The Sentencing Council: Reflections on its 10th Anniversary

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By April 2020 the Sentencing Council (the Council) will have been performing its role for 10 years. This anniversary has given us at the Council an opportunity to pause and reflect on its achievements and its vision for the future, and in March we launched a consultation on the future direction of the Council in which we invite views as to the ways in which we should set our priorities within the constraints of our budget, and go about our work, in the future. To mark the anniversary a number of activities will take place within the anniversary year, including a one-day event, which will summarise, showcase and celebrate some of the Council's achievements and provide an opportunity for interested parties to put forward ideas to help shape the development of the Council's priorities and vision for the next 10 years. In addition, the Council has set up an anniversary sentencing competition open to all BPTC and LPC students. Our aim is to establish a relationship with the next generation of legal practitioners while building on their understanding of sentencing and how the guidelines work. We will also be producing a package of communication activities targeted at schools and aimed at increasing the Council's engagement with young people; and finally, we are considering whether this might be the opportunity to redevelop the very popular online guide to sentencing, "You Be The Judge", which is designed to give members of the public an opportunity to see the way in which judges and magistrates make decisions about sentencing and challenge their perceptions about the fairness of sentencing.

A brief history of sentencing guidelines

When I began my career at the Bar in the late 1970s, guidance as to the appropriate levels of sentencing for particular types of offence was very limited. The Court of Appeal had the power to issue guideline judgments but had done so only rarely. So far as I am aware, it was not until 1982 that a guideline judgment was given for the first time by a Lord Chief Justice. Lord Lane's judgment in *Aramah*[1] summarised the facts of the case and the issues which had been raised, and then said:

[1] *Aramah* (1982) 4 Cr. App. R. (S) 407; [1983] Crim. L.R. 271.

> "… but before we deal with this particular case, it may be of assistance if we make some general observations about the level of sentences for drugs offences, since our list, as will have been observed, is entirely composed of such crimes."

It is perhaps not difficult to imagine the reaction which those words must have aroused in counsel waiting to make their submissions in the appeals further down that list.

Aramah remained a leading case for many years, and in my experience, was frequently referred to by counsel and judges, but there were few other types of crime which had the benefit of such "general observations". The ability of the Court of Appeal to give general guidance was inevitably limited by the combination of the need to link any such guidance to the specific circumstances of the individual case which the court was hearing, and the practical difficulties of the court's undertaking any wider research or consultation.

With effect from July 1999, the Crime and Disorder Act 1998 addressed the second of those features by creating the Sentencing Advisory Panel (the Panel), a non-departmental public body sponsored by the Home Office and the Lord Chancellor's Department, which was established to provide advice to the Court of Appeal. The Court of Appeal, if it decided to issue guidelines, was required first to notify the Panel. The Panel—which comprised both judicial and non-judicial members—drafted guidelines, consulted on them and then advised the Court of Appeal about the form they should take. The Court of Appeal, in framing its guidelines, was required to have regard to the Panel's advice (amongst other considerations specified in s.80(3) of the Act) but was not bound to accept it.

The Court of Appeal was, however, still limited to giving guidance in the context of an appeal against sentence in a particular case, and therefore had to wait until a suitable appeal had been identified before giving guidance which followed (or did not follow) the Panel's advice. Thus, the scope for giving wide-ranging advice remained limited.

The next development came with the Criminal Justice Act 2003, which established the Sentencing Guidelines Council (SGC), a body including both judicial and non-judicial members under the chairmanship of the Lord Chief Justice. The SGC was responsible for issuing guidelines and was not limited to individual cases or specific types of offence. It became the duty of the Panel to provide advice, not to the Court of Appeal, but rather to the SGC; and the SGC, for its part, was required to have regard to the views of the Panel in deciding to frame or revise sentencing guidelines. The SGC produced draft guidelines on which it consulted before issuing them as definitive guidelines. Sentencers were required, by s.172 of the 2003 Act, to "have regard to any guidelines which are relevant to the offender's case"; but as Lord Woolf CJ pointed out (in *Last*[2]):

> "The fact that 'every court must have regard to the relevant guideline' does not mean that it has to be followed."

The Coroners and Justice Act 2009 ended the system of having two bodies involved in the production of guidelines by abolishing both the SGC and the Panel

[2] *Last* [2005] EWCA Crim 106; [2005] Crim. L.R. 407.

and replacing them with the Sentencing Council, an independent, non-departmental public body of the Ministry of Justice. The 2009 Act also changed the status of guidelines: s.125(1) states that:

> "Every court (a) must, in sentencing an offender, 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."

The first definitive guideline published by the Council was that relating to assaults, which came into force in June 2011. The second related to burglary and came into force in January 2012. The third related to drugs and came into force in February 2012. Both the assault and drugs guidelines have been reviewed with a view to making any necessary changes. A consultation has recently been launched in relation to a revised drugs guideline, and we expect to launch a consultation relating to a revised assault guideline later this year.

As will be apparent from this brief history, the introduction of sentencing guidelines in a form familiar to practitioners and judges today came about halfway through my professional and judicial career. It is fair to say that, initially, the development was not universally welcomed, with some judges resenting what was seen as a restriction on their exercise of discretion. As time has passed, however, that resentment has diminished, and the benefits of sentencing guidelines have become more generally acknowledged. In part, no doubt, that reflects the simple fact that practitioners and judges much younger than me have spent all their professional lives working with the guidelines, and have had no reason to reflect on what the sentencing process was like without them. But to a greater extent, I believe, it reflects a general recognition that consistency of approach to sentencing, an increased transparency in the sentencing process and an improvement of public understanding both of the sentencing process and of the likely outcome of that process in a particular case, are all good things. Certainly those benefits are apparent to those who, like me, practised in the criminal courts at a time when guidance was limited (and, in a pre-internet age, accessible only in hard copy) and the outcome of a sentencing hearing could be heavily influenced by an individual judge's personal views as to the seriousness or otherwise of particular types of offence. During my time as Chairman of the Council I have been struck by the level of interest in our guidelines on the part of judges and officials from other jurisdictions, who do not presently have guidelines and who have sought information and advice from the Council.

Sentencing Council Guidelines

There are four aspects of our work over the last 10 years which I would particularly wish to mention.

First, the composition and working methods of the Council are important to the legitimacy and credibility of the guidelines which it produces. It is key to the success of the guidelines that the drafting of them has the benefit of input from representatives of all the main interested parties in the criminal justice system. The 14 full members of the Council comprise eight judges and magistrates, and six non-judicial members who bring experience of prosecution, defence, the rehabilitation of offenders, the welfare of victims, policing and academia.

Collectively, therefore, the members bring a mass of relevant experience and expertise to the production of guidelines. The members are assisted by a small but highly skilled and effective team in the Office of the Sentencing Council, whose work includes the research and analysis which underpin the drafting of guidelines (including, importantly, the analysis of current sentencing practice which is required by the Coroners and Justice Act 2009 s.120(11)), and also includes the consultation process which enables draft guidelines to be considered by all who are interested before they are made definitive. Since I joined the Council in 2015, I have been constantly impressed with the collaborative way in which the work is carried out, combining the experience and expertise of the judicial and non-judicial members in a manner which benefits the production of the guidelines. I would wish to emphasise that the Council's consultations are genuine consultations, not mere window-dressing, and always result in some amendments of the draft guidelines.

Secondly, the offence-specific guidelines provide a valuable benefit in assisting courts to focus on the key issues raised by the sentencing process in a particular case. In the early days of my practice, at a time when there was markedly less consistency of approach than there is now, prosecution counsel would play virtually no role in assisting the court as to sentence, and defence counsel would be constrained by the perceived need to avoid making any direct submission as to what the sentence should be. There was, consequently, a resort to circumlocution and to guarded references such as "inviting the court to adopt the course suggested in the Social Enquiry Report". In such an environment, a real dilemma could be posed for junior counsel when a judge, no doubt trying to be helpful, would interrupt mitigation to say something like "I think you know what is in my mind". Now, in contrast, submissions as to the appropriate categorisation of an offence within a relevant guideline, and the identification of relevant aggravating and mitigating features, can be made in a more open manner as part of a more focused process, and are therefore more helpful to the court.

Thirdly, the Council's offence-specific guidelines are designed to be sufficiently flexible to give judges and magistrates a range within which to exercise their discretion. As my predecessor Lord Justice Treacy noted in an article in the *Review*,[3] with reference to the provisions of the 2009 Act:

> "Section 125(3)(a) requires a court to sentence within the offence range. This range will typically be very broad. For example, for Class A drug supply it runs from a Community Order to 16 years custody. Section 125(3)(b) requires a court to identify a category of offence within a guideline so as to fix the starting point for sentence. However it does not impose a duty on the court to pass a sentence within the category ranges which each guideline includes as well as a starting point."

The approach set out in the guidelines, and the ability of the sentencer to increase or reduce the initial sentence by reference to the aggravating and mitigating features of the offence, give considerable flexibility and allow the sentencer to pass a sentence which is just and proportionate in all the circumstances of the case. Judges and magistrates always have to assess where a case fits within a guideline, and to balance the relevant factors to reach the most appropriate level of seriousness.

[3] C. Treacy, "Section 125 of the Coroners and Justice Act 2009 and sentencing guidelines" [2014] Crim. L.R. 298.

Each case varies, and a decision needs to be made about how much weight each of these factors should carry. Those are decisions which judges and magistrates are experienced in making, and it is vital that they continue to do so. Guidelines provide a structure and a consistent approach, and they contribute to transparency, but they cannot and do not seek to remove the court's discretion.

The one thing the guidelines do not permit a sentencer to do is to substitute his or her own view of the appropriate level of sentences for the type of offence generally: as Lord Justice Hughes (as he then was) said in *Healey*,[4] the flexibility available under the guidelines

> "does not, however, extend to deliberately disregarding the guidelines, not on the grounds that the case has particular facts which warrant distinguishing it from the general level, but because the judge happens to take a different view about where the general level ought to be. The latter approach is demonstrably unlawful. It would remove all point from the issuing of any guidelines at all but such guidelines are required by the Coroners and Justice Act 2009. It would also, for that matter, equally rob of any point guidelines contained in a decision of this Court."

It is therefore important to emphasise the role of the Council's consultations on draft guidelines: they provide a clear opportunity for anyone who strongly disagrees with the proposed levels of sentencing—or any other feature of the draft—to express his or her views, so that they may be taken into account before the definitive guideline is made.

Fourthly, the overarching principles guidelines assist judges and magistrates to give due weight to important factors which arise in many cases across all types of crime: for example, in relation to the sentencing of children and young people and in relation to sentencing in cases involving domestic abuse, two areas which have rightly been given increased attention in recent years.

Since its inception, the Council has published 27 sets of definitive guidelines, covering well over 200 offences, and eight sets of overarching principles. We have also revised some of our own guidelines, and the revision of existing guidelines may well be an increasing area of our work in the future. The revision of the drugs guidelines provides a good illustration of circumstances in which we may identify a need to review and amend an existing guideline. Evaluation by our team of analysts, and evidence from sentencers to whom we have spoken, showed that the existing guidelines for drug offences were for the most part working well. The nature of drug offending has however changed since 2012, both in the way in which drugs are dealt and in the types of drugs being dealt, and the Psychoactive Substances Act 2016 has created offences which are not covered by the existing guidelines. We want to ensure that the guidelines are still fit for purpose. Sentencers need assistance, for example, in assessing harm in cases relating to new drugs and psychoactive substances which are highly dangerous in tiny quantities, or which may be distributed in the form of impregnated sheets of paper rather than the more easily-measurable forms of powder or tablets. The Council is therefore proposing new guidelines for the new offences and some small changes to the existing guidelines, seeking to update, clarify some issues and take into account newer

[4] *Healey* [2012] EWCA Crim 1005; [2013] 1 Cr. App. R. (S) 33; [2012] Crim. L.R. 640.

types of offending. This process of evaluation and revision means that guidelines are constantly evolving to ensure that they work at their very best.

It is important to emphasise that the Council is independent of government and of any political agenda, both in the guidelines which we decide to produce and in the thinking which goes into producing them.

By statute, the Lord Chancellor may at any time propose that the Council produce or revise a guideline, as a previous Lord Chancellor did when he asked us to look at one-punch manslaughter,[5] but we are obliged only to consider such a proposal. In relation to that particular request, we took the view that we could not produce a guideline limited to one particular type of manslaughter, and so undertook the difficult but important task of producing a guideline for all manslaughter offences.

Statute also requires that we consult the Lord Chancellor on our draft guidelines, but we are under no obligation to make changes as a result (though as I have indicated, we always review our draft guidelines in light of the responses received from consultees). Another of our statutory consultees is the Justice Select Committee, a cross-party committee of the House of Commons whose remit includes examining the policy of bodies associated with the Ministry of Justice. We have a good relationship with the Committee but, again, we are not bound by their responses to our draft guidelines.

We maintain a constructive dialogue with officials in the Ministry of Justice, the department responsible for sentencing policy, and the Ministry is represented at Council meetings, although the representative is not a member of the Council. This assists the Council to keep abreast of the Ministry's priorities. It helps us to be aware at an early stage of any prospective new criminal offences, or changes to maximum sentences, or other changes to the law affecting sentencing. Legislative changes of that sort can have a substantial bearing on our work plans.

Ultimately, the Council is accountable to Parliament for how we have performed against our statutory duties. We provide this account through our annual report, which is laid before Parliament by the Lord Chancellor.[6]

Drafting guidelines and the work plan

Whilst the Council's independence from government is extremely important, it does not mean that the Council has complete autonomy when deciding upon the content or structure of its guidelines. It is Parliament which legislates to determine what conduct will amount to a criminal offence, to set the maximum (and in some circumstances the minimum) sentence for a particular offence and to establish different types of sentence. The Council is of course bound by these statutory provisions, and drafts guidelines that fit within the law. Obvious though that point is, and despite our best efforts to effectively communicate and explain it, it is unfortunately forgotten or misunderstood by some of those who criticise the guidelines, who therefore fail to distinguish between the statutory maximum sentence for an offence and the starting point or category range indicated by the guideline relevant to a particular category of that offence.

[5] Coroners and Justice Act 2009 s.124.

[6] *https://www.sentencingcouncil.org.uk/publications?cat=corporate-reports&s&topic=corporate* [Accessed 24 February 2020].

In deciding on our work plan, there may be a number of different reasons why we decide to produce a particular guideline: there may be a need for a guideline in relation to a type of offence which is frequently sentenced and/or particularly serious; or a type of offence which is less common and/or serious, but in respect of which courts would be particularly assisted by a guideline; or a type of offence which has been created, or significantly amended, by recent legislation. Inevitably, our limited budget places a constraint upon the number of guidelines we can produce and the extent of the other work we can undertake. This is a particular concern when legislation makes it necessary to give urgent attention to the drafting or revision of a guideline which would not otherwise have formed part of our work plan.

The basic structure of our guidelines reflects the Criminal Justice Act 2003 s.143, which requires the court to determine the seriousness of an offence by reference to culpability and harm. This feeds into the stepped approach adopted in our guidelines, which is now very familiar to courts and practitioners. Within that structure, however, we have the ability to create guidelines in the format which best fits specific offences, from the very simple structure of many of the guidelines that apply to summary only offences (for example drunk and disorderly), to complex guidelines such as health and safety that involve the assessment of culpability as well as the seriousness of harm risked, the likelihood of harm, and the size of the organisation in order to reach a starting point sentence and range. The aim of these tailor-made structures is to ensure that sentencers consider all the key factors in order to reach the most appropriate sentence.

Although our definitive guidelines are comparatively brief documents, a great deal of work goes into them. Fundamental decisions have to be made as to the overall approach to be taken to a particular guideline, and as to the identification of, and distinction between, the key factors which courts will have to consider at step 1 of the sentencing process and the aggravating and mitigating factors which will have to be considered at step 2. Similarly, fundamental decisions have to be made as to the appropriate levels of sentencing for each category of offence, starting with careful consideration of whether the intention is broadly to replicate the level of current sentencing practice or to make a deliberate departure from it in any respect. As drafting proceeds, it can be difficult to decide whether to include at step 1 any, and if so what, examples or illustrations of the factors which are listed: this is an area which is quite often commented upon in the responses we receive to our consultations on draft guidelines. It can also be surprisingly difficult to select the precise language to be used in a guideline: consultations sometimes show that words which we had believed to be clear had been misunderstood by some respondents.

Developing guidelines is an exercise in consultation and collaboration. Where appropriate, we bring in expertise to advise the Council as we develop a guideline: we did so, for example, when drafting the guidelines covering health and safety and sexual offences; and we are doing so in our current work in relation to overarching principles for sentencing offenders with mental health conditions or disorders.

It is also essential that guidelines are informed by the expertise of the people who work with them every day. Engagement and consultation, including

"road-testing" of draft guidelines with experienced judges and magistrates, are key to the way we develop our guidelines.

The structure and content of our guidelines evolve according to developments in the law, societal changes, and the needs of sentencers. For example, the assessment of harm has certainly evolved over the years: the victim of an offence is considered much more than was the case when I began my career, and now has a right to address the court prior to sentence, though of course it remains essential for judges and magistrates to avoid emotion in sentencing decisions. The psychological harm caused by sexual and violent crimes is now much better recognised and understood than in the past, and the guidelines assist the court to give appropriate weight to this factor. The guidelines relating to theft, fraud and burglary take account of the effect of loss upon the owner of property, and so are not solely concerned with the amount of money which has been obtained. Features of the guidelines such as these mirror a change in society's attitude towards victims of crime as expressed through the media and reflected in legislation.

It usually takes about two years to carry out the process of drafting, revising and bringing into effect a new guideline. We are however able to respond to a need for urgency, albeit at a cost (because of our limited resources) to the progression of other work. For example, in 2018 we published our terrorism guidelines, possibly one of our highest-profile guidelines of recent years. We began work on this guideline in 2017 and very sadly not long after we began the work there followed a number of terrorist attacks across the country. These incidents led us to believe that there was a need for this guideline to be before the courts as soon as possible and so resources were reassessed and the work plan for the guideline was expedited to ensure its publication within the year.

Our guidelines are drafted in a way which is intended to be neutral as to the sex and ethnicity of an offender. Our recently launched consultation on draft revisions to the drugs guidelines, to which I have referred above, was accompanied by the publication[7] of the results of research into whether there was any disparity in sentencing for supply-related offences. We have anxiously considered whether anything in our guidelines has caused or contributed to the disparities which the research revealed. We have not been able to identify anything, but as part of the consultation we have sought the views of others as to whether there are changes which should be made.

Going digital

In the last few years we have also worked hard to produce all guidelines for the Crown Court and magistrates' courts in a digital format. Digital guidelines are, in our minds, the clear way forward. They allow us to be more flexible, enabling us to make quick changes to the guideline, and we can embed additional guidance and information. Embedding information allows us to expand on factors for sentencers at precisely the time when they might need more guidance, and helps the court apply the factors in a way that is appropriate to the offence being sentenced. Adding information in this way means that the extra guidance is available

[7] *https://www.sentencingcouncil.org.uk/wp-content/uploads/Sex-and-ethnicity-analysis-final-1.pdf* [Accessed 24 February 2020].

in one place, making it easier for sentencers. It also means that the extra guidance can be accessed and read by those who need it but does not impose unnecessary or irrelevant information on others.

In addition to producing digital guidelines we are also keen to increase our digital presence through the use of social media such as Twitter, and through the launch later this year of a new website designed specifically to be of value to members of the public whose knowledge and understanding of sentencing is limited. Sentencing and the sentencing guidelines deal with technical legal concepts that can be difficult for non-lawyers to understand. There are also a great many myths and misunderstandings around sentencing, sometimes regrettably fostered by the terms in which sentencing decisions are reported by the media. Such myths and misunderstandings can be powerful forces in undermining confidence in the criminal justice system and the new website offers us an opportunity to dispel some of the most common.

Our broader duties

The Council has a statutory duty[8] to have regard to the need to promote public confidence in the criminal justice system when developing the sentencing guidelines and monitoring their impact. The Council has interpreted this duty more widely as an obligation to take direct steps to promote public confidence in the criminal justice system, and sentencing in particular.

In January 2018 the Council commissioned ComRes (a leading research consultancy) to conduct a programme of research into public confidence in sentencing and the criminal justice system.[9] The aims of the research were to understand the public's knowledge of, and attitudes towards, the criminal justice system, sentencing and sentencing guidelines; to help identify key audiences that the Sentencing Council may wish to target with its communications; and to gain insights into the messaging and media appropriate to each key audience. Some of the key findings of that research were:

- 67 per cent of the public and 68 per cent of victims of crime said that the existence of sentencing guidelines improved their confidence in the fairness of sentencing at least a little.
- Confidence in the effectiveness and fairness of the criminal justice system is mixed and varies according to demographic factors and involvement.
- Around 70 per cent of the public think sentencing in general is too lenient and the public is particularly likely to regard sentences for serious crimes, like rape and death by dangerous driving, as too lenient. However, this perception tends to lessen noticeably when the public are presented with actual scenarios and sentences (based on real cases).

For the public and other non-specialist audiences to have confidence in sentencing, it is crucial that we are able to bring together the considerable

[8] Coroners and Justice Act 2009 s.120.
[9] *https://www.sentencingcouncil.org.uk/publications/item/public-confidence-in-sentencing-and-the-criminal-justice-system/* [Accessed 24 February 2020].

knowledge and expertise of the Council and make it accessible in ways that help people understand how sentencing decisions are made, how the guidelines contribute to fairness and consistency of sentencing, and how sentencing works to deliver just outcomes. We will continue to do this through our new website and other public outreach work.

The Council's future approach

At its inception, the Council set itself a target of replacing the existing SGC guidelines and publishing definitive guidelines for all the most frequently sentenced types of offence, within 10 years. As we celebrate our 10th anniversary, we have substantially met that target: the principal exception is that we have not yet replaced the SGC guideline for offences of causing death by driving, work in that regard having been postponed because of the prospect of legislative change. It is therefore likely that in future we will increasingly be looking to develop guidelines on either lower-volume and/or less-serious offences, or niche offences where there may have been calls from specific interest groups for a guideline. A review of our role and remit is therefore timely.

There have also been a number of academic articles or editorials, and social media communications, commenting on and at times criticising our approach. These have questioned whether our strong focus on guideline development is at the expense of some of our other statutory duties[10] and whether the Council has settled on an appropriate interpretation of its duties.

In addition, our own independent review (conducted by Professor Sir Anthony Bottoms and published in April 2018[11]) itself highlighted areas that the Council should consider for the future. The Ministry of Justice published a *Tailored Review of the Council* in February 2019,[12] which found that the current delivery model as a non-departmental public body is still the most appropriate, that the Council's functions are still required, and that the Council is effective and efficient in the delivery of its responsibilities. The Justice Select Committee in their March 2019 response to the inquiry into the prison population to 2022 suggested that they may initiate an inquiry into the role of the Council in the future.[13]

We are therefore happy to open up a debate on the Council's future approach, which will not only assist in identifying key areas on which we may wish to focus but will also be relevant to the transparency and responsiveness of our work. We also welcome further collaborative working in future with interested parties (particularly academics), which we are confident will strengthen the Council's work.

[10] *http://www.legislation.gov.uk/ukpga/2009/25/part/4* [Accessed 24 February 2020].

[11] *https://www.sentencingcouncil.org.uk/wp-content/uploads/SCReport.FINAL-Version-for-Publication-April-2018.pdf* [Accessed 24 February 2020].

[12] *https://www.sentencingcouncil.org.uk/publications/item/tailored-review-of-the-sentencing-council-2019/* [Accessed 24 February 2020].

[13] House of Commons Justice Committee, *Prison population 2022: planning for the future* (TSO, 2019) HC Paper No.483 (Sixteenth Report of Session 2017–19).