

The new Sentencing Guidelines one year on: Their impact on the Construction industry

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1. Summary

- 1.1 The conviction data available on HSE's web site has been analysed to assess the impact of the first year of the new Sentencing Guidelines on organisations and individuals working in the construction industry who have been convicted of breaches of health and safety legislation. Comparisons have been made with the last year of the old Guidelines.
- 1.2 These analyses showed that the median fine per construction organisation increased from £13.4k under the old Sentencing Guidelines to £20k under the new Guidelines. The largest fine imposed on a construction organisation increased from £1m to £2.6m.
- 1.3 The proportion of individuals receiving prison or suspended prison sentences rose from around 1 in 3 (31%) to nearly 1 in 2 (47%) in the first year of the new Sentencing Guidelines. The proportion of individuals receiving fines reduced from 57% to 40% with the new Sentencing Guidelines.

2. Introduction

- 2.1 The Sentencing Guidelines⁽¹⁾ ('new Sentencing Guidelines') were introduced on 1 February 2016 to replace the 2010 Guidelines⁽²⁾ ('old Sentencing Guidelines'). After this date, all courts in England and Wales had to follow these guidelines when sentencing organisations and individuals for health and safety offences.
- 2.2 The new Sentencing Guidelines were issued to:
 - Extend the guidelines to non-fatal accidents
 - Extend the guidelines to individuals and custodial sentences
 - Increase the level of fines to of bring home to management and shareholders the need to comply with health and safety legislation
- 2.3 To arrive at a fine, courts would make an assessment of:
 - Culpability (4 levels)
 - Seriousness of harm risked (3 levels) and Likelihood (3 levels)

- Actual exposure and harm caused
- Harm category based on seriousness and likelihood of harm (4 levels) with the harm category potentially increasing if the offence exposed a large number of people to the risk of harm or the offence was a significant cause of actual harm

2.4 The relationship between the seriousness of harm risked and the likelihood of harm used in the new Sentencing Guidelines is shown in Table 2-1.

Table 2-1: Relationship between seriousness of harm risked and likelihood

Likelihood of harm	Seriousness of harm risked		
	Level A	Level B	Level C
High	Harm category 1	Harm category 2	Harm category 3
Medium	Harm category 2	Harm category 3	Harm category 4
Low	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

2.5 The harm category and level of culpability would then be fed in to a financial matrix to give a starting point and range of fines depending on the organisation's turnover. The ranges given are very wide and adjustments for aggravating and mitigating factors could easily double the amount of fine imposed.

2.6 A typical case involving construction organisations is likely to be medium culpability (*Systems were in place but these were not sufficiently adhered to or implemented*) and either harm category 1 or 2. This would lead to the levels of fine shown in Table 2-2. The size of the fine varies considerably depending on the turnover of the organisation. The new Sentencing Guidelines do not provide values for 'very large' organisations, hence the question marks shown in the table.

Table 2-2: Variation in the starting values and ranges of fines for organisations with medium culpability

Harm category	Starting value and ranges of fines for organisations with turnover of				
	Micro (<£2m)	Small (£2m-10m)	Medium (£10m-50m)	Large (>£50m)	Very Large (>£150m)
HC1	£100k £60k-£160k	£169k £100k-£600k	£540k £300k-£1.3m	£1.3m £800k-£3.25m	£???
HC2	£30k £14k-£70k	£54k £25k-£230k	£240k £100k-£600k	£600k £300k-£1.5m	£???

2.7 Similarly, a typical case involving individuals in construction is likely to be medium culpability (*Offence committed through act or omission which a person exercising reasonable care would not commit*) and either harm category 1 or 2. This would lead to the levels of sentences shown in Table 2-3.

Table 2-3: Variation in the starting values and ranges of fines for individuals with medium culpability

Harm category	Starting point	Range
HC1	26 weeks' custody	Band F fine (500%-700% of weekly income) or high level community order (150–300 hours of unpaid work) to 1 year's custody
HC2	Band F fine	Band E fine (300%-500% of weekly income) or medium level community order (80–150 hours of unpaid work) to 26 weeks' custody

3. HSE's conviction data

3.1 The Health and Safety Executive (HSE) provides details of convictions on its web site⁽³⁾. This contains information on the sentences imposed on both organisations and individuals. Whilst it provides relatively detailed information, this data has the following limitations:

- It only contains information on those cases where a court found the defendant guilty or the defendant pleaded
- No information is provided on those cases that were dropped before reaching court or where the court found the defendant to be not guilty
- No information is provided on those cases where the verdict is subject to an appeal
- No information is provided on the sentencing decisions (e.g. culpability, harm and turnover) – these would need to be obtained from court summaries

3.2 Despite these limitations, analysis of HSE's conviction data provides a good overview of the trends in sentencing.

3.3 The HSE conviction data provides the date of the hearing. This enables those cases sentenced after 1 February 2016 to be identified. The HSE conviction data has a time lapse of nine weeks. As such, the data for late January 2017 was only made available on the HSE web site in mid-April 2017.

3.4 To assess the impact of the first year of the Sentencing Guidelines, the conviction data from hearing dates between 1 February 2016 and 31 January 2017 have been compared with the data from 1 February 2015 to 31 January 2016.

4. Impact of the new Sentencing Guidelines on organisations

4.1 Organisations are prosecuted for breaches of the Health and Safety at Work etc. Act (HSWA) and/or a range of regulations (including the Construction (Design and Management) Regulations (CDM), Work at height Regulations and the Gas Safety Regulations). This means that organisations may be convicted of several breaches and can receive fines for each breach if found guilty. It is often the total fine that makes the headlines rather than the fines for the individual breaches. For completeness, the fines have been analysed both by breach and organisation.

4.2 Table 4-1 contains a summary of the prosecution data for the last year of the old Sentencing Guidelines along with the first year of the new Guidelines both by breach and organisation.

Table 4-1: Variation in fines between the last year of the old Sentencing Guidelines and the first year of the new Guidelines for construction industry organisations convicted of health and safety breaches

Statistic	Breaches		Organisations	
	2015-16	2016-17	2015-16	2016-17
Number of fines	193	152	151	116
Total value of fines	£8,222,300	£13,342,970	£8,222,300	£13,342,970
Smallest fine	£0	£0	£0	£0
Largest fine	£700,000	£2,600,000	£1,000,000	£2,600,000
Mean fine	£42,603	£87,783	£54,452	£115,026
Median fine	£10,000	£19,060	£13,400	£20,000
Fines < £100k	174	123	135	89
Fines >= £100k	19	29	16	27
Fines >= £250k	7	16	7	14
Fines >= £500k	5	6	5	8
Fines >= £1m	0	2	1	2

4.3 Table 4-1 shows that 116 construction organisations were convicted of one or more breaches in the first year of the new Sentencing Guidelines compared with 151 in the last year of the old Sentencing Guidelines. One potential hypothesis, based on anecdotal evidence, is that some organisations sought to have their case heard before the new Sentencing Guidelines came into force on 1 February 2016.

- 4.4 Whilst the majority of the fines are less than £100k, there are a small number of larger fines. These larger fines would skew the mean towards the larger values and, as such, the median (*the middle value in a series of values arranged from smallest to largest*) provides a better measure of the 'average' level of fine.
- 4.5 Table 4-1 shows that the median fine per breach nearly doubled from £10k to £19.06k, whilst the median fine per organisation increased from £13.4k to £20k. The largest fine for a breach increased by 270% from £700k to £2.6m, whilst the largest fine for an organisation increased by 160% from £1m to £2.6m.
- 4.6 In the last year of the old Sentencing Guidelines, seven breaches received fines of £250k or more. All of these were for breaches of either Sections 2 or 3 of the HSWA.
- 4.7 In the first year of the new Sentencing Guidelines, 16 breaches received fines of £250k or more. However, the range of breaches receiving this level of fines had broadened. Seven breaches were of the HSWA, whilst four were of CDM 2007 and two were of the Work at Height Regulations. PUWER, the Management Regulations and Corporate Manslaughter accounted for one breach each.
- 4.8 The wide range of fines makes it difficult to compare the distribution of the two years graphically – most of the data would be below £100k with a few organisations receiving larger fines. As such, the two years have been compared in Table 4-2.
- 4.9 Table 4-2 shows that the largest proportion of fines are still less than £50k for both breaches and organisations. However, this proportion reduced somewhat with the introduction of the new Sentencing Guidelines. The proportion of breaches now receiving fines of less than £50k has reduced from 79% to 62%. The proportion of organisations now receiving fines of less than £50k has reduced from 75% to 66%.
- 4.10 The proportion of breaches and organisations receiving fines between £100k and £200k has more than doubled under the new Sentencing Guidelines. The proportion of breaches now receiving fines in this range has increased from 3% to 7%. The proportion of organisations now receiving fines in this range has increased from 3% to 9%.

Table 4-2: Variation in the distribution of fines between the last year of the old Sentencing Guidelines and the first year of the new Guidelines

Range	Breaches		Organisations	
	2015-16	2016-17	2015-16	2016-17
£0	10 (5%)	14 (9%)	6 (4%)	2 (2%)
>£0 <=£50k	152 (79%)	94 (62%)	113 (75%)	76 (66%)
>£50k <=£100k	12 (6%)	15 (10%)	16 (11%)	11 (9%)
>£100k<=£200k	5 (3%)	10 (7%)	5 (3%)	10 (9%)
>£200k <=£300k	8 (4%)	9 (6%)	5 (3%)	5 (4%)
>£300k <=£400k	1 (2%)	2 (1%)	1 (1%)	1 (1%)
>£400k <=£500k	0 (0%)	2 (1%)	0 (0%)	3 (3%)
>£500k <=£600k	3 (2%)	1 (1%)	1 (1%)	2 (2%)
>£600k <=£700k	1 (1%)	2 (1%)	1 (1%)	2 (2%)
>£700k <=£800k	1 (1%)	0 (0%)	2 (1%)	1 (1%)
>£800k <=£900k	0 (0%)	1 (1%)	0 (0%)	1 (1%)
>£900k <=£1m	0 (0%)	0 (0%)	0 (0%)	0 (0%)
>£1m <=£1.5m	0 (0%)	1 (1%)	1 (1%)	1 (1%)
>£1.5m <=£2m	0 (0%)	0 (0%)	0 (0%)	0 (0%)
>£2m <=£3m	0 (0%)	1 (1%)	0 (0%)	1 (1%)
>£3m	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Total	193	152	151	116

5. Impact of the new Sentencing Guidelines on individuals

5.1 As with organisations, individuals can be convicted for breaches of the Health and Safety at Work etc. Act (HSWA) and/or a range of regulations (including CDM, Work at height and Gas Safety). However, they can also be prosecuted for manslaughter.

5.2 This means that individuals may be tried for several breaches and can receive custodial sentences, suspended sentences or fines for each breach if found guilty. For completeness, the sentences have been analysed both by breach and individual, and a summary is shown in Table 5-1.

Table 5-1: Variation in sentences for individuals between the last year of the old Sentencing Guidelines and the first year of the new Guidelines

Sentence	Breaches		Individuals	
	2015-16	2016-17	2015-16	2016-17
Community	5 (4%)	17 (13%)	4 (7%)	6 (10%)
Community / Fine	1 (1%)	0 (0%)	1 (2%)	0 (0%)
Community / Prison Suspended	4 (4%)	11 (8%)	2 (3%)	6 (10%)
Compensation / Other	0 (0%)	1 (1%)	0 (0%)	0 (0%)
Compensation / Prison Suspended	1 (1%)	5 (4%)	1 (2%)	2 (3%)
Compensation / S42Order	0 (0%)	1 (1%)	0 (0%)	0 (0%)
Deferred / Prison	0 (0%)	1 (1%)	0 (0%)	1 (1%)
Fine	63 (55%)	35 (26%)	35 (57%)	29 (40%)
Fine / Other	0 (0%)	1 (1%)	0 (0%)	1 (2%)
Fine / Prison Suspended	6 (5%)	4 (3%)	3 (5%)	3 (4%)
No Sep Penalty	4 (4%)	6 (5%)	0 (0%)	0 (0%)
Other	4 (3%)	1 (1%)	2 (3%)	1 (2%)
Prison	12 (11%)	28 (21%)	5 (8%)	9 (13%)
Prison Suspended	14 (12%)	25 (19%)	8 (13%)	14 (19%)
Total	114	136	61	72

5.3 Table 5-1 shows that the largest changes between the old and new Sentencing Guidelines are the increase in the proportion of individuals receiving custodial sentences (prison or suspended) and a reduction in the proportion of individuals receiving fines.

5.4 There was an increase in the number of individuals receiving prison sentences from five to nine. The number of individuals receiving suspended prison sentences rose from 14 (23%) to 25 (35%).

- 5.5 The proportion of individuals receiving prison or suspended prison sentences rose from around 1 in 3 (31%) to nearly 1 in 2 (47%) in the first year of the new Sentencing Guidelines. No details are available in the HSE Prosecution Database as to the length of the custodial sentences.
- 5.6 Under the old Sentencing Guidelines prison sentences were received for breaches of the HSWA, the Gas Safety Regulations or manslaughter. Under the new Sentencing Guidelines, the main difference was the addition of breaches of the Work at Height Regulations.
- 5.7 Under the both sets of Sentencing Guidelines suspended prison sentences were received for breaches of the HSWA, the Gas Safety Regulations, the Control of Asbestos Regulations, the Work at Height Regulations and CDM 2007.
- 5.8 The proportion of individuals receiving fines reduced from 57% to 40% with the new Sentencing Guidelines. The summary statistics for those individuals receiving fines are shown in Table 5-2.

Table 5-2: Variation in fines between the last year of the old Sentencing Guidelines and the first year of the new Guidelines for individuals found guilty of health and safety breaches in the construction industry

Statistic	Breaches		Individuals	
	2015-16	2016-17	2015-16	2016-17
Number of fines	60	35	36	29
Total value of fines	£248,331	£114,756	£248,331	£114,756
Smallest fine	£0	£220	£300	£253
Largest fine	£75,000	£40,000	£75,000	£40,000
Mean fine	£4,139	£3,279	£6,898	£3,957
Median fine	£2,500	£1,500	£4,500	£1,900
Fines <£10k	57	33	30	27
Fines >= £10k	3	2	6	2
Fines >= £25k	1	2	1	2
Fines >= £50k	1	0	1	0
Fines >= £75k	0	0	1	0

- 5.9 Table 5-2 shows that the majority of the fines received as sentences by individuals were for less than £10k.
- 5.10 Whilst the majority of the fines were less than £10k, there was a small number of larger fines. As with organisations, these larger fines would skew the mean towards

the larger values and, as such, the median provides a better measure of the 'average' level of fine.

- 5.11 Table 5-2 shows that the median level of fine for individuals reduced from £4,500 under the old Sentencing Guidelines to £1,900 under the new Guidelines. One hypothesis is that this reduction may be indicative of courts now using suspended sentences for individuals rather than higher fines. This would need to be confirmed by analysis of court sentencing records.

6. Summary of the findings

- 6.1 116 construction organisations were convicted of one or more breaches in the first year of the new Sentencing Guidelines compared with 151 in the last year of the old Sentencing Guidelines.
- 6.2 The median fine per breach nearly doubled from £10k to £19.06k, whilst the median fine per organisation increased from £13.4k to £20k.
- 6.3 The largest fine for a breach increased by 270% from £700k to £2.6m, whilst the largest fine for an organisation increased by 160% from £1m to £2.6m.
- 6.4 In the last year of the old Sentencing Guidelines, seven breaches received fines of £250k or more – all of these were for breaches of either Sections 2 or 3 of the HSWA.
- 6.5 In the first year of the new Sentencing Guidelines, 16 breaches received fines of £250k or more – the range of breaches receiving this level of fines had broadened, with seven breaches of the HSWA, four of CDM 2007 and two of the Work at Height Regulations.
- 6.6 The largest proportion of fines are still less than £50k for both breaches (61%) and organisations (66%).
- 6.7 The proportion of fines less than £50k reduced somewhat with the introduction of the new Sentencing Guidelines: from 79% to 61% for breaches and from 75% to 65% for organisations.
- 6.8 The proportion of breaches and organisations receiving fines between £100k and £200k has more than doubled under the new Sentencing Guidelines: from 3% to 7% for breaches and from 3% to 9% for organisations
- 6.9 There was an increase in the number of individuals receiving prison sentences from five to nine under the new Sentencing Guidelines.
- 6.10 The number of individuals receiving suspended prison sentences rose from 14 (23%) to 25 (35%).

- 6.11 The proportion of individuals receiving custodial sentences (prison or suspended prison sentences) rose from around 1 in 3 (31%) to nearly 1 in 2 (47%) in the first year of the new Sentencing Guidelines.
- 6.12 The proportion of individuals receiving fines reduced from 57% to 40% under the new Sentencing Guidelines.
- 6.13 The majority of the fines imposed on individuals were for less than £10k.
- 6.14 The median level of fine for individuals reduced from £4,500 under the old Sentencing Guidelines to £1,900 under the new Guidelines.

7. References

- 1 Sentencing Council: Health and Safety Offences, *Corporate Manslaughter and Food Safety and Hygiene Offences*, Definitive Guideline, 2015, 50 pages
<https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web.pdf>
- 2 Sentencing Guidelines Council: Corporate Manslaughter & Health and Safety Offences Causing Death, Definitive Guideline, 2010, 16 pages
https://www.sentencingcouncil.org.uk/wp-content/uploads/web_guideline_on_corporate_manslaughter_accessible.pdf
- 3 Health and Safety Executive: HSE Public Register of Convictions,
<http://www.hse.gov.uk/prosecutions/default.asp>

About the author:

Mike Webster is a chartered civil and structural engineer with over 30 years' experience. He specialises in engineering, construction and structural safety, and founded MPW R&R to provide Consulting, Forensic and Expert Witness services in these areas.

Mike has worked on the design, appraisal and site supervision of building and bridge structures. He has developed guidance for assessing the safety of existing structures. Mike led a review of CDM 1994 and the independent evaluation of CDM 2007. He also led the review of the use of CDM 2007 in the construction of London 2012.

Mike has been instructed as an expert witness by both defence and prosecution teams in cases involving allegations of gross negligence manslaughter and breaches of the Health and Safety at Work Act and the CDM Regulations.

He is the author of around 20 published reports and papers on construction health and safety and the CDM Regulations.