

Sentencing guidelines in England and Wales: a review of recent developments

Julian Roberts reports on the formation of the new Sentencing Council.

Sentencing in England and Wales entered another era in 2010 as a result of reforms introduced by the Coroners and Justice Act 2009. A new statutory body (the Sentencing Council for England and Wales), headed by Lord Justice Leveson, replaces two previous organisations (the Sentencing Advisory Panel and the Sentencing Guidelines Council). The creation of a single guidelines authority will undoubtedly promote more effective development and dissemination of guidelines. A great deal has changed as a result of the latest legislation – for example, the Sentencing Council has a significantly wider range of duties than its predecessors (see below). This brief article reviews the recent evolution of sentencing guidelines in England and Wales.

The reforms introduced by the Coroners and Justice Act 2009 may be traced to two recent developments. First, the high and rising prison population in England and Wales prompted the government to commission a review of the use of imprisonment and of sentencing guidelines (see Carter, 2007). The second development was a Working Group which recommended a revamp of the current arrangements rather than adoption of a completely new system of guidelines (see Sentencing Commission Working Group, 2008). US-style sentencing grids were rejected by the Sentencing Commission Working Group as being inappropriately restrictive for sentencing in this country.

Duties of the new Sentencing Council

The Coroners and Justice Act 2009 imposes a wide range of duties on the new Council in addition to the obvious function of producing guidelines. The Council also has to publish a resource assessment of, as well as monitor, the operation and effects of its guidelines. In addition it must draw conclusions about the factors which influence sentences imposed by the courts, the effect of the guidelines on consistency in sentencing and the effect of the guidelines on public confidence in the criminal justice system. Promoting public confidence is likely to be a priority for the new Council. A number of commentators (e.g. Hough and Jacobson, 2008) have argued that this is a central function of a sentencing guidelines authority. It has been argued that sentencing councils and commissions need to do more than simply devise and distribute guidelines – they have to be promoted to stakeholders in the field of sentencing as well as to the general public. The Act also states that the

Council 'may promote awareness of matters relating to the sentencing of offender ... in particular the costs of different sentences, and their relative effectiveness in preventing re-offending'.

The Sentencing Council is further required to publish a report about 'non-sentencing factors' which are likely to have an impact on the resources needed for sentencing. These non-sentencing factors include (but are not limited to): recalls of prisoners released to the community; breaches of community orders; patterns of re-offending; decisions taken by the Parole Board of England and Wales, and considerations relating to the remand prison population. Finally, the Council is also charged with a duty to assess the impact of all government policy proposals (or proposals for legislation) which may affect the provision for prison places, probation and youth justice services. Taken together, the tasks represent a radical departure from the far more restricted duties of the previous organisations responsible for devising and disseminating sentencing guidelines.

Size and composition of Sentencing Council

Despite its expanded range of duties, the new Council is a smaller body than its predecessors. The SAP-SCG had a combined membership of up to 25 members while the new Council is composed of 14 individuals. Judicial members constitute a majority on the new council. Some commentators have argued in favour of a Council with more non-judicial members. However, the predominance of judicial members will not mean that the judiciary will dominate the nature and direction of the guidelines; indeed, the new Chair has made it clear that non-judicial members 'will play an equal role on the Council' (Leveson, 2010).

How binding are the sentencing guidelines?

The Coroners and Justice Act 2009 introduced changes to the requirements for courts with respect to sentencing guidelines. The critical element of any guideline scheme is the degree of constraint imposed upon courts. A rigid system prevents courts from sentencing outside a specific range – unless exceptional circumstances justify a departure. Yet if the guidelines adopt a very relaxed approach to sentencing outside their ranges, consistency of approach in sentencing is hard to achieve. In evaluating the recent changes to the compliance requirement, it may be helpful to consider a specific guideline. Figure 1 summarises the definitive guideline ranges for

robbery in England and Wales. As with many offences for which definitive guidelines exist, this one is divided into three sub-categories based on crime seriousness.

Figure 1: Definitive guideline for robbery

Category of robbery	Starting point	Sentence length range
Threat or use of minimal force and removal of property	1 year custody	Up to 3 years custody
A weapon is produced and used to threaten, and/or force is used resulting in injury to the victim	4 years custody	2-7 years custody
Victim is caused serious physical injury by the use of significant force and/or use of weapon	8 years custody	7-12 years custody

Source: Sentencing Council of England and Wales

Previous statutory compliance requirement

Until 2009, the compliance requirement in England and Wales was the following: courts were directed that in sentencing an offender, they ‘*must have regard to any guidelines which are relevant to the offender’s case*’ (Criminal Justice Act 2003, s. 172(1)). In addition, s. 174(2) of the same Act stated that:

Where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different kind, or is outside that range, state the court’s reasons for deciding on a sentence of a different kind or outside that range.

In short, a court simply had to consider (‘have regard to’) the Council’s guidelines and to give reasons in the event that a ‘departure’ sentence was imposed.

The new test in England and Wales

The provisions attracted considerable debate during the course of Parliamentary review of the Coroners and Justice Act 2009. The version of the Bill ultimately proclaimed into law adopts the following formulation:

*Every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender’s case, and
(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function, unless the court is satisfied that it would be contrary to the interests of justice to do so.*

The new language is more directive than that which it replaces. Thus, from merely a duty to have regard to any relevant guideline, courts must now ‘follow’ any relevant definitive guideline. The more forceful language is of course qualified by the words creating the discretion to impose some other sentence in the event that the court is satisfied that imposing a disposal consistent with the guideline would be contrary to the interests of justice.

The innovation of the Coroners and Justice Act 2009 is to be found in subsequent sections which provide further clarification. Recall the three levels of seriousness found

in the robbery guideline, with separate (but overlapping) sentence length ranges for each level (see Figure 1). Section 125(3)(b) of the Act makes it clear that the duty of the court is to impose a sentence within the overall offence range, not the more restrictive category range. In the event that the court imposes a sentence outside the overall range – in the interests of justice – it must give reasons for its decision. The new provisions focus a court’s attention on the relevance of the guidelines, yet also allow judicial discretion to impose a fit sentence.

Where do these latest reforms leave us? Three conclusions may reasonably be drawn. First, the broader remit of the new Sentencing Council suggests that it will be more engaged in community outreach than its predecessors. It is likely that the Council will seek to promote public awareness and increase public knowledge of the sentencing process. Second, the new test for compliance in England and Wales is likely to create a heightened expectation that courts will impose a sentence consistent with any definitive guidelines issued by the Sentencing Council or its predecessors. Third, the new Sentencing Council will be responsible for producing a far more comprehensive portrait of sentencing decisions in this jurisdiction, and this will benefit sentencers, criminal justice professionals, crime victims, and indeed anyone with a stake in the sentencing process.

Government review of sentencing

The sentencing environment will be complicated still further – and in unknown ways – by the outcome of a government review of sentencing. This rapid review will apparently result in a Green Paper in November. The government will explore proposals to ‘restore public trust’ through the use of what has been termed ‘minimum/maximum’ sentencing. Offenders would serve a minimum period in prison set by the judge. They would not be eligible for release before this point. The judge would also set a maximum period, and offenders would have to earn any release before that point. The government may also explore other potential reforms such as the abolition or restriction of short term prison sentences, and the abolition or reform of Indeterminate Sentence for Public Protection sentences. Sentencing scholars will have no shortage of material for discussion in the foreseeable future. ■

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