House of Commons
Justice Committee

Draft Sentencing Council General Guideline for sentencing offences for which there is no specific guideline

Fourteenth Report of Session 2017–19

Report, together with formal minutes relating to the report

Ordered by the House of Commons
to be printed 5 February 2019
Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General’s Office, the Treasury Solicitor’s Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

Current membership
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Bambos Charalambous MP (Labour, Enfield, Southgate)
Janet Daby MP (Labour, Lewisham East)
Mr David Hanson MP (Labour, Delyn)
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Victoria Prentis MP (Conservative, Banbury)
Ellie Reeves MP (Labour, Lewisham West and Penge)
Ms Marie Rimmer (Labour, St Helens South and Whiston)

The following Members were also members of the Committee during the Parliament:
Ruth Cadbury MP (Labour, Brentford and Isleworth)
Alex Chalk MP (Conservative, Cheltenham)

Powers
The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via www.parliament.uk.

Publication
Committee reports are published on the Committee’s website at www.parliament.uk/justicecttee and in print by Order of the House.

Committee staff
The current staff of the Committee are Rhiannon Hollis (Clerk), Fiona Hoban (Second Clerk), Gemma Buckland (Senior Committee Specialist), Nony Ardill (Legal Specialist), Ben Rodin (Committee Specialist), Christine Randall (Senior Committee Assistant), Su Panchanathan (Committee Assistant), Samira Ali (Sandwich Student), and Liz Parratt and Simon Horswell (Committee Media Officers).

Contacts
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The Sentencing Council

1. The Sentencing Council for England and Wales is an independent non-departmental body of the Ministry of Justice, set up to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary. The primary role of the Council is to issue guidelines on sentencing, which the courts must follow unless it is in the interests of justice not to do so. The Council also assesses the impact of its guidelines on sentencing practice and promotes public awareness of sentencing in the magistrates’ courts and the Crown Court.

2. Under section 120 of the Coroners and Justice Act 2009, the Sentencing Council is required to publish new sentencing guidelines in draft before they are finalised. The Justice Committee is listed as a statutory consultee on draft guidelines under section 120(6) of the 2009 Act. The Council must also consult the Lord Chancellor and any person that the Lord Chancellor directs should be consulted, together with other persons considered appropriate by the Council. In setting guidelines, the Council is required to have regard to various factors, including the sentences imposed by courts in England and Wales for particular offences and the need to promote consistency in sentencing.

Our response to the consultation on the draft General Sentencing Guideline

3. On 16 June 2018, the Sentencing Council published for consultation a draft General Sentencing Guideline for sentencing offences for which there is no offence-specific guideline, along with a consultation stage resource assessment. The consultation ended on 11 September 2018.

4. The Council has produced—or expects soon to produce—offence specific guidelines for all high volume criminal offences that are sentenced by the courts in England and Wales. However, as it explained in its consultation paper, there remain many offences which are not yet covered by offence specific guidelines. The consultation paper provides a non-exhaustive list of these offences:

- Blackmail
- Child abduction
- Cybercrime/hacking
- Data protection offences
- Female genital mutilation
- Fire regulation offences
- Forgery/counterfeiting

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1 General Sentencing Guideline for use where there is no specific guideline: consultation. The Sentencing Council, June 2018
2 Draft Resource Assessment: General Guideline. The Sentencing Council, June 2018
- Immigration offences
- Kidnap and false imprisonment
- Landlord, HMO\(^3\) offences
- Modern slavery offences
- Offences against vulnerable adults
- Offences committed in custody
- Perverting the course of justice/perjury
- Planning offences
- Wildlife offences

5. The Council therefore decided to provide a guideline for the sentencing of offences not covered by an offence specific guideline, and to take the opportunity of embedding into the new guideline some additional overarching guidance on sentencing issues. The new guideline will apply to the sentencing of adults and organisations only. When the definitive guideline is implemented, it will replace the guideline on seriousness produced by the Sentencing Council’s predecessor body, the Sentencing Guidelines Council.\(^4\)

6. The Council explained in its consultation paper that it was seeking views on:
   - the principal factors that make offences more or less serious;
   - additional factors which should influence the sentence;
   - the applicability of the guideline to a wide range of offences;
   - the clarity and accessibility of the guideline;
   - anything else that respondents think should be considered.

As it has done on previous occasions, the Council shared with us the consultation responses that it received and we are grateful for this assistance, which avoided the need for us to seek our own, separate evidence on the Council’s proposals, either formally or informally. We also thank the Council for its flexibility in agreeing to consider our submissions after the conclusion of the consultation period.

7. Our response to the draft General Guideline was made by way of a letter from the Chair to the Chairman of the Sentencing Council, Lord Justice Holroyde, dated 18 December 2018. We were pleased to receive a helpful and positive response from Lord Justice Holroyde in a letter dated 18 December 2018. We have decided to publish this short report to draw the attention of both the House and other interested parties to the draft guidelines, to our own response, and the reply that we received from the Council. The two letters appear respectively at Appendix 1 and Appendix 2 to this report.

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\(^3\) House in Multiple Occupation

1 Letter from the Chair of the Justice Committee to the Chairman of the Sentencing Council, dated 18 December 2018

Draft General Guideline for sentencing offences for which there is no specific guideline

I would first like to thank you for taking the time last month for an informal meeting with myself and members of the Committee secretariat. The discussion was particularly useful to help us understand the Council’s direction of travel in relation to its research—including potential collaboration with the academic community—and the ongoing digitisation of its guidelines, as well as the budgetary challenges that the Council faces. I note your strong support for the Law Commission’s Sentencing Code, which the Justice Committee views as an uncontroversially positive development, and one that is certainly deserving of the limited Parliamentary time that would be needed to secure its introduction.

I now turn to our comments on the Council’s draft General Guideline for sentencing offences for which there is no specific guideline. Thank you for allowing my Committee to submit these comments considerably later than the closing date of your public consultation in September. This flexibility has been enormously helpful to us, given the competing demands of the Committee’s current programme of work. Once again, we are grateful for your willingness to share the consultation responses that you received, which has avoided the need for us to seek the views of stakeholders by way of oral or written evidence.

1. The structure and format of the guideline

The Committee welcomes the digital format adopted for this Guideline, in particular the inclusion of drop-down boxes that contain supplementary information to assist sentencers, including expanded guidance on the assessment of culpability and harm and on aggravating and mitigating factors. We note that the draft Guideline would replace the current guideline on “Overarching principles: seriousness” that was produced by the Sentencing Guidelines Council (SGC), the Council’s predecessor, setting out principles that apply to the sentencing of all offences, including those for which there is an offence-specific guideline.

We are aware that, as of 8th November 2018, the Council has made available online versions of the offence specific guidelines used in the Crown Court, but that these do not yet include drop-down boxes with additional information. We understand that it is the Council’s intention, as the digitisation project progresses, to build the expanded elements of its new draft General Guideline into the offence specific guidelines. We suggest that, meanwhile, sentencers be encouraged to make cross-reference to the General Guideline, once finalised, to obtain the expanded guidance on key issues; for example, on the issue of age and/or lack of maturity, an issue to which we return below.
We recognise that digital guidelines have the advantage of being easier to update than those in traditional formats. However, we suggest that the Council investigate setting up an online archive to preserve earlier versions of guidelines, as this would provide a valuable resource in appeal cases where the hearing takes place after the relevant guidelines have been amended. We also agree with the respondents to the Council’s consultation who called for PDF versions of the General Guideline to be available to download and print, as this will be needed for advising those who do not have ready access to computers— including remand prisoners.

2. **Consultation stage resource assessment**

You may recall that our letter on the draft Guidelines on arson/criminal damage and public order offences called for more robust consultation stage resource assessments of the potential impact of new guidelines on correctional services, especially where there may be a risk of sentence inflation. We recognise that the Council is doing what it can within its limited resources to assess the impact of guidelines, both before and after the consultation stage as well as post implementation—although we would hope that HMCTS would work with the Council to maximise the opportunities arising from improved data capture linked to the ongoing and planned digitisation of the courts.

We have particular concerns about the potential impact of the draft General Guideline, given that it does not contain prescribed sentence levels but invites sentencers to consider the definitive sentencing guidelines for “analogous offences”. While we accept that Legal Advisers could provide advice to magistrates on the identification and relevance of analogous offences (a point made by the Magistrates’ Association), we agree with the Department for Health and Social Care and the Insolvency Service that the Council should provide more guidance on this point. We also suggest that the level of consistency in sentencers’ selection of analogous offences be a focus of the Council’s post-implementation monitoring of this Guideline.

3. **Age and/or lack of maturity**

We have welcomed the Council’s decision to include in the draft Guideline an explanation of the mitigating factor “age and/or lack of maturity”, as recommended by our predecessor Committee in its report on young adults in the criminal justice system (Seventh Report of Session 2016–17); this report found that sentencers do not have a sufficiently sophisticated understanding of maturity to weigh up how it might affect the culpability of a young adult, and that Pre-Sentence Reports (PSRs) may not provide them with enough evidence to do so in individual cases. Our follow-up report on this issue (Eighth Report of Session 2017–18) confirmed the previous Committee’s view that research was needed into sentencers’ and prosecutors’ understanding of maturity, as well as on the impact on young adults of assessments of maturity made during prosecution, pre-sentence and sentencing.

However, your predecessor, Lord Justice Treacy, told us in a letter dated 14 May 2018 that the Council’s limited research budget was likely to prevent it from conducting any substantial research in this area.

We consider that there is scope for improving the explanatory text on age and/or lack of maturity. Based on the conclusions of the Committee’s two reports, we think that it would be important to clarify the distinction between typical and atypical (impaired)
development and its potential impact on behaviour. We also believe that a brief reference to neuroscientific evidence would be helpful in supporting sentencers’ understanding of this issue. Our predecessor Committee’s report noted that, in typical brain maturation, temperance (the ability to evaluate the consequences of actions and to limit impulsiveness and risk-taking, affecting consequential thinking, future-oriented decisions, empathy, remorse, and planning) is a significant factor in moderating behaviour; the fact that its development continues into a person’s 20s can influence anti-social decision-making among young adults. The Committee also received compelling evidence of the potential presence of atypical brain development in those who persist in criminal behaviour into adulthood, including cognitive difficulties with thinking, acting, and solving problems, emotional literacy and regulation, learning difficulties and language problems associated with Attention Deficit Hyperactivity Disorder (ADHD), autism, learning and language disorders and head injuries.

We have noted the consultation responses of Transition to Adulthood (T2A) and the Howard League for Penal Reform, both of which argued for the Guideline to include a presumption that young adults up to the age of 25 are still maturing; we agree with this approach and would further suggest that “young adults” be defined as those up to the age of 25, and that the term “immature offender” be replaced by “young adult or otherwise immature offender”: this would provide greater clarity to sentencers in distinguishing between typical and atypical development and give them flexibility—where appropriate—to recognize immaturity in adults over 25. We note the suggestion by T2A that the Guideline be amended to expressly require maturity to be considered at Step 1 of the sentencing process, rather than at Step 2, in keeping with the statement that culpability should be assessed by reference to the offender’s “role, level of intention and/or premeditation and the extent and sophistication of planning.” Given the risk of ambiguity arising from this wording, we think it would be helpful if the Council could clarify the stage at which age and/or lack of maturity should be considered to avoid the risk of double counting.

Returning to the question of research, we would emphasise the critical importance of assessing the impact of this explanatory text on age and/or lack of maturity on sentence decision-making as part of the Council’s post-implementation assessment of the General Guideline. Given the Council’s limited budget for research, we believe that there are strong arguments for this work to attract supplementary funding from the Ministry of Justice.

4. The five purposes of sentencing

We note that Professor Sir Anthony Bottoms, in the report of his review of the Sentencing Council’s exercise of its statutory functions (April 2018), suggested that guidelines might usefully include some reference to the legislative provisions under section 142 of the Criminal Justice Act 2003 setting out the five purposes of sentencing—not least to assist the understanding of victims, offenders and the public more generally. While we welcome the Council’s decision to re-state these five purposes in the General Guideline, we agree with Professor Bottoms that public understanding, as well as that of sentencers, would be enhanced by including additional explanatory text for each statutory purpose; in particular, we agree with the Crown Prosecution Service that it would be helpful to explain how they relate to section 143(1) of the 2003 Act, which requires the court to consider the offender’s culpability and any harm that the offence caused, or was intended to cause—suggesting a more censure-based approach to sentencing decisions than the
predominantly consequentialist purposes set out in section 142. We observe that research
evidence broadly supports the contention that increasing sentence lengths is less likely to
act as a deterrent than increasing the offender’s belief in the likelihood of detection, arrest
and conviction; we suggest that this evidence might usefully be brought to the attention
of sentencers.

I hope that these comments are helpful to the Council in producing the definitive version
of the General Guideline.

5 See, for example, A E Bottoms and A von Hirsch ‘The Crime Preventive Impact of Legal Sanctions’ in P Cane and
2 Letter from the Chairman of the Sentencing Council to the Chair of the Justice Committee, dated 18 December 2018

Draft General Guideline for sentencing offences for which there is no specific guideline

Thank you for your letter of 18 December 2018 responding to the consultation on the draft General Guideline and for coming to meet me last month—I too found our meeting to be very useful.

We will of course consider all of the points you raise in your letter in detail as we revise the guideline post-consultation, but I thought it might be helpful to respond briefly to some of the key points in your letter.

I note your comments regarding setting up an online archive to preserve earlier versions of guidelines and this is a matter that we touched upon briefly when we met. I agree that it is desirable to have some method of accessing previous versions of guidelines and knowing which was in force on what date. This is an area receiving active consideration as part of our digitisation agenda. I can also confirm that there will be a facility to print the digital guidelines for precisely the types of reason you suggest in your letter.

I note the point about the usefulness of more guidance on how to identify analogous guidelines and the value of monitoring the level of consistency on this point in the post-implementation evaluation of the guideline. We will consider this further in our post-consultation deliberations.

Your detailed recommendations regarding the ‘age and/or lack of maturity’ factor will also be considered by the Council in finalising the definitive guideline. I am grateful for your comments about further research in this area, which we shall examine with interest.

Finally, at its meeting in January 2019, the Council will consider your observations about providing more information on the five purposes of sentencing.

A more detailed response to all of the observations and recommendations of the Committee will be provided in the response to consultation when the definitive guideline is published, which we hope will be in July 2019.
Draft Sentencing Council General Guideline for sentencing offences for which there is no specific guideline

Formal minutes

Tuesday 5 February 2019

Members present:

Robert Neill, in the Chair

Bambos Charalambous       Gavin Newlands
Janet Daby                Victoria Prentis
Mr David Hanson           Ellie Reeves
John Howell               Marie Rimmer

Draft Report (Draft Sentencing Council guideline for the sentencing of offences not covered by an offence specific guideline), proposed by the Chair, brought up and read.

Ordered, That the Draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 7 read and agreed to.

Two papers were appended to the Report as Appendix 1 and 2.

Resolved, That the Report be the Fourteenth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 12 February at 9.30am]
List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee’s website. The reference number of the Government’s response to each Report is printed in brackets after the HC printing number.

Session 2017–19

| First Report | Disclosure of youth criminal records | HC 416 (Cm 9559) |
| Second Report | Draft Sentencing Council guidelines on intimidatory offences and domestic abuse | HC 417 |
| Third Report | Pre-legislative scrutiny: draft personal injury discount rate clause | HC 374 |
| Fourth Report | Draft Sentencing Council guidelines on manslaughter | HC 658 |
| Fifth Report | HM Inspectorate of Prisons report on HMP Liverpool | HC 751 (HC 967) |
| Sixth Report | Draft Sentencing guideline on terrorism | HC 746 |
| Seventh Report | Small claims limit for personal injury | HC 659 |
| Eighth Report | Young adults in the criminal justice system | HC 419 (HC 1530) |
| Ninth Report | Transforming Rehabilitation | HC 482 |
| Tenth Report | Draft Sentencing Council guideline on child cruelty offences | HC 892 |
| Eleventh Report | Disclosure of evidence in criminal cases | HC 859 |
| Twelfth Report | Criminal Legal Aid | HC 1069 |
| Thirteenth Report | Draft Sentencing Council guidelines on arson and criminal damage and public order offences | HC 1579 |
| First Special Report | The implications of Brexit for the Crown Dependencies: Government Response to the Committee’s Tenth Report of Session 2016–17 | HC 423 |
| Second Special Report | Government Responses to the Committee’s Reports of Session 2016–17 on (a) Prison reform: governor empowerment and prison performance (b) Prison reform: Part 1 of the Prisons and Courts Bill | HC 491 |
| Third Special Report | The implications of Brexit for the justice system: Government Response to the Committee’s Ninth Report of Session 2016–17 | HC 651 |
| Fourth Special Report | HM Inspectorate of Prisons report on HMP Liverpool: Government Response to the Committee’s Fifth Report | HC 967 |
Fifth Special Report Young adults in the criminal justice system: Government Response to the Committee’s Eighth Report of Session 2017–19 HC 1530