gov.uk

www.sentencingcouncil.org.uk

[@Sentencing_CCL](https://twitter.com/Sentencing_CCL)