

Sentencing Guidelines Update – July 2022

By Jonathan Underhill

3PB Criminal Team

Introduction

1. There are a number of new, or amended, sentencing guidelines that have recently come into force. All apply to sentences passed after the date of implementation. As a result, they are all applicable as at the stated date: for the large part 1st July 2022.
2. The rationale for introduction and alteration varies across the new guidance; however, for a change, it can be observed that the alterations and revisions are certainly designed to do more than simply tinker around the edges of a currently functioning process.

Burglary

3. New Guidelines have been introduced across all three core areas of offending:
 - (a) [Domestic](#)
 - (b) [Non-domestic](#)
 - (c) [Aggravated burglary](#)
4. **The need for a change?** - It was not anticipated that there would be any impact on sentence severity when the previous Guidelines came into force in 2012. As has often been the case the imposition of the previous guidance was aimed at achieving a higher level of reliability and consistency across nationwide sentencing decisions.
5. On the contrary, research conducted by the Sentencing Guidelines Council ('SGC') found that sentence severity increased for all three burglary offences following the introduction of the existing Guidelines. The most notable impact concerned sentences for non-domestic burglary, where the numbers of both suspended and immediate custodial sentences rose sharply after the existing Guidelines came into effect.
6. The SGC were quick to observe that:

“...Prior to consultation, the Council considered the available evidence relating to the increase in sentence severity and felt that, although the increases were above our predictions at the time, sentencing practice was proportionate to the seriousness of the offences that appeared before the courts. The revised guideline therefore was not intended to change sentences from their current levels...”

7. **Structural change** – Whilst the previous guidelines set out two categories of harm (greater and lesser) and two categories of culpability (higher and lower) the revised guidance expands both areas to provide a “middle way” for sentencers. There are now three times as many starting points (increased from 3 to 9), whilst it is immediately of note that the maximum sentences for burglary have not been altered by the revised guidance.
8. Some of the more notable changes include:
 - (a) The removal of offending motivated or demonstrating hostility based on a protected characteristic from higher culpability factors (although it remains an aggravating factor overall).
 - (b) Membership of a group ceases to be a culpability factor, but rather is now included as an aggravating factor.
 - (c) In the context of aggravated burglary, a weapon being present upon entry by the Defendant is no longer a higher culpability factor – but falls now to be considered as an aggravating factor.
 - (d) The new medium culpability factors include offending behaviour which demonstrates “some” as opposed to a “*significant*” degree of planning; and in the case of both domestic and non-domestic burglaries include offences where the Defendant is foolish or unlucky enough to be apprehended whilst equipped for said offence.
 - (e) What was the unholy trinity of “*soiling ransacking and vandalism*” have been – sensibly – subdivided; with “*soiling and/or extensive damage or disturbance to property*” now sitting in the highest category of harm and “*ransacking or vandalism*” relegated to the middling leagues.
 - (f) As is consistent with other guidelines the causing of physical or psychological harm has now been further qualified with offenders causing “substantial” injuries of this type being considered to fall within the highest category of harm, whilst those that can be said to cause “some” injury would properly be placed within the middle tier.

9. **Final thoughts?** - The SGC are quick to observe that: *“We have ... updated the format of the guidelines to introduce new middle categories for our culpability and harm factors, which give judges and magistrates greater flexibility in sentencing”*.
10. In reality this remains to be seen. By widening the categories and codifying them the revised guidelines arguably remove a level of judicial discretion which would have previously existed within wider ranges.
11. The readjustment of factors which would have affected category placement as aggravating factors runs the risk of Defendants finding that cases are aggravated far above the relative adjustment for offending which exhibited multiple factors within any given harm of culpability range. When placed within the context of the wider sentencing powers being made available to Magistrates, it remains to be seen what the practical effect of the revised guidance will be.
12. What can be said is that, on one view, the revised guidance gives Defence practitioners a greater space within which to manoeuvre, as well as being able to draw attention to the wider issue that the revision in the guidelines was specifically aimed at avoiding and correcting the inflation in burglary sentencing lengths.

Sexual offences (Revised Guidance)

13. **Where is the Child** - The Sentencing Council has published revised guidance for child sexual offences in cases where no sexual activity takes place, or the targeted child does not exist:
 - (a) [s10 causing or inciting](#)
 - (b) [s14 arranging or facilitating child sex offence](#)
14. The revisions came into place on 31st May 2022 and specify how judges and magistrates should base the sentence they impose on the intended sexual harm to a child, whether or not a child victim existed or sexual activity took place, for example in cases where the offender was arrested following a police ‘sting’ operation.
15. In short, the revisions stipulate that where no sexual activity takes place, the court should identify the category of harm on the basis of the sexual activity the offender intended, and then adjust the starting point downwards to reflect what actually happened. The final sentence will be influenced by other aspects of the offender’s culpability, as well as aggravating and mitigating factors specific to the offence and the offender.

16. **Two stage approach** - In light of the decision in *Alistair Reed, Mark Bennett v The Queen* [2021] EWCA Crim 572, where no activity has taken place, the sentencers are now more than familiar with the two stage approach articulated by the higher courts:
- (a) Step 1: Identify the category of harm based on the sexual activity intended.
 - (b) Step 2: Apply a downward adjustment to reflect that no harm or lesser harm actually occurred.
17. Their Lordships observations in Reed are well known, and almost certainly well founded. As the Sentencing Council itself has acknowledged; prior to revision the current sexual offences guidelines, originally published in 2013, had been interpreted in some cases to mean that harm should be considered low in these cases, or had placed the absence of actual harm to a child as a mitigating factor in cases where sexual activity was incited but did not actually occur. It was not surprising that their Lordships went on to specifically request that the Sentencing Council issue revised guidance to account for the correction in approach that they had identified. The revised guidance does precisely that; codifying the approach articulated above.
18. The extent of the downward adjustment will always be specific to the facts of the case. To illustrate this approach in practice, we can consider two scenarios:
- (a) In a case where the actual carrying out of the sexual activity was prevented by the police at a late stage or simply because the child did not exist (i.e., a 'sting' operation), the intention of the offender is the same regardless of the actual risk to a child. Therefore, this would likely only warrant a small reduction on the eventual sentence.
 - (b) However, where the offender desisted voluntarily at an early stage, i.e., by withdrawing from a conversation, then the likely reduction would likely be greater. A reduction is not automatically available on the basis that the act was only an attempt.
19. The effect of this two-stage approach is that a sentence may be more severe in a case where very serious sexual activity was intended than in a case where less serious sexual activity actually took place with a child.
20. It is important to note that this two-stage approach forms only one part of the sentencing exercise. The Court must then proceed to consider the aggravating and mitigating features as they would normally do.
21. In the final analysis, the Sentencing Council has concluded:

- (a) for causing or inciting a child to engage in sexual activity (section 10), there may be an increase in sentencing severity for cases where no child exists (which are charged as attempts), or where the child does exist and the offence was incited but did not occur. It is estimated that for these cases, the average sentence length may increase, with the potential requirement for around 190 additional prison places per year.
- (b) For causing or inciting a child under 13 to engage in sexual activity (section 8) it is anticipated that there will be little change in sentencing practice and, as such, there will be little impact on prison resources
- (c) For other causing or inciting sexual offences under sections 17, 31, 39, 42 and 52 of the SOA 2003, there may be a small increase in sentencing severity for cases where no real victim exists, or where a victim does exist and the offence was incited but did not occur. As volumes are low, it is difficult to ascertain the impact for these offences, but it is anticipated that any changes would have very little impact on prison and probation resources

22. **Jurisdiction and Maximum Sentences** - In addition to the change in approach, there have been adjustments made to the venue and maximum sentences available for specific, very serious offences.

23. For a section 14 offence, the following changes have now been implemented:

- (a) Where the offence was committed on or after 28th June 2022, it will now be triable on indictment only where the offence that was arranged or facilitated falls within section 5 (*rape of a child under 13*), section 6 (*assault of a child under 13 by penetration*), section 8 (*causing or inciting a child under 13 to engage in sexual activity*), section 9 where penetration is involved (*sexual activity with a child*) or section 10 where penetration is involved (*causing or inciting a child to engage in sexual activity*) of the Act. Otherwise, the offence is triable either way.

24. The maximum sentences for offences committed on or after 28th June 2022 are now as follows:

- (a) **Life imprisonment** if the offence arranged or facilitated falls under section 5, section 6 or section 8 (if penetration was involved) of the Act;
- (b) **14 years' custody** if the offence arranged or facilitated falls under section 7 (*sexual assault of a child under 13*), section 8 (if no penetration was involved), section 9 or section 10 of the Act; and

- (c) **10 years' custody** if the offence arranged or facilitated falls under section 11 (*engaging in sexual activity in the presence of a child*) or section 12 (*causing a child to watch a sexual act*) of the Act.
- (d) When a court is sentencing an offender for an offence under section 14, they should refer to the guideline for the applicable, substantive offence under sections 9 to 12 of the Act.
- (e) The maximum sentence for a section 10 offence is **14 years' imprisonment**.
25. **Sexual Communication with a Child** - Section 15A of the Act, which was inserted by the Serious Crime Act 2015, prescribes the offence of sexual communication with a child. For the offence to be made out, the offender must contact the child to obtain sexual gratification. This is a triable either way offence, with a maximum sentence of 2 years' imprisonment.
26. The new guidelines illustrate factors that determine harm and culpability. With regards to Harm, the sending and receiving of sexual images or media will place matters into the higher category (this should, frankly, come as no great surprise).
27. Similarly, any assessment of Culpability will be higher where an offender uses threats, gifts or bribes in order to facilitate his offending behaviour and where there can be said to be an element of commercial exploitation and/or motivation involved.
28. Offences under section 15A are also subject to the same two-stage exercise detailed above.

This document is not intended to constitute, and should not be used as a substitute for, legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the author. If you seek further information, please contact the 3PB clerking team.



Jonathan Underhill

Barrister
3PB Barristers

01202 292 102
Jonathan.underhill@3pb.co.uk
3pb.co.uk