SENTENCING ACADEMY

Sentencing Academy Response to Consultation: What next for the Sentencing Council?

7 September 2020

The Sentencing Academy (SA) congratulates the Sentencing Council for its successes in its first 10 years, during which it has become an established part of the criminal justice system in England and Wales. Sentencing in England and Wales is now more transparent and predictable than other common law jurisdictions and sentencers have much more guidance than their counterparts in other countries.

We welcome this opportunity to provide input into the Council's consideration of its next steps. We believe that Professor Bottoms' 2017 independent review of the Council's work is an essential starting point for reflection on the Council's progress to date and we agree with the recommendations made in that report.

Q1 *Council Priorities*: We agree that the Sentencing Council (SC) should continue with its current priorities of guideline development, including the development of new guidelines, the replacement of Sentencing Guidelines Council guidelines, and the monitoring, evaluation and revision of existing SC guidelines. Additionally, we encourage the SC to engage more fully in work that promotes public confidence in sentencing, although we recognise the resource limitations upon the Council.

Q2/3 *Primary Focus of the SC*: The SC provides a vital function in the sentencing regime in England and Wales. The guidelines provide greater transparency and predictability, and *should* enhance consistency and promote greater public confidence in courts. Whether (or to what extent) these objectives have been achieved is not yet fully known, as we discuss later in this response. Developing the guidelines and enhancing them through revision constitutes the Council's core function. To the extent that public confidence does increase as a result, this is a benefit, but the SC probably has only a limited ability to engineer significant shifts in public opinion – particularly if guidelines cannot be shown to be effective in terms of reducing re-offending.

Q4 *Balance Between Guideline Development and Other Activities*: Most of the SC efforts should be devoted to developing guidelines and understanding the effects of these guidelines on sentencing practices or public knowledge of sentencing. The considerable extent of guideline development during the SC's first 10 years represents a significant achievement; it

should now be possible to shift the focus towards understanding their impact and refining existing guidelines and away from development of further guidelines for low volume offences. State and federal sentencing guidelines in the US are reviewed annually by the sentencing commission and the legislature. Frequent reviews are possible as a result of the simple grid-based structures; the guidelines in England and Wales are more nuanced, detailed, and varied. Annual reviews of all guidelines are therefore impractical. However, by re-aligning priorities it would be possible to review more guidelines more frequently. We note that the assault offences guideline was issued in 2011, assessed in 2015 and the revised guideline following consultation and response to consultation is likely to be issued only in 2021. This timeline for review and amendment seems too protracted.

Q5 *Sources of Funding*: The SC should lobby central government for greater resources to permit it to discharge its duties more fully. In a number of areas, including local sentencing statistics (see below), the Council could be more productive, but only if awarded additional funds. Perhaps the SC could explore the possibility of securing philanthropic and research council funds – either directly, which may be problematic, or indirectly, through partnerships with NGOs and academia? There are precedents, such as the award in 2016 to a consortium of academics from the ESRC and the College of Policing for developing the 'What Works Centre for Reducing Crime'.

Q6 *Other Matters*: The SC's Crown Court Sentencing Survey (CCSS) was very useful in stimulating external research. The publicly available database has been used by a significant number of scholars and one of the ancillary benefits of the creation of the Sentencing Council was an increase in the volume of sentencing scholarship. A number of peer-review publications have drawn upon the Council's CCSS data. However, the CCSS is now over five years old. The SC discontinued the survey in 2015 and replaced it by periodic, bespoke data collections. If these data were made publicly available, they would also be useful to external researchers. Otherwise researchers will have to work with data which too old.

Q7 *Meeting Statutory Duties*:

(1) Promoting and Measuring Consistency: The SA believes that the SC has yet to adequately document the contribution of its guidelines to promoting a more consistent approach to sentencing. To date, the principal source of insight into the effects of the guidelines has been the academic literature. A small number of academic studies have suggested positive impacts on consistency,[1] but a more comprehensive evaluation

[1] This academic research has explored the question of whether the guidelines are consistently applied, rather than whether the outcomes are more consistent after the introduction of guidelines. Pina-Sánchez evaluated the assault and burglary guidelines and concluded that 'consistency improved in all the offences studied after the new guideline came into force' ('Defining and Measuring Consistency in Sentencing' in *Exploring Sentencing Practice in England and Wales* (London: Palgrave Macmillan, 2015), p. 87). See also Pina-Sánchez, J. and Linacre, R. 'Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales' (2014) 30 *Journal of Quantitative Criminology* 731. Irwin-Rogers and Perry explored the application of guideline factors in domestic burglary and found 'a strong indication that the courts were sentencing in a manner that was consistent with the guideline and in particular the principle that that the factors in step one of the

involving multiple guidelines is necessary. Of the three duties identified in Q7, this one is the most important. Promoting consistency is a key statutory duty of the Council, one we believe is being promoted by the offence-specific and overarching guidelines. But the informed public might reasonably ask whether the guidelines regime has achieved this goal, and to what extent. Research should also explore variation in the degree to which consistency has been promoted; some sources of guidance may have been more useful in this regard than others. One way of exploring the impact of the guidelines would be to compare, for a limited number of offences, sentencing in England and Wales and Scotland. No offence-specific guidelines have been issued to date in Scotland, and so it can serve as a useful comparator for the SC guidelines.

(2) Victims: The Council's guidelines incorporate victim impact through the guidelines which contain many victim-related factors. We believe the Council is meeting this duty. Could it do more? Possibly. Later in this response we discuss the utility of guidance regarding the Victim Personal Statement (VPS).

(3) Public Confidence: Resource limitations prevent the Council from doing much to meet its duty regarding public confidence. However, we urge the SC to consider drawing up a strategy for doing so, if only in outline, against the time when funding might become available.

Q9 *Rapid review:* We strongly support the Council's proposal (p. 53) for making revisions to existing guidelines without conducting a formal review and protracted public consultation. Any such amendments can be easily incorporated into the online guidance and efficiently highlighted for sentencers. It is important that such rapid review is limited to matters on which the SC has concluded there is unlikely to be a wide array of views.

Q12 *Additional Overarching Guidelines*: The overarching guidelines are a unique feature of the English guidelines – none of the other guideline regimes includes this form of guidance.[2] A number of areas suggest themselves as subjects of additional guidelines. One criterion of need is whether sentencers believe they have sufficient guidance. For this reason, we recommend the SC considers conducting a survey with judges and magistrates to help identify areas of sentencing law where there is a perceived need for greater guidance. This might take the form of a new guideline or the revision of an existing guideline. Topics might include drafting of behaviour orders, dangerousness and extended determinate sentences.

Some Possible Additional Guidelines

guideline should have more of an influence on sentence severity than the factors in step two' ('Exploring the Impact of Sentencing Factors on Sentencing Domestic Burglary' in *Exploring Sentencing Practice in England and Wales* (London: Palgrave Macmillan, 2015), p. 210). However, more research is needed.

[2] Roberts, J.V. (2019) 'The Evolution of Sentencing Guidelines: Comparing Minnesota and England and Wales', *Crime and Justice,* Volume 48: 187-254.

a. *Use of Victim Personal Statements*: Although they are present in only a minority of sentencing hearings,[3] Victim Personal Statements can play an important role. Courts may also benefit from more guidance in the appropriate use of the VPS, particularly magistrates who are involved in far fewer sentencing decisions than District Judges or Crown Court sentencers.[4] For example, courts have recognised that there may be occasions when the VPS suggests that a particular disposal such as immediate imprisonment would inflict undue hardship for the victim. If this occurs, the VPS provides insight into the impact of the potential sentence as well as the offence. How much weight should this information carry? At present, sentencing guidance takes the form of a judgment from the Court of Appeal, and a practice direction which is relatively brief.[5] Research with sentencers would provide clarification on the issue by revealing whether they share a common understanding of the role of the VPS and whether they are satisfied with current levels of guidance. Additionally, it is correct to note that the guidance from the Court of Appeal is now rather dated, and produced at a time when VPSs were used less frequently than at present.

b. *Determining the minimum term for murder*: Academic commentators have called for a guideline to assist courts in determining the minimum term served by an offender sentenced to life imprisonment for murder.[6] Schedule 21 was devised before definitive sentencing guidelines were introduced in England and Wales and was conceived to provide guidance regarding the appropriate minimum terms. When determining minimum terms for murder, judges lack the same degree of guidance that is available when sentencing almost all less serious offences which are now covered by a definitive sentencing guideline. The Council issued a guideline for manslaughter in 2019. A guideline for determining minimum terms for murder would therefore be consistent with this evolving guidance. The structure of Schedule 21 lends itself to creation of a definitive Council-style guideline. It contains subcategories of offences based upon their relative seriousness; starting point sentences; and lists of aggravating and mitigating factors – all elements of the offence-specific guidelines issued by the Council since 2011. Whilst we appreciate that this perhaps presents some difficulty

[3] Research drawing on the Crime Survey of England and Wales found that only 12.5% of crime victims recalled receiving an offer of a VPS. Of these victims, approximately half provided a statement. Sentencing Academy (2020, forthcoming) *Victim Personal Statements in England and Wales: A Review of Law, Policy and Research* (London: Sentencing Academy).

[4] Magistrates sit for approximately 15 days each year, and are likely to see few Victim Personal Statements since the crimes sentenced in the magistrates' courts are less serious and a VPS is less likely to be submitted in the less serious cases.

[5] See the guidance on pages 11-13 here: http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2012/crim-practice-directions-VII-sentencing-101213.pdf (accessed 9 August 2020).

[6] A prototype can be found in Mitchell, B. 'Sentencing Guidelines for Murder: From Political Schedule to Principled Guidelines' in *Sentencing Guidelines: Exploring the English Model* (Oxford University Press, 2013). See also: Fitz-Gibbon, K. (2016) 'Minimum sentencing for murder in England and Wales: A critical examination 10 years after the Criminal Justice Act 2003', *Punishment and Society* 18(1): 47-67 and Roberts, J.V. and Saunders, J. (2020) 'Sentencing for Murder: The Adverse and Unintended Consequences of Schedule 21 of the Criminal Justice Act 2003', *Criminal Law Review,* 10: 895-906.

given the extent of Parliament's intervention into this area of sentencing, there are a large number of steps that sentencing judges must go through when determining the minimum term for murder once the appropriate Schedule 21 starting point has been identified and it is with these subsequent steps that further guidance might assist. It is to be noted that Schedule 21 itself states that 'Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order' and therefore significant discretion is left to sentencing judges to weigh the non-starting point aggravating and mitigating factors. Ensuring a consistent approach to these subsequent steps falls within the SC's remit.

c. *Assessing dangerousness*: Release arrangements are becoming an increasingly important and complex element of sentencing and, whilst not all will be determined by the sentencing exercise carried out by the judge, the imposition of a life sentence or an extended determinate sentence following a finding of dangerousness will have a significant impact on the length of time to be served in custody and the degree of public protection afforded by the sentencing exercise (which, in turn, may influence public confidence). It is essential that these decisions are made in a consistent and transparent manner and a guideline along the lines of the Imposition guideline may assist sentencers in this exercise. This guideline might also provide assistance to sentencers when determining the appropriate type of sentence once a finding of dangerousness has been made.

d. *Sentencing procedure and the standard of proof for relevant sentencing factors*: In their recent article in the Criminal Law Review, Professors Wasik and Ashworth underline the need for a general guideline on sentencing procedure and evidence.[7] We echo this sentiment. When referring to an offence-specific guideline, a sentencing judge will be making a number of decisions at every step of the sentencing process that will ultimately determine the final sentence. It is conceivable that in some cases these decisions may have as much influence over the sentence as a decision by a jury to convict a defendant of a lesser or more serious offence. Settling disputed issues surrounding aggravating and mitigating factors is an area that has received insufficient attention and greater consistency may be aided by a guideline to assist sentencing judges to make these multifaceted decisions on which not only the length of a custodial sentence may turn but also whether custody is imposed in the first place. The case law on this area is vast and includes decisions dating back many decades. This is an area which would benefit from SC guidance.

Finally, we also recommend the Council revisit its 'Totality' guideline. This was introduced to promote a more consistent approach to sentencing offenders convicted of multiple offences. A number of academics have criticised this guideline for providing

[7] Crim. L.R. 2020, 5, 397-410.

insufficient or minimal guidance for courts.[8] Perhaps the Council could explore sentencers' experiences with, and reactions to, this particular guideline to determine whether it is in fact achieving a more uniform approach to multiple offence sentencing.

Q14 *Additional Analytic Work*: We are unaware of any research which has explored users' perceptions and experiences with the guidelines. Are the guidelines applied in practice in the ways expected by Council? A survey of current users would shed light on this question. At present, there is very little research on the effects and uses of the Council's overarching guidelines. We note below the urgent need for further analytical work into racial disparities at sentencing.

Q16 *Consistency*: The SC should undertake more research to determine the extent to which its guidelines have contributed to a more consistent approach to sentencing. To date, the Council's research has concentrated on projecting the impact of an impending guideline on prison capacity, or evaluating the impact of an existing guideline on trends in sentence severity, including prison admissions and sentence lengths. The Council's guideline assessments have overlooked the question of consistency. For example, the Robbery Guideline Assessment notes that the guideline 'was designed to improve consistency in sentencing'[9] yet fails to provide any information relating to changes in consistency. We note that the SC will be publishing a report on consistency later this year, and we welcome this development. Research on consistency is far from straightforward as it requires a definition of consistency and some way of measuring the concept, but it should be undertaken, nonetheless.

Q17: *Race/ Ethnicity*: The SC has recently published a limited analysis of sentencing differentials relating to race/ ethnicity. We urge the Council to extend this work to a wider range of offences. In addition, the Council should explore any possible differential effects of the guideline regulating sentence reductions for a guilty plea. Research has demonstrated that BAME defendants are less likely to plead guilty and therefore less likely to benefit from plea-based sentence reductions. The Council should include a 'race/ ethnicity' impact evaluation in its evaluations of its guidelines. Racial impact analyses are a feature of guidelines authorities in other jurisdictions.[10] We also encourage the SC to share with researchers any further data it holds in this important area so greater scrutiny can be applied to an area that is currently receiving a considerable degree of public and media attention.

Q18 *Work with Academic Institutions/External Organisations*: The SC has conducted several seminars in conjunction with academic researchers, the last being in 2018 in conjunction with City Law School. We encourage the Council to continue this collaborative

[8] For example, Ashworth and Wasik have argued that 'the guideline … actually says nothing about the proper role of the totality principle, and gives no clues as to how the court should assess totality in any particular case' ('Sentencing the Multiple Offender' in *Sentencing Multiple Crimes* (New York: Oxford University Press, 2018), p. 220).

[9] https://www.sentencingcouncil.org.uk/wp-content/uploads/Robbery-report-final-Feb-2019.pdf, p.3.

[10] See, for example: Mauer, M. (2009) Racial Impact Statements. Criminal Justice, 23(4); Minnesota: https://mn.gov/sentencing-guidelines/assets/2015_MN_Revised_SCS0878A550_Racial_Impact_Statement_RIS_12_tcm30-60155.pdf

activity and the SC could identify a list of research questions for which it is particularly interested in seeking answers. As noted above, SC support for research projects conducted by academics and other organisations could be key to unlocking philanthropic/research council funding.

Q19-21 *Promoting Public Confidence*: The Council could engage more with the Magistrates Association and other organisations with a view to planning joint activities – for example, holding public meetings where magistrates explain the role of the lay magistracy and the guidelines to members of the public. Outreach activities of this kind have proven successful in other countries, notably Australia. The SC's social media presence is quite limited and this is an area that may offer scope to reach additional parts of the public. Whilst the Council notes that 'With current resources, we are unable to do a great deal more with our existing Twitter account or engage in other social media activities' there may be innovative ways to garner more attention at very limited cost. Other social media platforms, for example, have a wider reach than Twitter.

Q22 *Duty to Have Regard to Costs and Cost Effectiveness of Sentencing*: The SA believes that the Council could do more to promote more cost-effective sentencing. We agree with the Council that 'in any individual case, the cost of a sentence should not be considered'.[11] Encouraging individual sentencers or panels of magistrates to undertake their own cost-effective analysis prior to choosing the appropriate disposal is likely to provoke greater inconsistency, as sentencers' views on this issue will diverge. In addition, proportionality will be undermined if disposal costs, a factor unrelated to harm or culpability, plays a pivotal role in determining sentencing outcomes.[12]

That said, the costs of different disposals vary greatly, and are a matter of public record. In addition, research by the Ministry of Justice has clearly demonstrated that short prison terms are associated with higher rates of re-offending than other, cheaper sanctions such as community orders or suspended sentence orders. The SC could consider simply making these trends (costs; effectiveness) more widely known to sentencers by publishing them on their website. The Council notes that 'resources are scarce' but Council should surely work with the Ministry of Justice to do more work in this area. There is a consensus among scholars at least that sentencing in England and Wales could deploy its more expensive sanctions more effectively than at present. All sentencers should be aware of the relative effectiveness of different sanctions at their disposal.

The SC's response to its statutory duty in this regard is to publish an 'annual internal report' (p. 38) summarising the latest research evidence regarding re-offending. This seems a rather modest step towards discharging the statutory duty. In its consultation document the Council concludes that this approach 'seems to work' (p. 39), but how do we know this, and who has determined what works? Is there any evidence or are there any examples of this

[11] Consultation document, p.39.

[12] If tables of disposal equivalents were available, a court could choose among sanctions, based upon cost effectiveness, knowing, for example that a 12 month community order carried the same 'penal weight' as, say, a three month term of immediate imprisonment. In this way, a more cost-effective option could be imposed without undermining proportionality at sentencing.

information having influenced the guidelines' sentence recommendations? We recommend the Council produce and publish a document on this subject -- possibly every other year -- and in conjunction with the Ministry of Justice. This would inform the wider community about the research findings, and also help external users understand the information which feeds into the Council's guideline construction.

Q24: *Reducing re-offending*: The SC is the primary statutory authority with respect to guidance for sentencers. This confers on the Council a unique authority to provide, for courts and the community, authoritative advice about the most effective ways of reducing re-offending *through the sentencing process*. The Council does not appear to have the resources at present to carry out original research in this area. But the Council could work with the Ministry of Justice to publish brief research summaries with respect to various questions relating to sentencing options and re-offending. We note that there is a 'What Works' Centre involving the College of Policing.[13] There is a clear need for some form of 'What Works' Centre focusing on the effectiveness of different disposals and the Council should play a key role in establishing and guiding such a centre.

A good example of collaborative research with the Ministry of Justice (and possibly academics) involves the most effective requirements of community orders in terms of preventing re-offending. When imposing a community order, courts in England and Wales may choose to impose one or more of 15 requirements such as a curfew, a residence requirement or an unpaid work requirement. When crafting the sentence, courts should individualise the restrictions imposed, with a view to determining the most effective and most appropriate combination. This determination is assisted by counsel and by advice from probation services. Ultimately, however, the conditions imposed are likely to reflect the court's experience and intuitions about which specific requirements are most useful or effective. The SC is encouraged to work with the Ministry of Justice to develop a research programme which would compare the effectiveness of different conditions. Furthermore, consideration must be given to the *availability* of specific requirements in each area and the SC must advocate for the universality of provision to both help reduce re-offending and ensure consistency.

Q25 *Consultation Process*: The SC should be encouraged to hold more consultation events. A number of such events have been held in the past targeting the academic community but a more consistent approach to such events might be helpful. These events should be opened up to as wide a group of participants as possible as this will also help inform the individual responses from attendees.

Q28 *Use and Interpretation of Guidelines*: We do not believe that the role of the Council is to provide more assistance on the use of its guidelines. This is a matter for individual magistrates' courts' legal advisors, individual members of the judiciary, the Court of Appeal and the Judicial College.

Other Issues

[13] https://whatworks.college.police.uk/Pages/default.aspx.

a. *Unanticipated Uplift in Severity*: A number of scholars have suggested that the onset of guidelines has generated an uplift in sentences. The issue has been explored and independent academic research has not found any general effect of the guidelines on prison sentence lengths.[14] However, at least two of the Council's guidelines have increased sentences of imprisonment, as documented in the Council's publications. For example, the Robbery Guideline Assessment found that: 'Quantitative analysis showed that the adjusted ACSL for dwelling robberies increased substantially following implementation of the new guideline, from 7 years in 2013/14 to 8 years and 9 months in 2016/17'.[15] A similar uplift was observed for non-domestic burglary[16] and some assault offences. In many cases the uplift appears to have been caused by what may be described as 'Category Creep' – an increasing number of cases being assigned to a higher level of seriousness following the introduction of the guideline. However this may be attributable to other factors; for instance, in relation to the assault guideline in particular, an increase in sentence lengths for murder and manslaughter (prompted by Schedule 21 to the Criminal Justice Act 2003 and decisions of the Court of Appeal such as Attorney General's Reference (*R. v Appleby*))[17] may have had a 'trickle-down' effect. As a matter of priority, the Council needs to determine whether these changes in sentencing practice reflect a principled and proportionate recalibration of the seriousness of cases, whether the guidelines need further adjusting, or whether further guidance on the proper application of the guidelines needs to be produced.

b. *Local Area Sentencing Data Trends*: The Coroners and Justice Act 2009 requires the SC to publish data on local sentencing patterns. The SC has declined to do so on the grounds that this would be misleading if the analysis were not to control for matters such as the type of case load. We agree that publishing misleading statistics is worse than not publishing data. However, the solution is rather to ensure that the comparisons are appropriate.[18] Local statistics are published for a wide range of issues; sentencing statistics should not be excluded. The problem appears to be that the Council has the mandate to publish these statistics but not the resources, while the Ministry of Justice has the resources but not the mandate. The impasse should be resolved, and these statistics published on a routine if not annual basis.

c. *The Relationship Between the SC and the Court of Appeal*: There have been two notable occasions in the last ten years in which the Court of Appeal has stepped in to issue guidance which may have a significant impact on sentencing levels and, indeed, on the degree to which 'normal' offence-specific guidelines apply. In response to the riots in

[14] Pina-Sanchez, J. et al. (2019) 'Have the England and Wales guidelines affected sentencing severity? An empirical analysis using a scale of severity and time-series analyses', *British Journal of Criminology*, 59: 979–1001.
[15] https://www.sentencingcouncil.org.uk/wp-content/uploads/Robbery-report-final-Feb-2019.pdf, p.18.
[16] https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary-further-assessment.pdf.
[17] [2009] EWCA Crim 2693.
[18] Aside from courts' caseload, the SC identifies two factors – urban/ rural and socioeconomic status – as factors that need to be controlled. It is unclear why either should be controlled – neither factor should affect the sentencing outcome.

2011 it was the Court of Appeal, in *Blackshaw*,[19] that provided the guidance on sentencing levels for these offences and recently in response to the impact the coronavirus has (and, it should be noted, continues to have) on prison conditions it was once again the Court of Appeal, in *Manning*,[20] that took the lead. Now that the Council is an established part of the criminal justice system it must reflect on the degree to which it can be responsive to such events and assert its position at the forefront of sentencing guidance in this jurisdiction.

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[19] [2011] EWCA Crim 2312.
[20] [2020] EWCA Crim 592.