Judicial Sentence Review: a 'carrot and stick' approach to rehabilitation

Judge John Samuels QC proposes a sentence review system for all courts that would consider the offender's progress and risk of reoffending.

Over the past five years there has been a growing discussion of the value of sentence reviews. The established position is that the court determines what the appropriate sentence should be; and the executive (whether in the form of the Prison Service or the Probation Service) then gives effect to that sentence. The role of the sentencer is not merely to determine a sentence whose length reflects the desire of society for retribution. While this remains an ingredient in calculating sentence length where the custody threshold is passed, and in the determination of sentence type in the case of a non-custodial disposal, the interests of society require consideration of other factors. These are: the rehabilitation of the offender, the assessment of the extent to which the offender poses a future risk, and the likelihood, where attempts at rehabilitation have failed, of the risk of future re-offending. As a significant proportion of the sentence concerns the future behaviour of the offender, it follows that the reduction of guesswork enables the most effective sentence to be assessed with increased accuracy.

In the light of the importance of sentencing, not only to the offender but to society generally, the balance should shift in the direction proposed by the Halliday Review.

The positive value of court-based reviews was first noted through the DTTO (Drug Testing and Treatment Order). Introduced within the *Crime & Disorder Act 1998*, the Order became generally available, after successful pilots, in May 2000. A recent National Audit Office study of the effectiveness of the order suggests that, while offenders were in the majority of cases continuing to access Class A drugs after 12 months, offending levels to finance drug addiction had fallen significantly; and drug use fell correspondingly. It is widely believed that the opportunity for regular court based reviews by sentencers has contributed to this broadly successful outcome. Such reviews not only enable an offender to be reminded of the negative consequences of failure - a direct result of breach of a DTTO will almost certainly have been spelled out at the sentencing stage as a lengthy custodial sentence – but there may also be value in the personal communication between offender and sentencer. In the words of the report:

"An innovative feature of the Drug Treatment and Testing Order has been the introduction of court reviews, in which a judge or magistrates, informed by reports from the Probation Service, review offenders' progress on the Order. The reviews aim to impress upon offenders the importance of completing the Order and allow courts to have input into the implementation of the Order. Our interviews with magistrates, judges and probation officers suggested that the court reviews were regarded as helpful in providing evidence to magistrates and judges on how well the orders were working and in providing feedback to offenders. Offenders interviewed by us seemed to welcome the court's interest in their progress" (Bourn, 2004).

Court-based reviews are also available through the power to defer sentence. These provisions, more frequently used in the Crown Court than in the Magistrates' Court, enable the sentencer to require the offender to appear regularly before him during the period of deferment, in order to confirm that the offender is complying with the other conditions of deferment: again, this regular review enables a bonding process to be developed, as well as to check whether the promises so eagerly offered at the sentencing stage are being delivered.

The sentencing provisions of the *Criminal Justice Act 2003*, when in force, will extend the powers of the court to direct court reviews both of suspended sentences (freed from their previous restraint of 'exceptional circumstances') and of community orders generally. It is very much to be hoped that these powers, which will require the Home Secretary's approval before being brought into force, will be included within the tranche of provisions to be brought into force in early 2005.

The first structured attempt to identify a reviewing role for *all* courts was set out in the outline of possible recommendations by the *Halliday Review* team. These proposals, to which I made a contribution, resulted in the final recommendations of the review (Halliday, 2001):

"In order to encourage courts to have a more active role in determining what is needed, not just at the point of sentence *but also during its course, and with better information about the outcomes of their decisions, the courts would develop and provide a 'sentence review' capacity* covering the following activities:

- Dealing with breaches of community sentences;
- Hearing appeals against recall to prison;
- Pre-release planning (authorising the content of the community 'package' for sentences of 12 months and over);
- Reviewing progress during community sentences or the community part of custodial sentences (and deciding whether to vary the intensity of the sentence)" (Halliday 2001).

The review also noted that although it would be desirable for the original sentencer to 'review' the case wherever possible, such a requirement would be difficult for magistrates and could also lead to unacceptable delay. In any event, "Those serving in a 'review hearing' capacity would need to develop an improved awareness of sentencing matters."

In considering what form these hearings might take, the review further stated: "Paper-based hearings or hearings using live television link would be appropriate in most cases... For the pre-release planning function, the prison and probation services would have worked up a release package in advance, involving the police where particularly high risk offenders are concerned, to which the review court would give its authority. Reviewing the package should require some visible engagement in the process on the part of the offender, and most of these 'hearings' should be conducted by TV link" (Halliday 2001).

Following the publication of the review, a further consultation exercise was undertaken which asked: "Would increasing the role of the courts in sentence management have a positive effect on reducing reoffending?" (McCormac, 2001). It seemed that within a short time of the publication of the review, the goal of sentence management had altered. In place of the desirability of "better information about the outcomes of their decisions", the primary focus of sentence management had shifted to a "reduction of reoffending".

What were the reasons for this shift? One explanation may be found in a comment made by Ian Chisholm of the Home Office, at a meeting with the Criminal Sub-Committee of the COCJ in November 2001. When asked what the perceived objection to sentence review by sentencers was, he replied: "Senior judiciary are opposed to it, because it will take up too much court time." In fact the court time required is minimal: less than the waiting time in the Crown Court while a security officer removes one defendant from the dock, and returns with another (currently at least five and usually up to 10 minutes). Review reports could be presented in a tick-box format, similar to expedited PSRs. If the review is positive, it will result in a reduced period in custody in a significant number of cases; and thus in cost benefit terms substantial savings can be expected.

If this was indeed the justification advanced by 'senior judiciary', meaning the then Senior Presiding Judges, Lord Justice Judge and Lord Justice Rose, who were in routine communication with the Home Office over criminal reform at the time, it is unfortunate. The sentence reviewing role proposed by the *Halliday Review* team was enthusiastically welcomed by the Council of Circuit Judges (as my own papers confirm). In the context of a criminal hearing it is commonplace to spend days or even weeks determining issues of guilt, but sentence is often dealt with in a cursory manner. In the light of the importance of sentencing, not only to the offender but to society generally, the balance should shift in the direction proposed by the *Halliday Review*.

The sentencer's role in sentence management

The creation of NOMS provides an opportunity for the creation of an offender manager who will remain responsible for an offender from the pre-sentence stage (the Pre Sentence Report), through sentence planning (in the early stages of a custodial sentence, or supervision of a community sentence) to planning for release followed by supervision of the licence stage of the sentence. The question is: should the original sentencer retain some (and if so what) sentence-review role? The *Halliday Review* clearly thought that the answer was a resounding "Yes", and the philosophy of the new *Criminal Justice Act* appears to support that conclusion. However, neither the particular language of the statute, nor the current NOMS consultation exercise, appear to envisage the continuing involvement of sentencers in the process of offender management. From what has been achieved thus far in court-based reviews of DTTOs and deferred sentences, this is an opportunity which should be grasped.

Enquiries by the Home Office confirm the existence of some limited court-based sentence reduction models, driven by sentencers, both in Missouri and Iowa. This work also suggests that other states have a flexible system allowing for the modification of a sentence up to 6 months after its imposition.

My proposal is that in those cases in which the sentencer is aware that part of the sentence reflects the risk the offender continues to pose to society, the element of risk may be more accurately assessed once the offender's post-sentence progress has been professionally monitored by the offender manager. To the extent that steps have been taken to address the offender's behaviour in the interim (such as treatment for addiction to drugs or alcohol, completion of cognitive behavioural courses and adult literacy achievements etc) it should be possible to revisit the question of whether the danger posed by that offender, and the consequential risk of reoffending, has reduced. If there is an objective reduction of the risk, there is — apart from the original penal and retributive element of sentence — a reduced justification for the continuation of the original sentence. This might be seen by the public as a decision taken only to free up prison or community supervision capacity, were it not for the role played by the original sentencer, who, engaged in overseeing the sentence implementation, would be an informed and objective arbiter about the progress the offender has made.

The system in practice

How would such a system work in practice? For custodial sentences take, for example, an offender sentenced to five years' imprisonment. The offender is told by the sentencer that he will be eligible for parole after two years and will then, once released, be on licence until the expiry of 75% of his sentence. Once the new *Criminal Justice Act* proposals have been introduced, however, such an offender will serve 50 % in custody, and will be on licence for the remainder. That offender would be told that he has the opportunity to leave prison sooner than those 30 months, after 18 months at the earliest, after which he will be on licence. The term of that licence may be shortened ***provided*** the offender satisfactorily completes all that is required of him by his offender manager. In order to confirm his progress, the offender would be the subject of periodic reports to the sentencer from his offender manager and would appear before the sentencer (via video link where practicable) at the sentencer's discretion. The decision of the sentencer to truncate the custodial term would technically be a recommendation to the Home Office in relation to executive release, thus obviating any right to appeal by a dissatisfied offender.

Given time and the favourable development of such a system, it could result in a significant reduction both to the prison time offenders serve and the overall prison population. Policy considerations would identify potential exclusions from such a scheme, such as the dangerous, violent or sexual offender. However in terms of the prison population taken as a whole this is a relatively minor proportion of those held in custody. Moreover to ensure that such a scheme is*Human*

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Conclusion

The needless criminalisation of looked-after children is unjust, socially damaging and exceedingly costly in its long-term consequences. Some progress has been made nationally and there are examples of notable good practice and significant progress locally. But averting this outcome needs greater, more concentrated effort. Together with the DfES, the YJB has commissioned NACRO to produce a handbook for local authorities covering many of the issues above, based on research and good practice. The Children's Bill and the proposed youth Green Paper, alongside the development of Children Trusts, should strengthen the concepts of corporate parenting, the value of prevention and early intervention, common assessment frameworks and information sharing. ■

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Rights Act compliant, the sentence term could not be increased, even if the risk factors noted on the review have increased since sentence was pronounced.

For non-custodial sentences consider a community sentence of two years. Although provisions currently exist for early revocation following a satisfactory response to supervision, they are rarely used. The current experience is that Probation Officers, in preference to seeking the revocation of a community order which it has become unnecessary to police, prefer to pursue a 'light-touch' approach, such as the Supervision and Monitoring Scheme ('SAMS'), used in London and other hard-pressed Probation Areas. It consists of transferring those under active supervision, once the interventions specifically identified by the supervisor at the commencement of a CRO have been concluded, to a regime of casual reporting, often only by telephone. This is simply poor professional practice; the maintenance of the highest standards of supervision demand that when a supervisor concludes that the basis upon which a court order was imposed has altered, the supervisor should actively communicate that view to the sentencer.

The scheme outlined in this article would not require legislation. The principle of discretionary executive release is well established. Provided the sentencer became involved through the offender manager, in recommending the executive reduce the length of the custodial term, the subsequent licence term or its conditions, the reduction is in fact being achieved by the executive, albeit with the active support and *de facto* recommendation of the sentencer. For practical purposes the sentencer would perform a similar role to that currently undertaken by the Parole Board. If a sentence has been the subject of a successful appeal, where the appeal has been allowed by the Crown Court, that court should then review the sentence. Where a Crown Court sentence has been reduced or increased by the Court of Appeal Criminal Division, it should be for the Presiding Lord Justice of that court to determine by whom the sentence should thereafter be reviewed, recognising that it would be inappropriate for the original sentencer to do so. The benefits of sentence reviews are that they would tend, by creating a link between offender and sentencer, to lower re-offending; and would, by reducing the time spent in custody, see a fall in prison over-population. ■

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This article is based on a paper presented to the Cambridge Senior Course in Criminology in July 2004, run by the Institute of Criminology. For more information, see the piece by Adam Mansky in this issue on court innovations in the US.

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