

The Rt Hon Lord Justice Leveson
Opening Remarks at Criminal Bar Association Conference
8 May 2010

Introduction

Can I start by thanking the Criminal Bar Association for the opportunity to take part in today's conference on sentencing? It may not surprise you that I intend to speak about the newly created Sentencing Council, established by ss118-136 of the Coroners and Justice Act 2009 and brought into force on 6th April this year.

When the Lord Chief Justice asked if I would accept appointment as the new Chairman of the Council, I said that I would do so enthusiastically. I expressed myself in that way because I believe that the Sentencing Council, which has a wider remit than the structures that came before it, has a significant opportunity to contribute both to the law and practice of sentencing and also to the wider public understanding of issues of sentencing. Public understanding can, and I have no doubt does, impact on confidence in the criminal justice system as a whole. The Council is certainly keen to raise and widen the debate about sentencing: accepting your invitation was, for me, the start of this exercise. Thus, here I am.

Evolution not revolution

Before I say more about the Sentencing Council I wanted to talk a little about what came before it. Many of you will know the background well but I believe it provides a useful basis on which to consider the development of sentencing in England and Wales and convey the message that I wish to share with you today that the Sentencing Council reflects an ongoing evolution in this area, rather than a revolution.

There have been judicially created sentencing guidelines in England and Wales for around 25 years. Perhaps the first attempt to talk about 'normal

sentences' for a specific crime was in relation to bank robberies¹ but from the early 1980s, the Court of Appeal increasingly laid down guidelines in the form of judgments. Many, albeit updated, are still regularly relied upon today: who of us have not turned up *Aramah*² and the line of cases that follow it when dealing with another drugs case? Even then, however it was relatively rare for the Lord Chief Justice to deliver guideline judgements and by the late 1990s, these judgments covered only a small proportion of offences.

When drafting its judgments, the Court of Appeal was constrained by the material on which reliance could be placed. To resolve that problem, the Crime and Disorder Act 1988 created the Sentencing Advisory Panel. The Panel, chaired by a distinguished academic lawyer, was established to draft and consult on proposals for guidelines and refer them back to the Court of Appeal for their consideration and, in that way, to inform the issuing of a guideline judgement. The Court of Appeal was not obliged to accept the Panel's recommendations but in most cases did so, sometimes with modifications. I have to admit that I was counsel in the only case in which the Court did not take up the advice offered³; in relation to handling stolen goods, I was also part of a Court of Appeal that did⁴. The important feature, however was that the laying down of guidelines remained under the control of the senior judiciary.

In 2001, the Halliday Report recommended that new structures were required in order to move towards comprehensive sentencing guidelines and so it was that the Criminal Justice Act 2003 created the Sentencing Guidelines Council. The Sentencing Advisory Panel continued to draft and consult on guidelines but the Sentencing Guidelines Council, rather than the Court of Appeal, took ultimate responsibility for the creation and form of any guideline that was issued. Thus, the SGC came between the SAP and the Court which then focussed on construing the guideline and on determining specific appeals. It was chaired by the Lord Chief Justice and established with eight members of

¹ *Turner* (1975) 61 Cr App R 67 at 91

² (1982) 4 Cr App R (S) 407

³ *Milford Haven Port Authority* [2000] 2 Cr App R (S) 423

⁴ *Webbe* [2002] EWCA crim 1217, [2002] 1 Cr App R (S) 22 page 82

the judiciary and four others, the DPP, a police officer, a defence solicitor and a representative of victims groups: the Chairman of the SAP attended as an observer. Although a small step, it the first time that anyone other than a judge had been involved in setting sentencing guidelines.

Before passing on, might I make use of this opportunity to pay tribute to the work of the Sentencing Advisory Panel and the Sentencing Guidelines Council? They started the ball rolling and have created a significant momentum which has led to the new Sentencing Council. Judges and practitioners alike have constantly referred to their work which itself has changed the approach to this important aspect of criminal justice. I am only too aware of the very real effort that was put in to the drafting and consultation around the guidelines and that this led to such high quality product.. Our job on the Sentencing Council will be to build on what they have achieved – as I said, evolution not revolution.

Sentencing Council

So given the good work that has gone before why has the Sentencing Council been created?

Different people will give you different answers to this question, but, for me, the answer lies in the opportunity both to streamline and to advance work on sentencing in a way that supports not only the judiciary but also all those working within the justice arena and the wider public.

The impetus for change came in response to concern about the prison population which led to an investigation by Lord Carter of Coles into options for improving the balance between the supply of, and demand for, prison places. He suggested a possible approach involving a US style structured sentencing framework and recommended that a Working group be set up to examine the advantages, disadvantages and feasibility of such a framework in this country. That Group, chaired by Lord Justice Gage, quickly rejected the American model – although many have failed to appreciate that fact – and,

reporting in 2008, made recommendations which have led to the new Act. These included that “the SAP and SGC would work more efficiently and speedily if the two bodies were combined whilst preserving the essence of their existing constituent representation and advisory functions.”⁵ The Sentencing Council achieves this by bringing together the functions of both bodies into what will hopefully be a more streamlined and less bureaucratic structure.

But the change isn’t just about streamlining; it is about the opportunity to take forward work on sentencing not only through improvements to guidelines but also through the development of a robust evidence base with the ability to engage with a better informed public about sentences. I believe the legislation is written in such a way that it will support this change to occur.

The Coroners and Justice Act 2009 provides a different starting point for the proper consideration of the guidelines to that prescribed by Criminal Justice Act 2003. Before the 2003 Act, Court of Appeal guidelines were intended to lead judges towards consistent sentencing. Under the 2003 Act, judges were required to “have regard to” the guidelines, while recognising, as many said, that they were guidelines not tramlines. The 2009 Act now states that judges “must follow” the guidelines, except when it is in the interests of justice not to do so. I am very aware that a number of judges were very concerned about the impact of this legislation on their discretion; others have suggested that different elements of the Act weaken the impact of the obligation. We shall, of course, have to see what the Court of Appeal ultimately makes of the language of the statute but I believe, that in providing a different starting point for the way in which judges approach the guidelines, the new Act strengthens the attention which will be paid to them, will do much to encourage consistency and will provide the Council with a basis to perform its reporting functions, and a foundation which can be used both to help promote consistency and, I hope, public confidence.

⁵ Para 9.2 Sentencing Commission Working Group Report page 31

In promoting a more consistent approach to sentencing, I want to be very clear what this means. Both I and the Council recognise absolutely that sentencing is a matter requires individual judgement and discretion directed to the facts of the specific case. In a Foreword to the Case Compendium issued by the SGC in 2005, Lord Justice Rose, then Vice President of the Court of Appeal (Criminal Division) put it in words that I am delighted to emphasise:

"Sentencing is a complex and difficult exercise. It can never be a rigid, mechanistic or scientific process. Consistency of approach by sentencers is essential to maintain public confidence. But perfect consistency in outcome is impossible to achieve because of the infinite variety of circumstances with which, even in relation to one kind of offence, the courts are presented".

Like the Sentencing Guidelines Council before it, the Sentencing Council has a mixture of judicial and non-judicial members albeit with a judicial majority. Recognising that it would require rather more time than the Lord Chief Justice could spare, he is no longer the Chairman but rather the President of the Council. As for the balance, I believe that it is correct. Judges are the professional sentencers, used to balancing the dictates of the legislation, the Guidelines and judgments of the Court of Appeal and fitting that mix into the facts of the case: they have had a professional lifetime, whether as solicitors, barristers, or judges part time and full time, in doing the job. They are in the best position to know what will help judges and, making use of the expertise available, whether any possible changes to the format would assist the process. Eight judicial members also allows for representation from across the judicial spectrum and allows for diversity of judicial view points; further, I believe that it will allow the Council to influence practice in a shorter space of time.

But the six non-judicial members will play an equal role on the Council; they are most decidedly not second class members. They are each 'heavy hitters' in their own fields – Keir Starmer, Director of Public Prosecutions; Tim Godwin Deputy Commissioner of the Metropolitan Police Service; Gillian Guy, Chief Executive of Victim Support; Professor Julian Roberts of Oxford University;

John Crawforth Chief Executive of the Greater Manchester Probation Trust; and Siobhan Egan a defence solicitor with direct and recent experience of advising clients in police stations and before court on likely sentencing. It is this breadth of view point that will enhance the work of the Sentencing Council as it moves forward.

Analysis and research

The Council also has a very real role to play in undertaking research and analysis. It is required not only to report on the resource impact of the guidelines it drafts and issues but also to monitor their use. It will also report on sentencing and non sentencing factors including the cost of different sentences and their relative effectiveness in preventing re-offending. It can also be asked by government to assess the impact of policy and legislative proposals when required. That role is particularly interesting: legislation comes at a cost and it is vital that the true cost of proposals is publicly foreshadowed so that Parliament understands that this cost must be met.

The Council is already starting to take its analysis work forward. A pilot of a Crown Court Sentencing Survey started in four Crown Court centres this week. Running for a month the survey will test the use of a single page questionnaire that will gather data on sentences and what has been taken into account. The purpose is to test the use of the form and to obtain feedback from the judges – High Court, Circuit and Recorders – required to use them before finalising a form which can be used for all high volume, high impact criminal cases.

I have no doubt of the enormity of the task that faces the Council around analysis and research given the finding in the Gage Report that current data collection in respect of sentencing is “inadequate”. It will take significant resource and I know that resource is something that will be scarce in government over the coming years but I see it as part of my role as Chairman to make the position very clear. We can only do the job if we have the resource and if better information leads to better targeting of resources, the

prize could be substantial. Furthermore, it is only by undertaking analysis and research that we can increase the quality of debate on sentencing, ensuring it is based on evidence rather than media anecdote.

Confidence in sentencing

Addressing media coverage is one of the areas that the Council will be seeking to tackle in its work to increase public confidence in sentencing. We know that the public have low levels of confidence – according to the British Crime Survey only 24 per cent of people believe the courts are effective at giving punishments which fit the crime. We also know that when asked about sentencing the public generally think it's too lenient. But when the public are presented with all the facts of a case and asked to decide for themselves what an appropriate sentence would be, they tend to suggest sentences which are no more severe, and in some cases less severe, than those handed down by the courts⁶. This is the experience of You Be The Judge events that are regularly held around the country.

The Sentencing Council will ensure that it is working both to seek the views of the public on sentencing but also inform them about sentencing. Working with the media will be just one part of a wider strategy on confidence that we will put in place with the aim of providing better information to the public through a range of communication channels. It is also an area where each of you can assist, engaging with your local communities and others, explaining the system, how it works and how it balances the statutory purposes of sentencing set out in s 142 of the Criminal Justice Act 2003, while taking into account the features identified in the s 143-146 relating to seriousness, aggravating features surrounding race, religion, disability and sexual orientation, and reduction for guilty pleas.

As well as considering broader issues around confidence, the Sentencing Council has a specific new responsibility which is to have regard to the impact

⁶ *Understanding Public Attitudes to Criminal Justice*, Roberts, J. and Hough, M., 2005

of sentencing decisions on victims of crime. Like the public, victims do not speak with one voice and whilst at a general level they can be said to be seeking more punitive sentences this simply is not true when you ask more probing questions. For example, almost two thirds of victims of crime do not believe that prison works to reduce non-violent crime⁷. But I also know – and readily understand – that family members of victims who have lost their lives, can often feel that no punishment is severe enough, whatever the offence, that their lives have been destroyed and that there is no reason why the offender should be in a better position. Understanding in more detail not just the wider public views but specifically the impact on victims will provide an important topic for debate as we go forward. It may also help to inform the government when policy decisions fall to be made as to the structure and make-up of sentencing disposals.

Closing comments

In taking work forward in all these areas, the Sentencing Council, and I as its chairman, am keen to both hear from you and work with you on this agenda. As a Council, we want to understand the issues relating to the guidance that cause you most concern so that we can consider how to address them, we also want to hear your views on the guidelines we consult on so that we can draft guidelines that everyone finds helpful. And we want to work with you - to use the guidelines and build broader public confidence in sentencing.

The idea is that all of us – the judiciary, the practitioners, the academics, those involved in the wider criminal justice system – should all be considering ways in which we can play a part in seeking to achieve greater confidence in sentencing and in the criminal justice system in the future. So I hope that, by being here today, I am beginning a dialogue between those of you here, and your wider colleagues, and the Sentencing Council that will achieve that end. Thank you very much.

⁷ *Crime victims say jail doesn't work*, Smart Justice report, 2006