

What do Sentencing Guidelines do?

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Justice in the Criminal Courts in the 21st Century

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Functions

- Structure Discretion
- Promote consistency
- Bring Law into Sentencing (Judge Frankel)
- Make sentencing more accountable
- Describe the process of sentencing decision making : Transparency?

Nine Step Approach/Procedure

- **Step One: Determining the offence category.**
- **Step Two: Starting Points and Category Ranges**
- **Step 3 Other factors such as assistance to the prosecution**
- **Step 4 Reduction for guilty pleas**
- **Step 5 Dangerousness**
- **Step 6 Totality Principle**
- **Step 7 Compensation and Ancillary orders**
- **Step 8 The court should give reasons for and explain the effect of the sentence being passed (under s174 CJA 2003)**
- **Step 9 Consideration of Remand Time**

Step One: Determining the offence category.

- Seriousness of the offence: Harm and Culpability
- Lists of aggravating and mitigating factors not comprehensive
- Three categories High (high culpability and high harm); Medium (high culpability and low harm/low culpability and high harm); and Low (low culpability, and low harm).
- Example: Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do grievous bodily harm
- Offences against the Person Act 1861 (section 18)

Category 1	12 years' custody	9–16 years' custody
Category 2	6 years' custody	5–9 years' custody
Category 3	4 years' custody	3–5 years' custody

Step Two: Starting Points and Category Ranges

- Further aggravating and mitigating factors
- Previous Convictions
- Personal Mitigation and Other Offence factors
- “make it appropriate for the court to move outside the category range”. i.e. step 1 is provisional.

Steps 1 and 2

- Intuition not calculation?
- Consistent with limiting retributivism
- Stage One- Seriousness
- Stage Two –Criminal record
- But not as clear as it might have been?

Departures from the Guidelines

- Section 125(1) states that the court “must follow any sentencing guidelines which are relevant to the offender’s case, unless the court is satisfied that it would be contrary to the interests of justice to do so.”
- Previously “have regard to”
- Courts can depart from category range without being required to give reasons. Only required to give reasons for departures from the offence range (test: in the interests of justice)
- From 13 June 2011 to end 2011 96 % of sentences covered by the Assault Definitive Guideline fell within the offence range. 1% below and 3% above (not surprising given that the guideline does not take account of previous convictions which are statutorily aggravating.)

Causing grievous bodily harm with intent to do
grievous bodily harm/Wounding with intent to do
grievous bodily harm

Offences against the Person Act 1861 (section 18)

	• Starting Point	Range
• Category 1	12 years	9–16 years
• Category 2	6 years	5–9 years
• Category 3	4 years	3–5 years

Constrain or eliminate judicial discretion?

- Starting Assumption: sentencing is a social practice: judicial function only part of the process.
- Most sentencing decisions are routine
- Guidelines produce an account of consistency not the practice of consistency?
- Scope for discretion in practice exaggerated?
- Sudnow 1965, Hawkins 1991, McConville et al 1990, Abbot (1988), Hutton 1996, Scheers and Beyens 2013

What is consistency?

- Approach or Outcomes?
- Approach: Courts follow the same Nine Step procedure. Failure to do so will constitute grounds for appeal.
- Wasik CLR 2008 English guidelines focus on “uniformity of approach not uniformity of outcomes”
- But also outcomes? Crown Court Survey, penalty ranges and departures

Consistency

- English guidelines therefore define consistency both in terms of approach and outcome. Guidelines perform consistency. Not something out there to be measured but created by the devices which we use to operationalise it and thereby monitor it.
- Why the emphasis on approach in E and W?
- A pure individualised system (each case unique, Cooper (CLR 2008) “no case is ever identical to another”) has no benchmark against which to measure consistency.

Consistency of Outcomes

- Where offence range is very wide guideline may become meaningless.
- Ashworth: final wording is “pitifully loose”
- Departures should have been from category ranges
- Compliance data not helpful
- May or may not have a negative impact on public confidence in guidelines?

Consistency of Approach

- “The underlying logic is that, if two courts sentencing two different cases of , say, robbery, impose different sentences, having followed the same sequence of steps to determine sentence, the difference between the dispositions is likely to reflect legally relevant factors.”
- Roberts, J. V. Sentencing Guidelines and Judicial Discretion Evolution of the Duty of the Courts to Comply in England and Wales. *British Journal of Criminology* (2011) 51 997-1013.
- Failure to demonstrate adherence to each of the nine steps will be a ground of appeal (as will failure to indicate the category at steps 1 and 2)

Accountability

- Compliance rates and reasoned departures provide an account of consistency
- Nine Steps describe a systematic set of procedures which must be complied with. Is there anything wrong with box ticking?
- Therefore guidelines provide a language to debate consistency.

Describe how sentencers make decisions?

- “a detailed and structured methodology for courts to follow” an “algorithm” Roberts,(2011)
- Reference to psychological evidence about decision making in Sentencing Council consultation on draft assault guideline.
- John Cooper 2008 CLR Judges see guidelines as “box ticking”
- Lord Justice Leveson evidence to Justice Committee, asked whether final six steps are an “aide memoire” “Absolutely, to make sure that the judge jumps through the hoops which Parliament has set, not which we have set.”
- Can or should guidelines be described as an accurate account of the process of sentencing decision making or box ticking or both? What is wrong with box ticking anyway?

Conclusions

- Structure Discretion: Formally yes, but allows intuitive sentencing with post hoc justification, no requirements for indicating weight of factors
- Promote consistency: Approach and outcomes
- Make sentencing more accountable; Steps must be followed, interests of justice identified, departures monitored
- In terms of public perceptions and public confidence the departure rules and the continued opacity of stages 1 and 2 may make it difficult for the public to see the point of the guidelines?
- Should guidelines aim to describe the process of sentencing decision making? Why risk creating unrealistic expectations?
- Make explicit the difference between formal accountability and trust in professional judgement.