

NOVEMBER 2019

Sentencing Guidelines

History

Sixteen years ago, we knew nothing of sentencing guidelines. As practitioners we would browse through *Current Sentencing Practice* (Thomas) to try to find a similar case to the one we were dealing with in the hope of persuading the judge to our way of thinking.

In 2001 the Halliday Report was commissioned to look at sentences in general. Among other recommendations about sentencing length, victim involvement, and greater court scrutiny of the progress of sentences it made this proposal:

Codified guidelines should be produced for application by all criminal courts, taking account of existing guidelines and the need for their further development and modification in the light of changes resulting from this report. Such guidelines should be permanently available to all in their up-to-date form.

It was a proposal made in response to concerns about variations in sentencing because of 'judicial discretion'.

On 27 February 2004 the Sentencing Guidelines Council (SGC) was born, created by the Criminal Justice Act 2003 (CJA 2003). The first two sentencing guidelines published were *Overarching Principles: Seriousness* and *New Sentences: Criminal Justice Act 2003* in December 2004. At the time the court was only required by s.172 CJA 2003 to 'have regard to a relevant guideline'.

The guidelines took some time to bed-in and undoubtedly some judges railed against the very idea that their judicial discretion may be fettered. The oft heard phrase in court was 'these are guidelines not tramlines'.

However, by s.118 of the Coroners and Justice Act 2009, the SGC was rebranded – losing the word 'Guidelines'. Crucially, under s.125 (1) of that Act, the new guidelines became obligatory (albeit with a judicial discretion caveat: the court can still decide not to apply the guidelines if it is satisfied it would be contrary to the interests of justice to do so).

Present guidelines

In the nine years that have followed, old guidelines that had been published before 2010, for instance on Robbery, Sexual Offences and Assault, have been updated and homogenised into the style that is now familiar.

There are now some 27 guidelines: 7 dealing with 'overarching principles' which cross all offences and a further 20 which cover the vast majority of criminal offences, though one is not yet in force.

Name of guideline	Effective from
Overarching guidelines	
Allocation of Venue	1 Mar 2016
Imposition of Community and Custodial Sentences	1 Feb 2017
Offences Taken into Consideration and Totality	11 Jun 2012
Overarching Principles: Domestic Abuse	24 May 2018
General Guideline: Overarching Principles (Guidelines for offences with no guidelines and expanded explanations, replacing the 'Seriousness' guideline)	1 Oct 2019
Reduction in Sentence for a Guilty Plea	1 Jun 2017
Sentencing Children and Young People	1 Jun 2017
Offence-specific definitive guidelines	
Arson and Criminal Damage	1 Oct 2019
Assault	13 Jun 2011
Attempted Murder	27 Jul 2009
Bladed Articles and Offensive Weapons	1 Jun 2018
Breach Offences	1 Oct 2018
Burglary	16 Jan 2012
Causing Death by Driving	4 Aug 2008
Child Cruelty	1 Jan 2019
Dangerous Dogs	1 Jul 2016
Drugs	27 Feb 2012

Environmental Offences	1 Jul 2014
Fraud, Bribery and Money Laundering	1 Oct 2014
Health and Safety, Corporate Manslaughter and Food Safety and Hygiene	1 Feb 2016
Intimidatory Offences	1 Oct 2018
Manslaughter	1 Nov 2018
Public Order Offences	1 Jan 2020
Robbery	1 Apr 2016
Sexual Offences	1 Apr 2014
Terrorism	27 Apr 2018
Theft	1 Feb 2016

The Sentencing Council and the website

The Sentencing Council is responsible for developing the guidelines, assessing their impact and promoting awareness of the realities of sentencing to the public at large. The Council members include judges from all criminal courts, barristers, the DPP, heads of Victim Support and Probation, and academics.

The Council meets monthly and the published minutes on the website sentencingcouncil.org.uk are a good indicator of what updates on present guidelines, or what new guidelines, are to come. In May 2019 for instance, the Council meeting included presentations on Firearms and as a result a draft guideline was published on 9 October 2019 for consultation. Similarly, there was a discussion about updating the Attempted Murder guidelines and reviewing the Bladed Articles guideline in the May and June meetings.

The Council publishes a consultation document and impact assessment prior to each final guideline. As well as the live consultation in relation to Firearms, there is one further 'overarching principles' guideline relating to sentencing Offenders with Mental Health conditions which has recently closed. We can expect that guideline soon. Indeed at the time of writing this newsletter there has been a flurry of activity from the Sentencing Council, I anticipate that last sentence may shortly be out of date!

Once each guideline is published, the Council continues to reconsider and refresh them. Importantly any changes are now only published on the website and the expectation is that everyone should use the website version as the hard copies and indeed those summarised in *Archbold* or *Blackstone's* become outdated.

For instance, in November 2018 s.2 of the Assaults on Emergency Workers (Offences) Act 2018 came into force; that section makes it a statutory aggravating factor on the full range of assaults, up to manslaughter, if the offence is committed against an emergency worker. As a result, the guidelines on, for instance, ABH and Threats to Kill have all been updated on the website but the PDF document I had downloaded no longer reflects the law.

Perhaps more importantly and usefully is the most recent overarching guideline which includes in it 'expanded explanations'. These set out the philosophy as to why a sentence is being approached in the way that it is (an example of the transparency principle) and are only available by clicking through those parts underlined with a dotted line.

It is crucial therefore that all practitioners use the website and become familiar with what is a great resource – not only for the guidelines themselves but also for some fascinating research papers and statistics.

The importance of the guidelines

The importance of knowing and understanding the guidelines cannot be overstated. The Court of Appeal expects all those involved in the criminal justice system to follow them and has stressed a number of times that they don't expect advocates to be referring to pre-guideline cases (unless there is no offence-specific guideline, of course).

The expectation now is that judges will sentence using the following terminology and steps from each guideline:

1. Set out what 'culpability' and 'harm' bracket she/he considers the case to fall in;
2. State what the 'starting point' for the particular category is (and then never use the term 'starting point' again);
3. Set out what the mitigating and/or aggravating factors are – both statutory factors and other factors;
4. State what the sentence would have been if there had been a trial;
5. Give any appropriate discount for plea;
6. Pass sentence including any ancillary orders and explain the impact of the sentence.

The Court of Appeal, rightly or wrongly, places a duty on the advocate to ensure the judge gets it right: ensuring that the right guideline is used (is it a professionally planned commercial robbery or less sophisticated robbery, for instance?); ensuring the judge has been told of all mitigating or aggravating factors; and checking off the ancillary orders.

Conclusion

The guidelines can sometimes feel a little like a computer algorithm and the structure is such that sentencing – both mitigation and the delivery of sentence – can be very formulaic: a frustration to the more flamboyant advocate.

But there is evidence that sentences have become more consistent nationwide and that fewer appeals against sentence succeed: a victory for the guidelines.

Jo Martin QC

Click [here](#) to view Jo Martin's profile

OTHER NEWS:

Welcome to our new tenants

Devon Chambers is delighted to welcome Holly Rust and Danielle Metters as tenants following the successful completion of their pupillages. Holly completed her pupillage under the supervision of Emily Cook, and Danielle under the supervision of Sally Daulton. Both will bring added depth to Chambers' burgeoning Family and Criminal teams.

Welcome to our new pupils

Devon Chambers is very pleased to announce that Sophie Johns and Ryan Murray have commenced pupillage in October 2019. Both will undertake 12-month common law pupillages under the supervision of Jason Beal and Piers Norsworthy respectively, and will be available for instruction from April 2020.

Devon Chambers also welcomes Jennifer Grehan as a third-six pupil beginning on 28 October 2019. Jennifer is a welcome new addition to Chambers' Family and Criminal teams.

THE CRIMINAL TEAM:

Jason Beal (Head of Chambers)
Piers Norsworthy (Head of Crime)
Jo Martin QC
Rupert Taylor
Edward Bailey
Judith Constable
Emily Cook
Sally Daulton
Emma Cross
Althea Brooks
Danielle Metters
Holly Rust

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