

Sentencing Council

Sentencing Council meeting: 19 June 2015
Paper number: SC(15)JUN08 – Supporting materials for guidelines
Lead officials: Ruth Pope

1 ISSUE

1.1 To review the Council's current practice and agree its future approach to the provision of supporting information or explanatory material for users of guidelines.

2 RECOMMENDATION

2.1 That the Council decides:

- whether it agrees with the recommendation to provide resources for sentencers and other users of sentencing guidelines to assist them in the correct application of the Council's guidelines;
- whether the existing material on the website is relevant and helpful;
- whether additional information, for example, links to useful Court of Appeal judgments or information of a more general application should be made available.

3 CONSIDERATION

Current position

3.1 There is currently some material available on the Council's website designed to assist users of guidelines. This can be accessed under 'publications' either on a guideline by guideline basis or for a complete list by selecting the publication type 'Information.' The full list is reproduced below (listed in date order, most recent first) and is also available at:

<http://www.sentencingcouncil.org.uk/publications/?type=publications&s=&cat=information&topic=&year=>

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 Publication — Information — 1 October 2014
 A case study intended to familiarise sentencers with the guideline and its step-by-step approach in relation to confidence fraud.

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i) Case studies

Benefit fraud case study

A case study intended to familiarise sentencers with the guideline and its step-by-step approach in relation to benefit fraud. (1 October 2014)

Confidence fraud case study (1)

A case study intended to familiarise sentencers with the guideline and its step-by-step approach in relation to confidence fraud. (1 October 2014)

Confidence fraud case study (2)

A case study intended to familiarise sentencers with the guideline and its step-by-step approach in relation to confidence fraud. (1 October 2014)

Mortgage fraud case study

A case study intended to familiarise sentencers with the guideline and its step-by-step approach in relation to mortgage fraud. (1 October 2014)

Environmental offences case study – Company

A case study intended to familiarise sentencers with the environmental offences guideline for organisations and its step-by-step approach. (1 July 2014)

Environmental offences case study – Individual

A case study intended to familiarise sentencers with the environmental offences guideline for individuals and its step-by-step approach. (1 July 2014)

Scenarios: Dangerous dog offences

A selection of scenarios intended to familiarise sentencers with the dangerous dog offences guideline and its step-by-step approach. (20 August 2012)

Scenarios: Drug offences

A selection of scenarios intended to familiarise sentencers with the drug offences guideline and its step-by-step approach. (27 February 2012)

Scenario: sentencing process for burglary offences

Two scenarios intended to familiarise sentencers with the guideline and its step-by-step approach in relation to domestic and non-domestic burglary. (16 January 2012)

Scenario: sentencing process for fictional ABH offence

An illustrative scenario taking the sentencer through the sentencing process in relation to a fictional Actual Bodily Harm offence. (13 June 2011)

ii) Guides

A short guide – Sentencing for offences taken into consideration (TICs)

A short guide on offences taken into consideration to accompany the consultation exercise. (15 September 2011)

A short guide – Making the decision about where trials are heard (Allocation)

A short guide on allocation to accompany the consultation exercise. (15 September 2011)

A short guide – Sentencing for multiple offences (Totality)

A short guide on totality to accompany the consultation exercise. (15 September 2011)

iii) Other

Presentation - researchers and academics

This presentation, designed primarily for use by researchers and academics, provides an introduction to the role of the sentencing council and the history of sentencing guidelines in England and Wales. (2 August 2011)

Assault: Guideline approach

A document intended to familiarise sentencers with the assault guideline and its step-by step approach. (13 June 2011)

3.2 The majority of these documents, listed under subsection i), are scenarios or case studies designed to illustrate how individual guidelines work. Feedback from those involved with training on guidelines, in particular Judicial College officials and some individual sentencers, especially magistrates, suggests that these are very helpful (although such feedback as we have from sentencers is anecdotal; no research has been undertaken on this issue). Therefore, although it is not apparent whether the Council has specifically authorised the production or content of any of these documents, **it is recommended that the Council continues to make them available on the website.**

3.3 The only SC definitive guideline for which there are no scenarios or case studies is the Sexual Offences guideline. We have not been made aware of any issues arising from this and given the wide range of offences covered by the guideline it may not be helpful to attempt to provide any. Extensive training material on this guideline was provided by the Judicial College, which included case studies. The Office provided considerable input both to these and also to police training materials at the time of publication. There are no case studies for any of the guidelines produced by the SGC. **We do not recommend producing case studies retrospectively for any of these guidelines.**

3.4 There are three documents listed at 3.2 subsection ii) above, which relate to the 2011 consultation on Allocation, Totality and Offences Taken Into Consideration. Whilst these documents contain some useful information for a more general audience, **it is recommended that they are re-categorised on the website so that they appear only when selecting consultations.** Consideration could be given to producing an updated document giving the useful general information relating to these guidelines, or to providing this information elsewhere on the website where it would be more accessible to the general public.

3.5 The two remaining documents in the list at 3.2, subsection iii) above were produced early in the Council's existence. **It is recommended that the presentation for researchers and academics is reviewed**, and if it is considered to be useful, either updated or the information added to the research section of the website.

3.6 The document entitled 'Assault: guideline approach' provides a step by step explanation of the Assault guideline including of factors such as 'injury which is serious in the context of the offence' and 'Victim is particularly vulnerable because of personal circumstances'). We know that interpretation of these factors still causes difficulties for the courts, which suggests either that the information in this document is not helpful or that

sentencers are unaware of it. **In light of this, and also because this is the only step by step guide in existence, the Council may wish to consider archiving this content.**

Future approach

3.7 Council members have previously expressed mixed views about the provision of explanatory material. Guidelines are designed to be self-explanatory, although some training is provided to sentencers. The extent of training depends on the complexity of the guideline and the resources and priorities of the Judicial College (for example, there was extensive training on the sex offences guideline but there is unlikely to be much more than awareness-raising on the new dangerous dogs guideline).

3.8 Additionally, when a new definitive guideline comes into force there are often appeals to the Court of Appeal (Criminal Division) relating to the application of the guideline. In such circumstances it is the practice of the Registrar of Criminal Appeals to list several such appeals together so that any common issues can be resolved in a single judgment. Such cases can provide assistance with the particular guideline involved and sometimes more generally in the use of Sentencing Council guidelines. A good example of this is the case of *Healey*¹ in which the Court states as follows:

9. The format which is adopted by the Sentencing Council in producing its guidelines is to present the broad categories of offence frequently encountered pictorially in boxes. That is perhaps convenient, especially since it is necessary to condense the presentation as much as possible and to avoid discursive narrative on so wide a range of offending. It may be that the pictorial boxes which are part of the presentation may lead a superficial reader to think that adjacent boxes are mutually exclusive, one of the other. They are not. There is an inevitable overlap between the scenarios which are described in adjacent boxes. In real life offending is found on a sliding scale of gravity with few hard lines. The guidelines set out to describe such sliding scales and graduations. We wholeheartedly endorse the approach of Mr Wyatt, counsel for one of these defendants (Brearley), who asked us to find that a particular case was to be located on examination somewhere between two of the pictorial boxes.

10. In these guidelines, as in almost all such, there is a recognition that the two principal factors which affect sentencing for crime can broadly be collected together as, first, the harm the offence does, and secondly, the culpability of the offender. Those two root factors are often linked but not always. In some other contexts from that which we are now considering, such as for example offences of impromptu violence or offences which are committed carelessly, the two factors may not march together. In the context of offences which involve a considerable degree of deliberation and planning, such as will normally be the case for the production of drugs, they generally do march broadly together and certainly the one is likely to colour the other. Quantity, which is a broad appreciation of harm, may well colour participation, which is a broad appreciation of culpability, and vice versa. What we

¹ R v Healey and Ors [2012] EWCA Crim 1005

have just said about sliding scales applies equally to both elements, both to culpability and to harm. In neither case do the boxes have hard edges.

3.9 It is recommended that the Council provides three types of supporting explanatory materials for guidelines on the website:

- i. Scenarios or case studies to illustrate the approach to be taken in applying individual guidelines. These can be particularly helpful to those providing training (both the Judicial College and the Legal Trainer Network make use of this resource) and for guidelines where slightly more unusual concepts are used (an example is the mortgage fraud scenario which helps users to understand the approach to risk of harm in the fraud guideline).
- ii. Summaries of and links to Court of Appeal cases which give guidance on specific offences or guidelines (examples would include *Povey*² and *Monteiro*³ on knives, *Caley*⁴ on guilty pleas). It would need to be made clear that the cases should be used for the points of principle that they contain and not as precedents for the actual sentences.
- iii. Cases which provide more general guidance on the application of guidelines, including cases relating to the approach to be taken to cases which pre-date the guidelines (for example *Boakye*⁵ and *Healy*).

3.10 There may also be a case for the Council to provide a fourth category of information and, where available, links to cases, on issues relating to sentencing that are indirectly related to guidelines. One such issue could be the role of victim personal statements (VPS) in sentencing. In that regard the case of *Perkins*⁶ is very useful in explaining what part the VPS should play. Another matter that has previously been raised as an area where guidance might be helpful, is the use of suspended sentence orders (guidance on this is provided within the MCSG, but it could be helpful to give this greater prominence on the website). This would tie in with the work that the Council is currently undertaking on the breach guideline.

² R v Povey [2008] EWCA Crim 1261 (there is an existing additional note to the MCSG summarising this case)

³ R v Monteiro [2014] EWCA Crim 747

⁴ R v Caley and Ors [2012] EWCA Crim 2821

⁵ R v Boakye and Ors [2012] EWCA 838 which states that guidelines are not retrospective

⁶ R v Perkins [2013] EWCA Crim 323

Question 1: Does the Council agree that it is part of its function to provide resources that will assist users of guidelines and if so, that these should take the form of case studies and references to Court of Appeal judgments of both specific and general application?

Question 2: If so, does the Council agree that the content of the existing documents listed at paragraph 3.2(i) should be reviewed by officials and (if appropriate) presented to the Council at a future meeting?

Question 3: Does the Council agree to provide new case studies for future guidelines only; or does it wish to provide case studies for any existing definitive guidelines?

Question 4: Does the Council agree to provide general information relating to allocation, totality and TICs on the website, replacing the guidance listed at paragraph 3.2 (ii)?

Question 5: Does the Council agree to review and update the information for researchers and academics (paragraph 3(iii))?

Question 6: Does the Council agree to consider providing explanatory materials on other sentencing related issues (paragraph 3.10)?

4 RISK

4.1 The Council will need to ensure that any material provided via its website is accurate and up-to-date. By way of mitigation, we will review, with a view to removing or archiving old explanatory material upon introduction of revised guidelines, and will clarify that it is explanatory material and does not purport to have the status of a guideline.

4.2 The Judicial College remains responsible for training judges and magistrates and it will be important to ensure that this distinction is understood. The current case studies and other materials are a resource which the College has confirmed it finds very useful for training purposes. It is content to continue to work with us in developing new case studies, time permitting, and for us to make this material available via the website as explanatory material.

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