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Sentencing guidelines mechanisms in other jurisdictions

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This research paper provides comparative information on sentencing guidelines schemes in a number of jurisdictions.

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Key Points

- A number of jurisdictions have moved towards a structured sentencing guidelines system administered by a sentencing council, including England and Wales and Scotland.
- Northern Ireland already has a sentencing guidelines mechanism in the form of the Lord Chief Justice's Sentencing Group. It does not however, have a body such as the Sentencing Council in England and Wales.
- A sentencing guidelines body in the form of a council or commission, may be developed to address specific policy issues. This could include a perceived lack of public confidence in the sentencing process, wide disparities in sentencing, a growing prison population or a perceived lack of fairness in sentencing.
- One of the key aims of the guidelines issued by the Sentencing Council in England and Wales is the achievement of consistency of approach in sentencing.
- Most guidelines retain a considerable element of judicial discretion whereby judges can depart from the guidelines if circumstances warrant such a departure.
- The public can often underestimate the severity of punishments handed down at sentencing. For example, while courts in England and Wales handed down tougher sentences, especially in the 1990s, people underestimated the sentences given to adult rapists and burglars. Sentencing councils or commissions can be a method of making the sentencing process more transparent and allowing it to be subject to political and public debate.
- In the United States, significant disparities in sentencing and a prison population that was reaching crisis levels led to the introduction and development of sentencing guidelines at both the state and federal level. The impact of the guidelines on the prison population has been mixed.
- Other common law jurisdictions, such as Canada and New Zealand, have undertaken a considerable amount of preparatory work to develop sentencing guidelines mechanisms, but changes of government in both jurisdictions meant they have yet to be implemented.

Executive Summary

There has been a trend for jurisdictions comparable to Northern Ireland, in the sense of having a common law system, to at least explore the possibility of introducing sentencing guidelines that have been developed, drafted and disseminated by a dedicated sentencing council or commission.

Such models go some way to replacing the traditional wide discretion afforded to judges at sentencing. This is not to say that sentencing guidelines cannot exist without a council or commission – they do, for example in Northern Ireland, with the Lord Chief Justice's Sentencing Group.

In England and Wales, despite the existence of the Sentencing Council, where no guideline exists, judges refer to court of appeal judgments to examine how sentences have been reached for similar cases in the past.

Nevertheless, sentencing councils are seen as desirable for various reasons and can potentially address a number of policy areas. In England, for example, debate on sentencing disparities goes back to the 19th century although it was not until the 1990s that bodies were established to develop and disseminate guidelines. In the United States, the earliest sentencing commissions are over 40 years old. There too, concerns existed around variations in sentencing and, later, the ever-expanding prison population.

A fundamental aim of sentencing councils is achieving consistency of approach in sentencing, while allowing for judicial discretion. In departing from guidelines, sentencers will usually have to provide a written reason for doing so. Figures relating to the Sentencing Council for England and Wales show high levels of compliance with the guidelines issued to date, but it has been highlighted that the offences are broadly defined and the penalties are correspondingly wide. Therefore, compliance is more likely.

The Sentencing Council in England and Wales also has a statutory duty to undertake research and analysis to monitor the impact of its guidelines, for example on the resource implications in terms of prison populations.

The riots that occurred in some English cities in 2011, however, provided evidence of the judiciary's willingness to depart from the guidelines to deal with an extraordinary situation. It was pointed out that the guidelines which the courts put in place to deal with rioters, unlike the definitive guidelines which courts must follow, were not developed after any systematic research, without a protracted public and professional consultation, and were not subject to any parliamentary scrutiny.

The question for policymakers considering the introduction of, for example, a sentencing body, is what is the policy issue or issues that need to be addressed in that jurisdiction? Any legislature that is considering the adoption of such a regime would

need to be convinced that wide disparities in sentencing was a problem that needed to be addressed.

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1 Introduction

This paper has been prepared following a request from the Committee for Justice. The Committee sought information on the following:

Sentencing guidelines mechanisms in place in other relevant jurisdictions to inform consideration of the Sentencing Policy Review being undertaken by the Department of Justice including international models of good practice and approaches employed to secure public confidence in sentencing.

The first part of the paper (sections 2-8) looks at a number of aspects related to sentencing, including the adoption of guidelines systems in other countries, the aim of guidelines including the promotion of consistency in sentencing and fairness in sentencing.

Section 9 comments on specific categories of crime that may form part of the Department of Justice's review of sentencing policy and places them in the overall context of deterrence.

2 Context of research

This paper focuses on sentencing guideline mechanisms in other jurisdictions, but it is useful at the outset to place the research in the context of the current situation in Northern Ireland.

The Hillsborough Agreement in 2010 contained a commitment to establish a sentencing guidelines council. The Department of Justice subsequently consulted on a sentencing guidelines mechanism which set out three options for a sentencing guidelines body:

- An independent sentencing guidelines council with a statutory remit for producing guidelines;
- An independent sentencing advisory panel with a statutory remit to draft guidelines for approval of the Court of Appeal; and
- A judicial oversight committee known as a Sentencing Group to be established by the Lord Chief Justice.

In 2012, it was announced that the Lord Chief Justice's initiative would form the basis of a sentencing guidelines mechanism for Northern Ireland, with the addition of enhanced community engagement to include lay members on the Sentencing Group¹.

¹ Correspondence from the Department of Justice to the Committee for Justice, 7 June 2016

The Lord Chief Justice's Sentencing Group has a number of functions relating to sentencing guidelines:

- advise the Lord Chief Justice as to topics for his 'Programme of Action on Sentencing';
- consider and advise sentencing guidelines for the Magistrates' Courts in Northern Ireland;
- consider judgments of the Court of Appeal and advise the Judicial Studies Board for Northern Ireland ("JSB") as to their suitability for inclusion on the JSB Sentencing Guidelines and Guidance website;
- consider first instance judgments of the Crown Court and advise the JSB as to their suitability for inclusion on the Sentencing Guidelines and Guidance section of the JSB website;
- liaise with the JSB as to the training of the judiciary on sentencing practice and the dissemination of sentencing guidelines;
- make such other proposals and carry forward such other programmes of action relating to sentencing guidelines and practice as may seem fit to them after consultation of the Lord Chief Justice².

Therefore, any discussions around other models and their potential application in Northern Ireland will take place in the context of the ongoing work of the Lord Chief Justice's group.

Basis of the current review

The Terms of Reference for the sentencing policy review state that "...sentences imposed should be appropriate, fair, consistent, and effective and that the sentencing process should be transparent and understood. A lack of information about sentencing practice means that views are often formed without any real knowledge of the factors or the processes involved."³

Types of sentencing regime

There exist various models of sentencing regimes, ranging from those that utilise rigid numerical guidelines, such as in the United States, to those that are more narrative based, such as in England and Wales, to those that continue to favour wide-ranging judicial discretion.

The Australian model, for example, is known as "instinctive synthesis", which requires judges to measure all the available evidence before arriving at a sentence: "Instinctive

² Report by the Lord Chief Justice's Sentencing Group, December 2014

³ Terms of Reference, Sentencing Review, Department of Justice, June 2016

synthesis views sentencing as a holistic, parallel process requiring great cognitive capacity”⁴. This approach rejects the structured or even numerical approach adopted elsewhere. In a 2005 Australia High Court case the judge stated that:

...there is no Aladdin’s Cave of accurate sentencing methodology... There is only human judgement based on all the facts of the case, the judge’s experience, the data derived from comparable sentences and the guidelines and principles... laid down in statutes and authoritative judgements⁵.

The sentencing guidelines in England and Wales offer an example of a “discursive or narrative” system, providing “a series of reasoning steps or sequential analysis. Others, such as those used in some US states, are quantitative, employing grid formats and relying on numerical guidance”⁶.

Previous research states that:

The decision-making model that judges can apply differs across jurisdictions depending on whether, and how, sentencing laws are translated into sentencing guidelines. (It has been suggested) that sentencing (and guideline) systems lie along a continuum ranging from discretionary to rule-based. Guidelines typically limit or control judicial discretion... guidelines sometimes aim to achieve effective sentencing in terms of reducing crime and increasing public safety, as well as acting as a resource management tool by increasing the cost-effectiveness of sentences. Finally, guidelines may aim to increase public understanding and confidence in sentencing, including victim satisfaction.

The role of sentencing guidelines

There has been a trend for comparable jurisdictions to at least consider the introduction of structured guidelines:

In recent years, many legislatures across the common law world have attempted to structure judicial discretion at sentencing – or have expressed a desire to do so. These developments reflect recognition that greater consistency at sentencing is desirable or even necessary – both in order to ensure fairness of outcome and greater accuracy in prison population projections... Sentencing guidelines offer a means to achieve the objectives of greater consistency and hence predictability”⁷.

⁴ The Law Library of Congress, *Sentencing Guidelines*, April 2014

⁵ Mandeep K. Dhami, ‘Quasirational Models of Sentencing’, *Journal of Applied Research in Memory and Cognition*, (2015) 4: 239-247

⁶ Sarah Krasnostein and Arie Freiberg, ‘Sentencing Guideline Schemes Across the United States and Beyond’, Oxford Handbooks Online, (2014)

⁷ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

Research from 2013 stated that guidelines are designed to achieve multiple objectives. They should promote a more principled approach to sentencing; constrain prison populations and ensure fairness in sentencing. But the most common justification for guidelines is to ensure consistency. Therefore, any legislature that is considering the adoption of such a regime would need to be convinced that wide disparities in sentencing was a problem that needed to be addressed⁸.

There are critical elements that must be present to ensure the effectiveness of guidelines:

first, they need to be sufficiently detailed and prescriptive to actually provide guidance for courts at sentencing...the offence specific English guidelines provide sentence ranges, starting point sentences, lists of aggravating and mitigating factors, reminders of statutory requirements...beyond these elements, the guidelines also require courts to follow a step by step methodology...Finally, sentencers also benefit from generic guidelines dealing with issues applicable across all offences⁹.

The Common Law model

Before discussing the approach adopted in England and Wales in more detail, it is useful to place the development of sentencing guidelines in the context of the historic common law model of sentencing.

Research from the New Zealand Law Commission highlighted key features of the common law model of sentencing before the adoption of structured guidelines or independent bodies with a remit for drafting guidelines:

1. The legislature prescribes maximum penalties and the types of sentences (e.g. imprisonment, fine, community work) that are available to judges, but otherwise provide relatively little guidance.
2. Subject to the maximum penalty, judges have wide discretion to determine the appropriate sentence in the individual case.
3. That discretion is primarily moderated and limited by principles and precedents laid down by higher court when reviewing cases that go on appeal.

However, there are perceived flaws within the traditional model and these can be summarised as follows:

1. There can be inconsistency in sentencing practice. Some courts may be systematically more severe than others, and this was the case in, for example,

⁸ Julian V. Roberts, Structuring Sentencing in Canada, England and Wales: A tale of two jurisdictions, in *Criminal Law Forum* (2012) 23:319-345

⁹ As above

New Zealand. Although some variation from judge to judge and court to court is to be expected, it is unfair that offenders appearing before one judge or court should receive systematically more severe or more lenient sentences than equivalent offenders appearing before another court or judge.

2. The development of sentencing policy by appellate courts is done largely via individual cases, meaning it can be inaccessible and lack transparency. It is not, therefore, subject to informed political or public debate.

3. This lack of transparency can lead to a loss of confidence in the sentencing system. Too much focus can be placed on individual cases, leading to a constant demand for change.

4. Under the common law model, legislatures may have limited input into sentencing.

5. Under the traditional model, sentence severity levels are determined without any explicit consideration or weighing up of relative costs and benefits. Moreover, it is the only part of Government expenditure that is allocated without reference to competing demands, because the Government has no control over it...Choices about expenditure within criminal justice...ought to be identified explicitly and properly debated...

6. The absence of a systematic and transparent mechanism for sentencing severity levels makes the system inherently unpredictable and thus creates substantial difficulties for the Government in managing its penal resources.

Essentially then, structured sentencing guidelines aim to achieve a transparent, consistent approach to sentencing. Within this broad objective, judicial discretion may be limited to varying extents depending on the rigidity of the guidelines.

3 England and Wales

Debate on sentencing structures in England dates back to the second half of the 19th century, with calls for a Royal Commission to establish sentence levels. This did not materialise and evidence of sentencing disparities grew. The only significant step was the Alverstone Memorandum of 1901, which established sentence levels for various permutations of six categories of offence.

The next major step came in the 1970s when two Court of Appeal judgements on sexual offences moved beyond the individual case and proposed sentence levels for different varieties of the offence. The then Lord Chief Justice began to deliver guideline judgements to improve consistency, but such judgements were relatively infrequent as the Lord Chief Justice had no staff to assist in the preparation of guideline judgements.

The response

Arguments for a sentencing body date back to 1982, “based on the recognition that generating sentencing guidelines is a public policy function...The proposal recognised that judges have considerable knowledge about sentencing, but argued that others also have important experience to bring to the process, notably prison governors, probation officers, police, prosecutors and defence lawyers, as well as academics and sentencers from the lower courts”¹⁰.

Throughout the 1980s momentum gathered for a move towards a sentencing body, but the Conservative government resisted, hoping that the Court of Appeal would build on its earlier work. The government also warned that a sentencing council could lead to a grid-like system such as that operating in Minnesota.

The Labour Opposition had argued in favour of a sentencing council and, once in government, brought forward proposals to for sentencing guidelines linked to a sentencing body.

The Crime and Disorder Act 1998 established the Sentencing Advisory Panel (SAP) which was tasked with drafting guidelines for particular offences and remitting these advisory guidelines to the Court of Appeal. The SAP included circuit judges, lay magistrates, senior members of the probation service, prison service, police service and prosecution service, three professors and three lay people. The Court of Appeal could adopt the proposals, amend them or reject them. The Court usually accepted the Panel’s recommendations and were incorporated into guideline judgements issued by the Court of Appeal.

Criminal Justice Act 2003

The Criminal Justice Act 2003 created another statutory body, the Sentencing Guidelines Council (SGC), which received advice from the SAP. The SGC had a judicial majority and was chaired by the Lord Chief Justice. It examined the advice from the SAP, and issued its own draft guideline for public consultation before issuing a ‘definitive guideline’.

Courts had a statutory duty to have regard to these guidelines and had to provide reasons if they decided to depart from them. It was considered not ideal that two agencies were involved and issued “only offence specific guidelines seriatim (in series) – with the result that it took some years before even a majority of offences were covered by a guideline”¹¹.

¹⁰ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

¹¹ Julian V. Roberts, ‘Structuring Sentencing in Canada, England and Wales: A Tale of Two Jurisdictions’, *Criminal Law Forum* (2012) 23:319–345

The Criminal Justice Act 2003 also sets out the five purposes of sentencing, to which any court dealing with an offender must have regard. This provision extended to England and Wales, but it is nevertheless useful when discussing the issue of sentencing. The purposes are:

1. the punishment of offenders;
2. the reduction of crime (including its reduction by deterrence);
3. the reform and rehabilitation of offenders;
4. the protection of the public; and
5. the making of reparation by offenders to persons affected by their offences¹².

An increasing prison population forced another rethink on sentencing and the Coroners and Justice Act 2009 introduced significant changes to the approach to sentencing.

The SAP and SGC were abolished and replaced by the Sentencing Council of England and Wales. The Lord Chief Justice remains President. A fundamental difference was the nature of the compliance duty placed on courts with regards to the new regime:

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. This still leaves room for judicial discretion to depart from the guidelines.

When sentencing an offender for an offence committed on or after 6 April 2010, a court must **follow** any relevant sentencing guidelines, unless it is contrary to the interests of justice to do so. When sentencing an offender for an offence committed before 6 April 2010, the courts must **have regard** to any relevant sentencing guidelines¹³.

The new Sentencing Council, therefore, did not begin its work in a vacuum:

Parliament had laid down complex sentencing laws for many decades. Probation officers had been writing reports, counsel had been making pleas in mitigation. The Court of Appeal had for over a century been giving (ever-increasing) detailed narrative guidance in appellate decisions¹⁴.

¹² Section 142 of the Criminal Justice Act 2003

¹³ Sentencing Council England and Wales website – About guidelines: <https://www.sentencingcouncil.org.uk/about-sentencing/about-guidelines/>

¹⁴ Nicola Padfield, 'Exploring the Success of Sentencing Guidelines', in *Sentencing Guidelines: Exploring the English Model*, OUP, 2013

The Sentencing Council

The Sentencing Council was established to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary. The primary function of the Sentencing Council is to prepare sentencing guidelines¹⁵ which the courts must follow unless it is in the interest of justice not to do so.¹⁶ The Sentencing Council fulfils other statutory functions as follows:

- publishes the resource implications in respect of the guidelines it drafts and issues;¹⁷
- monitors the operation and effect of its sentencing guidelines and draws conclusions;¹⁸
- prepares a resource assessment to accompany new guidelines;¹⁹
- consults when preparing guidelines;²⁰
- promotes awareness of sentencing and sentencing practice;²¹
- publishes a sentencing factors report;²²
- publishes a non-sentencing factors report;²³
- publishes an annual report²⁴

Reflecting on the aims and functions of the Council, research from 2013 identified three other possible aims against which the Council could be measured:

- To reduce the amount of crime or reoffending
- To reduce the costs of crime (or the costs of sentencing and/or the criminal justice system: the costs of appeals; the costs of the prison system. Essentially, do guidelines provide 'value for money?'); and
- To help and support judges and magistrates to do their job: a training aid²⁵.

¹⁵ S.120 Coroners and Justice Act 2009

¹⁶ S.125(1) *ibid*

¹⁷ S.127 *ibid*

¹⁸ S.128 *ibid*

¹⁹ S.127 *ibid*

²⁰ S.120(6) *ibid*

²¹ S.129 *ibid*

²² S.130 *ibid*

²³ S.131 *ibid*

²⁴ S.119 *ibid*

²⁵ Nicola Padfield, 'Exploring the Success of Sentencing Guidelines', in *Sentencing Guidelines: Exploring the English Model*, OUP, 2013

Composition and governance of the Council²⁶

There are 14 Members of the Sentencing Council – eight judicial and six non-judicial.

All judicial appointments are made by the Lord Chief Justice with the agreement of the Lord Chancellor whilst non-judicial appointments are made by the Lord Chancellor with the agreement of the Lord Chief Justice following open competition.

The Council is accountable to Parliament for the delivery of its statutory remit set out in the Coroners and Justice Act 2009. This Act also provides that the Lord Chancellor may provide the Council with such assistance as it requests in connection with the performance of its functions.

The Council is accountable to the Permanent Secretary at the Ministry of Justice as accounting officer and to Ministers for the efficient and proper use of public funds delegated to the Council. Ministers are also responsible for protecting the Council's independence.

The Director General of the Criminal Justice Group at the Ministry of Justice is accountable for ensuring that there are effective arrangements for oversight of the Council in its statutory functions and as one of Non-Departmental Public Bodies of the Ministry of Justice.

The Lord Chancellor and Secretary of State and the Lord Chief Justice, have a representative at every meeting.

The Council has a statutory requirement to consult with Parliament. This includes regular appearances before the House of Commons Justice Select Committee. In addition to this, the work of the Council has also been open to further scrutiny in the form of a wide ranging sentencing debate in the House of Commons led by the Lord Chancellor and Secretary of State for Justice.

How the Sentencing Council works

The English model breaks the task of sentencing into component parts: determining the offence category, locating a sentence along the category range, considering reduction for a guilty plea, considering dangerous(ness), and considering totality, if relevant.

Figure 1: How the Council develops a guideline²⁷

Step 1 – Priorities
The Council identifies high priority work and research begins.
Step 2 – Research
Research is undertaken; policy and legal investigations are carried out; the approach is agreed and an initial draft is created.

²⁶ The information in this section is taken from the Council's website: <https://www.sentencingcouncil.org.uk/about-us/>

²⁷ Sentencing Council - About guidelines: <https://www.sentencingcouncil.org.uk/about-sentencing/about-guidelines/>

Step 3 – Approach
Council members discuss the draft guideline, refine the approach and agree on the broad structure and detail which will form the basis for consultation.
Step 4 – Consultation
The Council consults the statutory consultees, criminal justice professionals and wider public over a 12 week period. A draft resource assessment and an equality impact assessment are also produced.
Step 5 – Responses
The Council considers the responses to the consultation and develops a definitive version of the guideline.
Step 6 – Publication
The Council issues the definitive guideline and associated publications and supports training for sentencers where necessary.
Step 7 – Monitoring
The use of the guideline is monitored via the Crown Court Sentencing Survey.

Figure 2 (overleaf) provides an extract of the first step of the nine step process to be used by sentencers.

Figure 2: Extract showing step two of the guideline relating to dangerous dogs

STEP ONE Determining the offence category
In order to determine the category the court should assess culpability and harm . The court should determine the offence category with reference only to the factors in the tables below.
The level of culpability is determined by weighing up all the factors of the case. Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender's culpability.
CULPABILITY demonstrated by one or more of the following:
A – High culpability
Dog used as a weapon or to intimidate people
Dog known to be prohibited
Dog trained to be aggressive
Offender disqualified from owning a dog, or failed to respond to official warnings, or to comply with orders concerning the dog
B – Medium culpability
All other cases where characteristics for categories A or C are not present, and in particular:
Failure to respond to warnings or concerns expressed by others about the dog's behaviour
Failure to act on prior knowledge of the dog's aggressive behaviour
Lack of safety or control measures taken in situations where an incident could reasonably have been foreseen
Failure to intervene in the incident (where it would have been reasonable to do so)
Ill treatment or failure to ensure welfare needs of the dog (where connected to the offence and where not charged separately)
C – Lesser culpability
Attempts made to regain control of the dog and/or intervene
Provocation of the dog without fault of the offender
Evidence of safety or control measures having been taken
Incident could not have reasonably been foreseen by the offender
Momentary lapse of control/attention
HARM
There is no variation in the level of harm caused, as by definition the harm involved in an offence where a death is caused is always of the utmost seriousness.

Research and analysis

The Council has a statutory duty to undertake research and analysis to monitor the operation and effect of its guidelines. This includes:

- the frequency with which, and the extent to which, courts depart from sentencing guidelines;
- the factors which influence the sentences imposed by the courts;
- the effect of guidelines on the promotion of consistency in sentencing; and
- the effect of guidelines on the promotion of public confidence in the criminal justice system.

The Council has a statutory duty to produce a resource assessment for each of its guidelines which considers the likely effect of its guidelines on the resources required for the provision of prison places, probation and youth justice services. As

an example, figure 3 reproduces the Council's estimated resource implications for the importation of drugs²⁸.

Figure 3: extract from resource assessment for drugs guideline

<p>Importation</p> <p>5.6 The new guideline is expected to cause a reduction in the severity of sentencing for drug 'mules' that would fall into the 'lesser role' category of the guideline. The true proportion of these offenders is not known, but it is thought that between 10% and 30% of those sentenced would be categorized as drug 'mules' under the new guideline. Overall, around 590 adults are sentenced each year for importing drugs.</p> <p>5.7 Almost all sentences for importation are custodial, and no change is expected in the use of the various types of disposal for cases of importation.</p> <p>5.8 It is expected that the decrease in custodial sentence lengths amongst drug 'mules' would result in a requirement for between 30 and 150 fewer prison places per annum.</p> <p>5.9 This change is expected to result in an annual cost saving to the prison service of between £1m and £5m per annum and a small (<£0.1m) saving to the probation service per annum, due to changes in the length of time offenders spend on licence.</p>
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Crown Court Sentencing Survey

The Crown Court Sentencing Survey ran between 2010 and 2015 and captured data on the way that Crown Court judges sentence across England and Wales. The paper-based survey was completed by the sentencing judge (or other sentencer) passing sentence in the Crown Court. It collected information on the factors taken into account by the judge in working out the appropriate sentence for an offender and the final sentence given.

According to the Council:

The survey has contributed to work on a number of guidelines, including reviewing the reduction in sentence currently available for offenders who plead guilty by identifying the timing and location of any guilty plea. It is also used to produce estimates of the sentence before taking any guilty plea into account. This information is used to determine current sentencing practice before the guilty plea discount is applied and therefore appropriate guideline ranges²⁹.

²⁸ Sentencing Council: Final Resource Assessment – Guideline on Drugs

²⁹ Sentencing Council England Wales, Annual Report 2014-15

Starting point sentences in England and Wales

These are unique to the English guidelines and reflect many years of appellate jurisprudence (i.e. guidelines issued by the Court of Appeal) and provide a link between the new structure and what went before. They are deemed as surplus to requirements in jurisdictions where grid-based systems are prevalent.

Under the US grid-based guidelines, crime seriousness and criminal history comprise two dimensions and each cell of the two-dimensional matrix contains a range of sentence lengths. For example, in Minnesota, robbery carries a presumptive sentence length of between fifty and sixty-nine months for an offender with a single criminal-history point. With such narrow ranges of sentence length, starting points are presumably unnecessary and none are provided³⁰.

In England, due to the wider range of sentences, sentencers could enter the range at different starting points, leading to inconsistency.

Commentary on the work of the Council

The English judiciary was opposed to the introduction of a US-style system as it would have limited judicial discretion to too great an extent, so the current guidelines leave room for the application of judicial experience and expertise when sentencing. There is a counter-argument that the English guidelines are too ambiguous, lack precision and transparency and allow too much subjective interpretation³¹.

Research from 2013 examined the revised definitive assault guideline produced by the Sentencing Council in 2011. It recognised that the revised guideline represented a “significant improvement” over the previous guideline, but highlighted some flaws:

For instance, important terms remain undefined and open to subjective interpretation, the list of relevant aggravating and mitigating factors are non-exhaustive...The SC has not taken into account the difficulties decision-makers may have in weighing and integrating all the available and relevant information to make reliable and informed decisions.

The research went on to argue that:

...sentencing guidelines are not always successful in achieving the desired outcomes. For instance, research evaluating state sentencing guidelines in the United States suggests that although successful in reducing extra-legal disparity in sentencing in some jurisdictions, the guidelines have sharply increased such disparity in other jurisdictions. A fifteen-year review of the US

³⁰ Julian V. Roberts, ‘Sentencing Guidelines in England and Wales recent developments and emerging issues’ *Law and Contemporary Problems*, (2013) 76: 2-25

³¹ Mandeep K. Dhami, ‘Quasirational Models of Sentencing’, *Journal of Applied Research in Memory and Cognition*, (2015) 4: 239-247

federal sentencing guidelines concluded that there were both positive and negative outcomes associated with their use. The guidelines increased the transparency and predictability of sentencing and reduced inter-judge and regional disparities. However, the guidelines also reduced the use of simple probation while dramatically increasing the use and length of incarceration... Finally, the guidelines failed to eradicate some ethnicity, race and gender disparities in sentencing".³²

In England and Wales, the numbers of appeals against sentence from magistrates' court or the Crown Court have been... steady in recent years, and the number of applications to appeal against sentence to the Court of Appeal (Criminal Division) has been creeping slowly upwards³³.

This could be seen as a sign of the success of the guidelines as it is easier to see if a sentence is outside the 'normal' range.

Success of the guidelines

One way to measure the success or otherwise of the guidelines is to look at the extent to which courts have departed from them. This is measured by the rate of compliance with the guidelines or, the rate of departures³⁴. However, it has been contended that the wording of section 125(1) of the Coroners and Justice Act 2009 was too loose, allowing sentencers wide discretion despite the use of the term 'must follow'. Therefore, it seems likely that departures from the offence range will be very limited because the range is so broad: "The offence itself is broadly defined (the categories are more narrowly defined) and the range of penalty is correspondingly wide. This approach drastically weakens the significance of proportionality and may make it difficult for the public to make sense of the definition of consistency which the guideline puts into practice"³⁵.

Data published by the Sentencing Council as part of the Crown Court Survey show high levels of compliance with the guidelines:

Assault occasioning actual bodily harm: 96 per cent of sentences imposed fell within the guideline offence range, 1 per cent were above, and 2 per cent below the range. Causing grievous bodily harm/wounding with intent to do grievous bodily harm: 92 per cent within the range, 7 per cent above, and 1 per cent below the range... Common assault: 99 per cent were within the range and 1 per cent above.

³² Mandeep K. Dhami, 'Sentencing Guidelines in England and Wales: Missed Opportunities?', *Law and Contemporary Problems*, (2013) 76: 289-307

³³ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

³⁴ As above

³⁵ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

It has been suggested that the high levels of compliance rates can reflect a high degree of consistency in judicial sentencing practices. But as noted above it has also been argued that a closer examination of the data shows a relatively wide range of sentencing across a broadly defined offence classification:

How are the public meant to understand how a sentence at the top end of the range compares with a sentence at the bottom end?...Most guideline systems recognise that it is neither possible nor desirable to take account of every possible combination of relevant facts and circumstances and that there is an important place for judgement in sentencing. Many of the US guideline systems expect a higher rate of departures from their guidelines and accept this as an unexceptional and indeed desirable part of the guideline system. High rates of compliance may not necessarily generate a persuasive account of consistency³⁶.

Protection against punitive sentencing

It has been suggested that sentencing guidelines can act as a barrier to punitive sentencing that might arise from the wishes of the legislature, “where politicians sometimes introduce tough mandatory sentences that distort sentencing practices and undermine principles such as proportionality and restraint...it may also be the case that the judicial culture in some jurisdictions is more responsive to public pressure to get tough with offenders. Some researchers have argued that the courts in England have been influenced by a public desire to punish offenders more severely. People tend to underestimate the harshness of sentences handed down, perceiving that criminals tend to ‘get off lightly’”³⁷.

It has been argued that in the period from 1992 onwards, in Great Britain, there was a desire on the part of elected representatives to be seen to ‘give the public what they want’ in relation to criminal justice:

A good case can be made that in the 15-year period from 1992 British politicians used tough-talking penal rhetoric to ‘heat up’ the climate of opinion in which sentencers operated, and contributed substantially to the rapidly rising prison population at that time³⁸.

It is in this context – ‘tough on crime’ – that structured sentencing guidelines were developed in England and Wales. There are competing views about the desirability of incorporating public opinion into sentencing policy. There is an argument that because judgements about suitable punishments are intuitive rather than reasoned, the intuitions of the general public have no less value than those of the professionals³⁹:

³⁶ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

³⁷ As above

³⁸ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

³⁹ As above

It can be assumed with some confidence that if the judicial system loses its legitimacy in the eyes of the public, this will weaken public preparedness to cooperate with the authorities and to offer consent to the rule of law. The case has yet to be proven, however, that public support for sentencing outcomes is one of the building blocks of judicial legitimacy...A cautious policy implication to draw from this that guidelines should certainly aim to fall within the outer limits of public tolerance, but that a tight correspondence is not needed⁴⁰.

The English riots of 2011 – departures from the guidelines

The riots that took place in some English cities in August 2011 presented a challenge to the guidelines. Charges were laid for a wide range of offenses including burglary of a commercial property, receiving stolen goods, and theft⁴¹. A memo circulated by a legal advisor advised courts to depart from the sentencing guidelines, claiming that when the guidelines were drafted, nothing like the riots had been envisaged⁴².

This advice was put into practice in Manchester when the court stated that the guidelines could be properly departed from, given the seriousness of the offences and their context. The ‘Manchester guidelines’ were subsequently endorsed by other courts dealing with riot-related offences. This has been identified as problematic because:

- they were “created spontaneously by a group of trial judges without the imprimatur of the Court of Appeal or the statutory guidelines authority (the Sentencing Council)”
- Moreover, unlike the definitive guidelines which courts must follow, the Manchester guidelines were not developed after any systematic research, without a protracted public and professional consultation, and were not subject to any parliamentary scrutiny⁴³.

4 Scotland

The policy issue

The debate around sentencing in Scotland was more limited than in England, but a 2006 report identified several key issues were identified as needing to be addressed:

- such research evidence as does exist, limited though it is, supports the view that there is some inconsistency in sentencing in Scotland;

⁴⁰ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

⁴¹ Julian V. Roberts, ‘Sentencing Guidelines in England and Wales recent developments and emerging issues’ *Law and Contemporary Problems*, (2013) 76: 2-25

⁴² As above

⁴³ Julian V. Roberts, ‘Sentencing Guidelines in England and Wales recent developments and emerging issues’ *Law and Contemporary Problems*, (2013) 76: 2-25

- the experience of members of the Commission, including their consideration of the decisions and Opinions of the Criminal Appeal Court, and anecdotal evidence regularly encountered by them points to the occurrence of some inconsistency in sentencing in Scotland;
- the statutory powers of the High Court of Justiciary when dealing with appeals against sentence to issue 'guideline judgments', which were enacted in the Criminal Procedure (Scotland) Act 1995 ('the 1995 Act'), have been used only to a limited extent;
- given the limited natures of the existing mechanisms for promoting consistency of sentencing, it is not surprising if there is a measure of inconsistency in sentencing; and
- it is reasonable to conclude that if more were done to promote consistency in sentencing, greater consistency in sentencing would be achieved and would be capable of being demonstrated to have been achieved.

The response

In 2006 the judicially-led Sentencing Commission for Scotland produced a report *The Scope to Improve Consistency in Sentencing*. That report stated that: "While there is little research evidence measuring the extent to which there is inconsistency in sentencing in the courts in Scotland, there is a public perception that such inconsistency exists, and the Commission has concluded that that perception is in some measure well founded⁴⁴.

Under the Criminal Procedure (Scotland) Act 1995 the Appeal Court can issue guideline judgements, but the 2006 report from the Commission highlighted that the Court had made relatively little use of its powers. The report also noted that research on consistency/non-consistency in sentencing was virtually non-existent.

The Commission recommended the creation of an independent sentencing body.

Composition, functions and governance of the Scottish Sentencing Council

The Scottish Sentencing Council (SSC) was established in October 2015 under the Criminal Justice and Licensing (Scotland) Act 2010.

The SSC has a number of functions and statutory objectives. The functions include:

- Preparing sentencing guidelines for the Scottish Courts;
- Publishing guideline judgements issued by the Scottish Courts;
- Publishing information about sentences imposed by the courts

⁴⁴ The Sentencing Commission for Scotland, 'The Scope to Improve Consistency in Sentencing', 2006

The Council also has statutory objectives which it must seek to achieve when carrying out its functions:

- Promote consistency in sentencing practice;
- Assist the development of policy in relation to sentencing;
- Promote greater awareness and understanding of sentencing policy and practice⁴⁵.

Relationship with the courts

Guidelines prepared by the Council are considered by the High Court of Justiciary, Scotland's Supreme Court, which may approve them in whole or in part, with or without modifications. Guidelines do not have effect unless approved by the Court.

When sentencing an offender, a court must have regard to any sentencing guidelines which are applicable in relation to the case. If the court decides not to follow the guidelines it must state its reasons.

The Council must also prepare an assessment of the likely costs and benefits of implementing the guidelines and an assessment of the likely effect on the criminal justice system generally.

The Council is comprised of 12 members: six judicial (Lord Justice Clerk is the Chair), three legal members and three lay members (one constable and one person with knowledge of victims' issues).

Success or otherwise of the Council

Given its recent establishment, it is too early to gauge the effectiveness or otherwise of the Council.

5 Developments in the Republic of Ireland

The Republic of Ireland undertook a strategic review of penal policy with a report published in July 2014. A Working Group was established by the then Minister for Justice with a broad remit which encompassed an examination and analysis of sentencing policies.

The background to the review was the context of a growing prison population and substandard conditions in parts of the prison estate.

The report recommended that imprisonment be regarded as a sanction of last resort and that this principle be incorporated in statute.

⁴⁵ Scottish Sentencing Council website

The Working Group also addressed the issue of consistency in sentencing. It questioned the extent to which this was an issue outside of a few individual cases, but recognised that a lack of public awareness around general sentencing practice “does not assist in dispelling such perceptions”⁴⁶.

In addressing sentencing guidelines, the majority of the Group supported the view that the primary role of developing sentencing guidelines is the responsibility of the judiciary and not in detailed statutory based guidelines: “While a statutory framework undoubtedly supports consistency in sentencing, it does so at the potential cost of judicial discretion”⁴⁷.

The Group also referred to specific judgements from the Court of Criminal Appeal which “...address consistency in sentencing, acknowledging that due to the myriad of factors that can be considered in individual cases, a direct comparison is rarely feasible”⁴⁸. It also recommended that any concerns regarding consistency in sentencing should be the subject of a further review in three years’ time.

In 2014 the Court of Criminal Appeal indicated appropriate sentence ranges for the offence of causing serious harm and the illegal possession of firearms and ammunition.

In the latter case, the Court:

indicated relevant factors for assessing the seriousness of certain firearms offences and then held that for offences at the lower end of the scale, a sentence of five to seven years would be appropriate, with seven to 10 years for offences in the middle range and 10 to 14 years for those at the top of the range. (Under the current legislation, most of these offences attract a presumptive minimum sentence of five years, a factor which the court had to take into account)...The Court of Criminal Appeal Panel...stated that there is no reason why a sentencing judge cannot be told by the DPP how the case before them compares to previous cases in terms of severity...One of the motivations for this move was that the CCA felt it was unfair of the DPP to make appeals criticising a sentencers leniency when it had failed to state what it believed the punishment should be⁴⁹.

The Irish Penal Reform Trust (IPRT):

...has repeatedly called for the establishment of a Judicial Council that is empowered to develop and publish non-statutory sentencing guidelines reflecting the general aims of criminal sanctions and setting out the principles that should underpin sentencing, including the principle of imprisonment as a

⁴⁶ Report of the Working Group, ‘Strategic Review of Penal Policy’ (Republic of Ireland), July 2014

⁴⁷ As above

⁴⁸ Report of the Working Group, ‘Strategic Review of Penal Policy’ (Republic of Ireland), July 2014

⁴⁹ Irish Times, 31 March 2014: <http://www.irishtimes.com/news/crime-and-law/a-quiet-revolution-occurred-this-month-sentencing-guidelines-were-introduced-1.1741707>

last resort and the principle of proportionality between the sentence and the seriousness of the offence”⁵⁰.

6 Other common law jurisdictions

Canada

Although Canada does not have sentencing guidelines or a sentencing guidelines body, the Canadian Criminal Code makes provision for principles and purposes of sentencing and establishes mandatory minimum sentences of imprisonment. As with New Zealand, considerable background work was carried out in Canada on potential reform of the sentencing system, but was ultimately not proceeded with. The amendments made to the Criminal Code have been described as “chaotic, piecemeal and idiosyncratic...most of which have made sentencing more severe with no apparent beneficial effect in terms of more rational or principled sentencing”

The Canadian Criminal Code sets out a number of mandatory minimum sentences, which can be classified into four categories:

- mandatory life sentences for high treason, first degree and second degree murder;
- mandatory minimum sentences in offences involving firearms, trafficking and possession of weapons and living off the proceeds of child prostitution;
- repeat offenders; and
- hybrid offences which can proceed by way of summary or indictment. For summary offences, penalties are lower than an indictment, therefore there are no mandatory minimum sentences⁵¹.

In the 1980s, an independent royal commission of inquiry and later a parliamentary committee, both recommended the creation of a sentencing commission. The federal government decided not to act on the recommendations.

New Zealand

New Zealand travelled a considerable distance along the road of establishing a sentencing commission. The main driver behind this was a rising prison population and public dissatisfaction. The Law Commission was asked to consider improvements and it identified “a number of problems with the status quo, which involved empirically demonstrated inconsistency among sentencing judges and courts, the inherent limitations of relying solely on appellate guidance regarding sentencing practice, lack of

⁵⁰ Irish Penal Reform Trust Position Paper 3, ‘Mandatory Sentencing’, August 2013

⁵¹ RalSe paper: ‘Sentencing Guidelines Mechanisms in other Jurisdictions’, Northern Ireland Assembly, 2011

transparency, lack of public confidence, lack of legislative input, and little consideration of resource effectiveness”⁵².

The Law Commission recommended the creation of a sentencing council to address these issues and the Sentencing Council Act 2007 was intended to give effect to the Commission’s recommendations. The guidelines were to be subject to the ultimate control of Parliament in that they would come into effect unless disallowed by Parliament: “Presumptively binding, the guidelines allowed a range of sentences and were intended to be imposed unless the judge was satisfied that doing so would be contrary to the interests of justice”⁵³.

In 2008 a new Government was elected which indicated that it would not proceed with the guidelines.

Australia

There are sentencing councils operating in at least four Australian states. These are independent bodies that monitor and research sentencing issues and provide information that could assist judges, policymakers as well as informing the public.

Furthermore, “In addition to the councils, in some states judicial branch or related entities may publish information on sentencing with the aim of improving consistency and public confidence in the justice system...(However) the option of an independent entity setting standardised sentencing guidelines or grids for multiple offences has largely been rejected, due to the restrictions these would impose on judicial discretion...”⁵⁴.

7 United States

The United States provides an interesting perspective on sentencing guidelines. Its grid-based systems are distinct from the model used in England and Wales and it is unlikely there would be judicial acceptance of such an approach in the UK or Ireland.

The US provides numerous examples of rule-based sentencing guidelines, among them Minnesota, Kansas, North Carolina, Virginia, Oregon, which limit a sentencers’ ability to depart from prescribed sentences⁵⁵. There are also federal guidelines produced by the United States Sentencing Commission (USSC).

⁵² Sarah Krasnostein and Arie Freiberg, ‘Sentencing Guideline Schemes Across the United States and Beyond’, Oxford Handbooks Online, (2014)

⁵³ As above

⁵⁴ The Law Library of Congress, Sentencing Guidelines, April 2014

⁵⁵ Mandeep K. Dhami, ‘Quasirational Models of Sentencing’, *Journal of Applied Research in Memory and Cognition*, (2015) 4: 239-247

The policy issue

A fundamental driving force behind the introduction and development of sentencing guidelines in the US was widespread disparity in sentencing and later, the growth in prison populations, which reached “emergency”⁵⁶ levels in the 1980s and 1990s. For example, the USSC is required to develop guidelines that “minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons”⁵⁷.

The success of US guideline systems

How do grid-based systems work? Taking the Minnesota guidelines as an example, there are two axes – offence seriousness and the offender’s criminal history: “The point along the grid where these two dimensions intersect determines the range in which the sentence may fall. In order to reach this decision, first, the judge identifies the severity of the offence on a scale from 1 to 11, with 11 being the most severe, by consulting reference tables that list the severity assigned to each offence. For the majority of offences, there is no flexibility in the assignment of severity”⁵⁸.

Practice differs across the US states with regard to sentencing guidelines. The Minnesota model is perhaps the most widely-known, but this system is not replicated widely across the country. In Virginia, the system is advisory with no appellate review of trial court sentences, while the North Carolina guidelines are themselves mandatory statutes so that no penalties outside the guidelines grid are legally permissible⁵⁹.

Referring specifically to the federal guidelines, a recent article described them in the following terms:

The sentencing guidelines are essentially an algorithm. For each charge, the judge inputs the crime’s “input offense level” and makes adjustments based on factors like the defendant’s role in the crime, his acceptance of responsibility, and whether he had a gun. The resulting value, from one to 43, is the defendant’s “offense level”. The judge then uses a table to cross-reference the offense level with another number based on the defendant’s prior convictions. At the intersection of the offense level and criminal-history category, the judge finds the “guideline range”, an upper and lower sentencing limit. Some judges call this process “grid and bear it”⁶⁰.

There are perceived benefits to a grid-based approach to sentencing. It can:

reduce unwanted disparity by increasing uniformity (similar offenders committing similar offences are punished equivalently), and it supports a

⁵⁶ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

⁵⁷ United States Sentencing Commission, *Annual Report 2015*: <http://www.ussc.gov/about/2015-annual-report/annual-report-2015>

⁵⁸ Mandeep K. Dhali, ‘Quasirational Models of Sentencing’, *Journal of Applied Research in Memory and Cognition*, (2015) 4: 239-247

⁵⁹ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

⁶⁰ The Atlantic magazine, *One Judge Makes the Case for Judgment*, February 2016

consistent approach to proportionality (different offenders committing different offences receive appropriately different sentences). In addition, grid-based guidelines appear to be transparent and advocate certainty of outcome⁶¹.

But if mistakes are made early on in the process, such as about offence seriousness then these will have implications later on. The US approach has also been criticised for being too complex, particularly at the federal level, while it has been contended that this complexity has led to a lowering of the quality of judicial sentences and a demotivation and deskilling of judges⁶². Numerical, grid-based guidelines have also been criticised for being too rigid, mechanistic, restrictive and inflexible and the concept that “the characteristics of each offence and offender can be objectively measured, weighted and combined by some algorithmic formula is said to be dehumanising”⁶³.

⁶¹ Mandeep K. Dhami, ‘Quasirational Models of Sentencing’, *Journal of Applied Research in Memory and Cognition*, (2015) 4: 239-247

⁶² As above

⁶³ Mandeep K. Dhami, ‘Quasirational Models of Sentencing’, *Journal of Applied Research in Memory and Cognition*, (2015) 4: 239-247

Figure 4: Sentencing guidelines grid from Minnesota

Presumptive sentence lengths are in months. Italicized numbers within the grid denote the discretionary range within which a court may sentence without the sentence being deemed a departure. Offenders with stayed felony sentences may be subject to local confinement.

Severity level of conviction offense (Example offenses listed in italics)	Criminal history score							
	0	1	2	3	4	5	6 or more	
<i>Murder, 2nd degree (intentional murder; drive-by-shootings)</i>	11	306 <i>261-367</i>	326 <i>278-391</i>	346 <i>295-415</i>	366 <i>312-439</i>	386 <i>329-463</i>	406 <i>346-480²</i>	426 <i>363-480²</i>
<i>Murder, 3rd degree</i> <i>Murder, 2nd degree (unintentional murder)</i>	10	150 <i>128-180</i>	165 <i>141-198</i>	180 <i>153-216</i>	195 <i>166-234</i>	210 <i>179-252</i>	225 <i>192-270</i>	240 <i>204-288</i>
<i>Assault, 1st degree</i> <i>controlled substance crime, 1st degree</i>	9	86 <i>74-103</i>	98 <i>84-117</i>	110 <i>94-132</i>	122 <i>104-146</i>	134 <i>114-160</i>	146 <i>125-175</i>	158 <i>135-189</i>
<i>Aggravated robbery, 1st degree</i> <i>controlled substance crime, 2nd degree</i>	8	48 <i>41-57</i>	58 <i>50-69</i>	68 <i>58-81</i>	78 <i>67-93</i>	88 <i>75-105</i>	98 <i>84-117</i>	108 <i>92-129</i>
<i>Felony DWI</i>	7	36	42	48	54 <i>46-64</i>	60 <i>51-72</i>	66 <i>57-79</i>	72 <i>62-84²</i>
<i>Controlled substance crime, 3rd degree</i>	6	21	27	33	39 <i>34-46</i>	45 <i>39-54</i>	51 <i>44-61</i>	57 <i>49-68</i>
<i>Residential burglary</i> <i>simple robbery</i>	5	18	23	28	33 <i>29-39</i>	38 <i>33-45</i>	43 <i>37-51</i>	48 <i>41-57</i>
<i>Nonresidential burglary</i>	4	12 ¹	15	18	21	24 <i>21-28</i>	27 <i>23-32</i>	30 <i>26-36</i>
<i>Theft crimes (over \$5,000)</i>	3	12 ¹	13	15	17	19 <i>17-22</i>	21 <i>18-25</i>	23 <i>20-27</i>
<i>Theft crimes (\$5,000 or less)</i> <i>check forgery (\$251-\$2,500)</i>	2	12 ¹	12 ¹	13	15	17	19	21 <i>18-25</i>
<i>Sale of simulated</i> <i>controlled substance</i>	1	12 ¹	12 ¹	12 ¹	13	15	17	19 <i>17-22</i>

- Presumptive commitment to state imprisonment. First-degree murder has a mandatory life sentence and is excluded from the guidelines under minn. stat. § 609.185. See guidelines section 2.E. Mandatory sentences, for policies regarding those sentences controlled by law.
- Presumptive stayed sentence; at the discretion of the court, up to one year of confinement and other non-jail sanctions can be imposed as conditions of probation. However, certain offenses in the shaded area of the grid always carry a presumptive commitment to state prison. Guidelines sections 2.C. presumptive sentence and 2.E. mandatory sentences.

¹12¹ = One year and one day

²Minn.stat § 244.09 requires that the guidelines provide a range for sentences that are presumptive commitment to state imprisonment of 15% lower and 20% higher than the fixed duration displayed, provided that the minimum sentence is not less than one year and one day and the maximum sentence is not more than the statutory maximum. Guidelines section 2.C.1-2. Presumptive sentence.

The model used in some US States place significant compliance requirements on sentencers. For example, in Minnesota, the “sentencing judge must find, and record, ‘substantial and compelling’ reasons why the presumptive guidelines sentence would be too high or too low in a given case”. The manual accompanying the Minnesota guidelines states that “the purposes of the Guidelines cannot be achieved unless the presumptive sentences are applied with a high degree of regularity. Sentencing disparity cannot be reduced if courts depart from the Guidelines frequently, certainty in sentencing cannot be attained if departure rates are high”⁶⁴.

In 2005, the Supreme Court ruled that as long as the guidelines issued by the USSC (at the federal level) were considered mandatory, they were unconstitutional. But it

⁶⁴ Manual accompanying Minnesota guidelines

ruled that the guidelines could stand as long as they were advisory and judges could depart at will and provide a good reason for doing so. Around 200 judges wrote opinions arguing that the guidelines were unconstitutional, but the Supreme Court overruled all objections in 1989. In spite of objections, there appears to be an increasing acceptance with the guidelines, particularly among judges who started their careers after the introduction of the guidelines.

Yet data from the USSC shows that judges are exercising discretion, with fewer than half (47%) of sentences falling within the guidelines range. Just over half (51%) fell below the guidelines. Among these figures are huge regional variations⁶⁵.

Impact on prison population - US

It is perhaps not surprising that the US had to find innovative methods to reduce its burgeoning prison population, but the methods employed by the states have not always been used to exert a downward trend:

Minnesota is representative. In some years the legislature has ordered the sentencing commission to increase penalties for designated offence categories – often in response to high-profile crimes – and the guidelines have been effective in implementing such policy changes. In other years, however, the guidelines have been allowed to operate quietly to hold back prison expansion, and cost projections by the sentencing commission have often been instrumental in the defeat or softening of proposed tough-on-crime legislation⁶⁶.

Nevertheless, there is evidence that state sentencing guidelines schemes are linked to lower rates of prison growth than other types of sentencing systems. Minnesota's prison rate (185 per 100,000) is the second lowest in the US and about one-fifth of the highest incarceration state, Louisiana (867 per 100,000). It has also been pointed out though that such schemes came too late to reverse the overall trend in America of a rising prison population.

8 Issues for consideration

There are competing views on the effectiveness and desirability of sentencing guidelines and it is difficult to draw definitive conclusions about which model works best.

It can be said that there is a tendency among jurisdictions comparable to Northern Ireland to at least explore the possibility of establishing a structured framework to assist

⁶⁵ The Atlantic magazine, *One Judge Makes the Case for Judgment*, February 2016

⁶⁶ Andrew Ashworth and Julian V. Roberts (eds) *Sentencing guidelines: Exploring the English model*, 2013

in sentencing. England and Wales and Scotland have established sentencing councils with a remit not just to develop, draft and disseminate guidelines, but to monitor their impact and undertake detailed research and analysis. Other relevant jurisdictions such as New Zealand and Canada have taken significant steps towards a model similar to those operating in Great Britain, but in both jurisdictions political decisions were taken not to advance with the proposals.

The United States, at both the federal and state level, provides examples of grid-based sentencing models, as opposed to the narrative-style guidelines used in Great Britain. In the United States, the key drivers behind the introduction of guidelines were sentencing disparities and a growing prison population that was reaching emergency levels in the 1980s. There is a mixed picture when assessing the impact of the guidelines on prison numbers.

There are a number of issues that arise when addressing the issue of sentencing guidelines and the Committee may wish to consider these in their deliberations:

- Why is there a perceived need for reform? Is it related to the prison population or are there broader concerns about inconsistencies in sentencing?
- Is there a lack of public confidence in sentencing?
- What is it hoped the guidelines will achieve that is not already being done?

9 Other issues

This section comments on specific crimes identified in the Terms of Reference to the Sentencing Policy Review. It begins with a general discussion on the role of deterrence in sentencing.

The role of deterrence in sentencing

Historically, punishment meant retribution and deterrence, with the concept of rehabilitation eventually challenging this. In countries such as the UK, New Zealand and Australia, sentences are imposed for the purposes of “punishment...denunciation, rehabilitation, community protection and deterrence or any combination of two or more of those purposes”⁶⁷.

There are two aspects to deterrence: general and specific. General deterrence aims to reduce crime by imposing a sentence that will induce other persons who might be tempted to commit crime to desist out of fear of the penalty.

⁶⁷ Kate Warner, ‘Theories of sentencing: punishment and the deterrent value of sentencing’, academic conference in Canberra, February 2014

Specific deterrence aims to impose a sentence that is sufficient to dissuade the convicted offender from reoffending.

Many reviews of the deterrence literature purport to summarise large numbers of studies and draw general conclusions from them about the relationship between sentence severity and crime levels. The majority of these reviews do not support the claim that harsher sentences deter.

One problem with deterrence theory is that it assumes that people act rationally and “consider the consequences of their behaviour before deciding to commit a crime; however, this is often not the case”⁶⁸. Research from the United States highlighted that half of all state prisoners were under the influence of drugs or alcohol at the time of their arrest and were therefore unlikely to weigh up the pros and cons of their actions.

Another factor limiting the effectiveness of deterrence is the fact that most crimes do not result in arrest and conviction, so the certainty of punishment is reduced. The research pointed to the fact that the overall conclusion of research across countries into deterrence is that “enhancing the certainty of punishment produces a stronger deterrent effect than increasing the severity of punishment”⁶⁹.

Work undertaken to compare crime and punishment trends in the US, England and Sweden failed to find an effect for severity.

The fundamental question around deterrence is *Do more severe sentences increase public safety?* In theory, locking people up for longer periods should make the public safer. It takes offenders off the streets and deters would-be offenders from committing crimes. But this is not supported by evidence.

A study from 1999 reviewed 50 studies dating back to 1958 involving over 330,000 offenders with various offenses and criminal histories. The study found that longer prison sentences were associated with a 3% increase in recidivism⁷⁰.

Other studies have shown that “when prisoners serve longer sentences they are more likely to become institutionalised, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism”⁷¹.

It has been argued that “sentencing has limited impact on crime rates. Indeed, punishment may work against rehabilitation or reform; and offenders are not deterred by serious sentences unless they think they will be caught and prosecuted”⁷².

⁶⁸ Valerie Wright, ‘Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment’ published by The Sentencing Project, November 2010

⁶⁹ As above

⁷⁰ Valerie Wright, ‘Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment’ published by The Sentencing Project, November 2010

⁷¹ As above

⁷² Valerie Wright, ‘Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment’ published by The Sentencing Project, November 2010

Unduly lenient sentences

In Northern Ireland, the Director of Public Prosecutions has the power to ask the Court of Appeal to review a sentence on the grounds that it is unduly lenient. An application to review a sentence must be made within 28 days from the day when the sentence was imposed. If the Court of Appeal agrees that the sentence was unduly lenient it may increase the sentence.

Definition of unduly lenient

The Court of Appeal has held that an unduly lenient sentence is one that falls outside the range of sentence that a judge, taking into consideration all relevant factors, and having regard to sentencing guidance, could reasonably consider appropriate. Therefore, the sentence must not just be lenient, but must be **unduly** lenient.

Types of offences that can be reviewed

The sentence imposed must be for one of the following offences:

- more serious offences that can be dealt with only in the Crown Court, such as murder, rape and dangerous driving causing death;
- certain sex offences;
- child cruelty;
- threats to kill;
- certain serious frauds;
- certain drugs offences; and
- conspiring, attempting or inciting any of these offences.

In addition, the Criminal Justice Act 1988 (Review of Sentencing) Order (Northern Ireland) 2016 added to the list, including offences involving animal cruelty, harmful disposal of waste, indecent images of children and bodily injury with or without a weapon⁷³.

In the Court of Appeal hearing [2014] NICA 6, the Appeal judges made reference to the observations of Lord Lane CJ in Attorney General's Reference (No 4 of 1989), adopted by Hutton LCJ in Attorney General's Reference (No 1 of 1989) [1989] NI 245:

The first thing to be observed was that it is implicit in the section that this court may only increase sentences which it concludes were unduly lenient.

It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that that naturally gave rise to – merely because in the opinion of this court the sentence was less than this court would have imposed.

⁷³ Criminal Justice Act 1988 (Review of Sentencing) Order (Northern Ireland) 2016

A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.

In that connection, regard must of course be had to reported cases and in particular to the guidance given by this court from time to time in the so-called guideline cases.

However, it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature.”

We would also refer to the words of Carswell LCJ in Attorney General’s Reference (Nos 2, 6, 7 and 8) [2004] NI 50 when, after referring to guideline schemes of sentencing, he went on to observe that:

“We would, however, remind sentencers of the importance of looking at the individual features of each case and the need to observe a degree of flexibility rather than adopting a mechanistic type of approach. If they bear this in mind, they will in our view be able to maintain a desirable level of consistency between cases, while doing justice to the infinite variety of circumstances with which they have to deal.”

Crimes against older and vulnerable people

The issue of crimes against older and vulnerable people was raised during the passage of the Justice Bill 2015. An amendment was brought that would have introduced a mandatory minimum sentence of seven years for a violent offence against a person aged 65 and over. A Petition of Concern was tabled against the amendment and it subsequently did not become part of the Bill⁷⁴.

The Judicial Sentencing Working Group convened by the Lord Chief Justice identified attacks on older and vulnerable people as an area in particular need of review. Guidelines produced by the Judicial Studies Board of Northern Ireland state that the vulnerability of the victim is an aggravating factor in certain crimes, for example assault occasioning actual bodily harm, common assault, threats to kill and wounding/inflicting grievous bodily harm⁷⁵.

Specifically, in relation to attacks on the elderly, judgement in a Court of Appeal case delivered in January 2015 stated that: “Whilst this (a 10 year custodial sentence) does constitute a stiff sentence and is probably at the higher end of the appropriate bracket, nonetheless we do not consider it to be manifestly excessive or wrong in principle in a case of this despicable nature where deterrence and the need to protect the elderly and infirm are highly relevant components”⁷⁶.

⁷⁴ See the Official Report for text of the amendment and debate:

<http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2015/06/16&docID=238200>

⁷⁵ See guidelines under ‘Assault Offences’ at: <http://www.jsbni.com/Publications/sentencing-guides-magistrates-court/Pages/default.aspx>

⁷⁶ [2015] NICA 4 available at: http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/%5b2015%5d%20NICA%204/j_j_GIL9477Final.htm

US Federal Sentencing Guidelines

The United States Sentencing Commission has made provision to increase sentences for crimes committed against vulnerable people. A vulnerable person is defined as someone who is “unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct”⁷⁷.

England and Wales

The Crown Prosecution Service (CPS) advises that: “There is no statutory definition of a crime against an older person, and no general statutory offence of neglect of an older person”⁷⁸. However, the CPS recognises that older people (which is defined as age 60 or older) may be targeted due to their perceived vulnerability. Courts have taken into consideration the age of victims when handing down sentences⁷⁹.

Causing death by dangerous driving

The Road Traffic (Northern Ireland) Order 1995 is the relevant legislation in respect of offences due to dangerous driving. The purpose of the 1995 Order was to harmonise Northern Ireland’s road safety traffic laws with those in force under the Road Traffic Act 1988 in Great Britain.

A person who causes the death of, or grievous bodily injury to, another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence under article 9 of the 1995 Order⁸⁰.

Article 14 of the 1995 Order also introduced a new offence of causing death or grievous bodily injury by careless driving while under the influence of drink or drugs. For this offence, the penalty was also a maximum 10 years’ imprisonment or an unlimited fine, or both.

The Criminal Justice Act 2003 increased the maximum sentence for death by dangerous driving from 10 years to 14 years⁸¹. The same legislation also increased the penalty for the same offence in Great Britain to 14 years.

The 2003 Act also increased the maximum penalty for an offence under Article 14 of the 1995 Order to 14 years.

The Public Prosecution Service (PPS) indicates that because offences under Article 9 (causing death by dangerous driving) and Article 14 (causing death, or grievous bodily injury, by careless driving when under influence of drink or drugs) of the 1995 Order

⁷⁷ United States Sentencing Guidelines manual: <http://www.ussc.gov/guidelines/2015-guidelines-manual/archive/2011-3a11>

⁷⁸ Crown Prosecution Service: *Public Policy Statement: Prosecuting Crimes against Older People*, 2008

⁷⁹ See for example the cases referenced at:

http://www.cps.gov.uk/legal/p_to_r/prosecuting_crimes_against_older_people/#relevance

⁸⁰ Section 9, Road Traffic (Northern Ireland) Order 1995

⁸¹ Section 285 of the Criminal Justice Act 2003.

carry the same maximum penalty, the choice of charge will not inhibit the court's sentencing powers⁸².

The court will sentence an offender in proportion to his criminality. The consumption of alcohol is an aggravating feature within the meaning of Article 14. The PPS states that while it is not part of the definition of Article 9, it may be treated as an aggravating feature, increasing the criminality of the offender and therefore the sentence passed⁸³.

The guideline indicates that for the most serious offences covering driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others, the sentencing range is between seven and 14 years, with a starting point of eight years' custody⁸⁴. There is a driving offence of gross negligence manslaughter which requires the prosecution to prove the following five points:

- The suspect owed the deceased a duty of care;
- The suspect was in breach of that duty;
- The suspect caused the death of the deceased;
- The driving fell far below the minimum acceptable standard of driving such that there was an obvious and serious risk of death; and
- The conduct of the suspect was so bad in all the circumstances as, in the opinion of the jury, to amount to a crime (R v Adomako [1993] 3 All ER 79)⁸⁵.

Sentencing Reform in England and Wales

In May 2014, the then Justice Secretary, Chris Grayling, announced his intention to launch a full review of all driving offences and penalties, to ensure people who endanger lives and public safety are properly punished⁸⁶. It does not appear that this has been progressed.

In October 2015, the Justice Minister, Andrew Selous, said: "Driving offences can have devastating consequences for victims and their loved ones, which is why tough sentences are available to the courts. The previous Secretary of State established a review of these issues. Ministers will consider any findings and set out their position in due course"⁸⁷.

⁸² Public Prosecution Service (2010) *Road Traffic Policy*. Available from: <http://www.ppsni.gov.uk/SiteDocuments/PPS%20Press%20Office/PPSNI%20TRAFFIC.pdf> p.11.

⁸³ As above.

⁸⁴ Sentencing Guidelines Council (2008) *Causing death by driving: definitive guideline*. Available from: http://www.sentencingcouncil.org.uk/wp-content/uploads/web_causing_death_by_driving_definitive_guideline.pdf

⁸⁵ http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_guidance_on_prosecuting_cases_of_bad_driving/

⁸⁶ Ministry of Justice (2014) *Justice for victims of banned drivers* Available from: <https://www.gov.uk/government/news/justice-for-victims-of-banned-drivers>

⁸⁷ House of Commons (2015) *Serious driving offences* Available from: <http://researchbriefings.files.parliament.uk/documents/SN01496/SN01496.pdf>

Provisions for further reform were anticipated to be included in the Queen's Speech to Parliament in May 2016, but were not.

Drivers who are intoxicated through excess drink or drugs may be temporarily unable to consider the pros and cons of their actions. If this is the case, it is unlikely they will be deterred by either the certainty or severity of being punished⁸⁸.

Hate crime

England and Wales

In England and Wales, Sections 29 to 32 of the Crime and Disorder Act 1998 create specific racially or religiously aggravated offences, which have higher maximum penalties than the non-aggravated versions of those offences. The individual offence guidelines indicate whether there is a specifically aggravated form of the offence.

An offence is racially or religiously aggravated for the purposes of sections 29-32 of the Act if the offender demonstrates hostility towards the victim based on his or her membership (or presumed membership) of a racial or religious group, or if the offence is racially or religiously motivated.⁸⁹

The enhanced sentencing provisions are provided for by Sections 145 and 146 of the Criminal Justice Act 2003. Section 145 requires the courts to consider racial or religious hostility as an aggravating factor when deciding on the sentence for any offence (which has not been identified as a racially or religiously aggravated offence as outlined above).

Section 146 has the same effect for sexual orientation, disability or transgender. In cases where the prosecution is able to prove that the offender was motivated by hostility towards a person's (actual or perceived) race, religion, sexual orientation, disability or transgender identity the court must treat that fact as an aggravating factor⁹⁰.

The Sentencing Council has produced the following information to assist sentencers with hate crimes:

When sentencing any offence where such aggravation is found to be present, the following approach should be followed. This applies both to the specific racially or religiously aggravated offences under the Crime and Disorder Act 1998 and to offences which are regarded as aggravated under section 145 or 146 of the Criminal Justice Act 2003:

⁸⁸ Valerie Wright, 'Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment' published by The Sentencing Project, November 2010

⁸⁹ Information taken from the website of the Sentencing Council: <https://www.sentencingcouncil.org.uk/explanatory-material/item/hate-crime/1-racial-or-religious-aggravation-statutory-provisions/>

⁹⁰ Information taken from the Home Office publication: *Action Against Hate: The UK Government's plan for tackling hate crime* July 2016

- sentencers should first determine the appropriate sentence, leaving aside the element of aggravation related to race, religion, disability, sexual orientation or transgender identity but taking into account all other aggravating or mitigating factors;
- the sentence should then be increased to take account of the aggravation related to race, religion, disability, sexual orientation or transgender identity;
- the increase may mean that a more onerous penalty of the same type is appropriate, or that the threshold for a more severe type of sentence is passed;
- the sentencer must state in open court that the offence was aggravated by reason of race, religion, disability, sexual orientation or transgender identity;
- the sentencer should state what the sentence would have been without that element of aggravation⁹¹.

Republic of Ireland

It has been claimed that the Republic of Ireland is the only western democracy without specific hate crime legislation and that this position places it in breach of various European and international obligations⁹².

A detailed report published by the University of Limerick and a NGO Working Group on hate crime made proposals for new legislation in this area. Some of the key points from the report are summarised below:

- The Irish State has yet to criminalise the hate element of crime, citing as reasons for its inaction: **1.** Generic criminal offences are sufficient to combat hate crime **2.** The courts consider racist and xenophobic motivations at sentencing; **3.** Introducing aggravated sentencing provisions would have broader ramifications for the criminal law, including a restructuring of penalties for basic offences; **4.** The criminal law would in any event be insufficient to challenge hate crime which requires a broader educative measure to combat.
- If the State's assertion that judges reflect a hate motivation through an aggravated sentence is correct, then judges must necessarily be made aware of the hate element during the course of a hearing, a trial or a guilty plea. (The report's) findings show, however, that the hate aspect of an offence will often be 'disappeared' from proceedings, meaning that the court will never be made aware of the bias element to the crime. This 'disappearing' element occurs in three ways: first, where it is pleaded out; second, where it is deemed

⁹¹ Sentencing Council, 'Hate Crime: Approach to Sentencing': <https://www.sentencingcouncil.org.uk/explanatory-material/item/hate-crime/3-approach-to-sentencing/>

⁹² Irish Examiner 'Fight against hate crime must continue', 22 July 2015: <http://www.irishexaminer.com/viewpoints/analysis/fight-against-hate-crime-must-continue-343792.html>

inadmissible; and finally, where the hate element is ‘coded’ during the course of the trial.

- In a recent judgment from the Court of Appeal, (the judge) observed that in sentencing the appellant for a section 3 assault, the sentencing court had imposed the maximum sentence of five years’ imprisonment, noting that the racist element to the attack was an aggravating factor. In assessing whether the sentence imposed was appropriate, (the judge) discussed the aggravating factors: “Among the very many aggravating factors present were that there was a racist dimension, an aspect that was very properly highlighted by the Circuit Court judge. It may be that as counsel for the appellant said that this was not the case where someone was attacked because of their race, but that there was a racist dimension is nonetheless clear and that is an aggravated fact.” The Court of Appeal did suspend the final twelve months of the sentence.
- Using enhanced sentencing provisions, (the report) proposes to encourage judges to reflect upon the hate element of a standard crime at the point of sentencing. It is not feasible within the Irish criminal justice system to require judges to treat a hate element as an aggravating factor, but this provision will encourage them to at least give consideration as to whether the present of a hate element might merit such a response. At present it is entirely at the discretion of the judge as to whether they give it attention or not.

On 21 July 2016 a Private Members’ Bill was introduced which aims to: “make provision for aggravation by prejudice of offences in circumstances where an offence, at the time of commission, is accompanied by prejudice relating to the race, colour or ethnic origin, a disability, sexual orientation or transgender identity of a person and to provide for related matters”⁹³. It would place a duty on a court, on conviction, to:

- (a) state that the offence is aggravated by prejudice relating to race, colour or ethnic origin,
- (b) record the conviction in a manner that demonstrates that the offence is so aggravated,
- (c) take said aggravation into account when determining sentence, and
- (d) where the sentence in respect of the offence is different from that which the court would have imposed if said offence was not aggravated, state the extent of and the reasons for that difference⁹⁴.

Scotland

The Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012 criminalises behaviour which is threatening, hateful or otherwise offensive at a

⁹³ Criminal Justice (Aggravation by Prejudice) Bill 2016

⁹⁴ As above

regulated football match including offensive singing or chanting. It also criminalises the communication of threats of serious violence and threats intended to incite religious hatred, whether sent through the post or posted on the internet⁹⁵.

The Offences (Aggravation by Prejudice) (Scotland) Act 2009 provides for statutory aggravations for crimes motivated by malice and ill will towards an individual based on their sexual orientation, transgender identity or disability. Where offences are proven to be as a result of such malice or ill-will, the court must take that into account when determining sentence. The Criminal Justice and Licensing (Scotland) Act 2010 further strengthened statutory aggravations for racial and religiously motivated crimes. The Explanatory Notes to the 2009 Act state:

This Act makes provision for the prejudicial context (i.e. either the motivation or the demonstration of malice or ill will) of an offence to be taken into consideration when an offender is sentenced when that prejudicial context has been one of hatred towards persons within certain groups.

The Act provides for new statutory aggravations which may be applied in cases where there is evidence that a crime has been motivated by malice and ill-will based on the victim's actual or presumed sexual orientation, transgender identity or disability. The aggravations also cover situations where an offender demonstrates malice and ill-will towards a relevant societal group as a whole, without the need for an individual victim to be identified.

Where aggravations are proven, the court must take that motivation into account when determining sentence. However, the ultimate discretion of the court to impose a sentence is not affected. In some cases this may well lead to a different sentence (e.g. a longer period of custody, a higher fine or an appropriate community disposal) than might have been the case if the offence was not so aggravated. In other cases, an aggravating factor may not have any bearing on sentence⁹⁶.

Offences against those providing a public service

In England and Wales there is no separate offence for assaulting a public servant or emergency worker, although there are offences of obstructing or hindering emergency workers under the Emergency Workers (Obstruction) Act 2006⁹⁷.

In its sentencing guideline on assault, the Sentencing Council lists "Offence committed against those working in the public sector or providing a service to the public" as an

⁹⁵ Charges under the 'Offensive Behaviour at Football and Threatening Communications (Scotland) act 2012' in 2015-16: <http://www.gov.scot/Publications/2016/06/5808/2>

⁹⁶ Explanatory Notes to the Offences (Aggravation by Prejudice) (Scotland) Act 2009: <http://www.legislation.gov.uk/asp/2009/8/notes>

⁹⁷ Crown Prosecution Service, 'Offences against the Person, incorporating the Charging Standard' http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/

aggravating factor. This reflected in sentencing practice in cases involving assaults on, for example, doctors and paramedics:

- R v Eastwood [2002] 2 Cr. App. R. (S) 72 (at 318) - the appellant was drunk and in A&E when he assaulted a nurse during the course of an X-ray. The nurse suffered torn ligaments in her hand, and he was charged with ABH. The Court found that in such circumstances, the starting point after trial was between 21 - 24 months' imprisonment with a sentence of 15 months' imprisonment suitable after guilty plea.
- R v McDermott (Victor) [2006] EWCA Crim 1899 - assault occasioning actual bodily harm carried out on a member of an ambulance crew. Appellant was attended to by an ambulance crew when found lying in the road and was verbally abusive to the crew who sat him on the ambulance step. He stood up and punched one of the crew in the head, causing his ear drum to rupture. Appellant was drunk at the time and had previous convictions for drink-related offences, including ABH and criminal damage. Appeal against length of the sentence was dismissed - assaults on medical staff and ambulance personnel would frequently merit a custodial term. There had been no personal reason for the assault, alcohol was an aggravating, not a mitigating feature. 15 months' imprisonment was appropriate in all the circumstances⁹⁸.

Several Australian territories have moved to introduce tougher sentences for attacks on medical staff and other public sector workers. The Sentencing Amendment (Emergency Workers) Bill was introduced in Victoria to provide a statutory minimum sentence for assaults on emergency workers, including nurses, doctors and any other healthcare workers who provide emergency care. This was then swiftly followed by further legislation to recognise that attacks against health practitioners occur in a range of settings, not just in emergency departments, and to therefore amend the previous legislation to take account of this too⁹⁹. The assault of an emergency worker carries a minimum of three years in jail and the murder of a police officer an average of 30 years.

In Queensland, legislation was introduced which allows for a sentence of up to 14 years for assaults on emergency workers.

Some US states have introduced similar legislation.

Community sentences

Community sentences are one of the four options available to courts in the UK, the others being custodial sentences; fines and discharges. Courts should not pass custodial sentences unless the court is of the opinion "that the offence (or combination

⁹⁸ See: http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/

⁹⁹ Queensland Introduces Law to Protect Health Workers: <http://www.safecard.com.au/news/819-queensland-introduces-law-to-protect-health-workers>

of offences) is: ‘so serious that neither a fine alone nor a community sentence can be justified’.¹⁰⁰

In the UK, as in other countries, community sentences are viewed as a way of keeping the prison population from growing, particularly in relation to short prison sentences that are not cost-effective and lead to higher re-conviction rates. Nevertheless, research shows that “between 1995 and 2009 the number of people imprisoned in England and Wales for failing to comply with a community sentence grew by 470%”¹⁰¹.

Community sentences are known by various names across the UK:

- England and Wales: Community Orders – include a menu of possible requirements such as community payback, probation supervision and rehabilitation activities
- Scotland: Community Payback Orders; Drug Treatment and Testing Orders; Restriction of Liberty Orders
- Northern Ireland: Probation Order; Community Service Order; Combination Order; Supervised Activity Orders¹⁰².

Despite one of their intended aims being a reduction in the prison population, there is little evidence that this has been the case. Research has identified that one reason for this as being a “decrease in the use of fines in favour of community sentences and concluded that there had been an ‘upwards drift in severity’ of sentences for certain types of offence”¹⁰³.

There has been legislative change to allow courts to avoid a resort to custody where a community sentence has been breached, but it will take time to see whether this has had any impact.

The research from the Centre for Crime and Justice Studies also highlighted the potentially stigmatising nature of certain aspects of community sentences in England and Wales, such as unpaid work and tagging. It questioned the rehabilitative value of cleaning graffiti or removing rubbish and pointed to the fact that offenders are required to wear high-visibility jackets that clearly state they are carrying out community payback. The rules relating to such schemes state that they are required to comply with health and safety measures and are not worn to stigmatise¹⁰⁴.

Life sentences

¹⁰⁰ Centre for Crime and Justice Studies, *Community sentences since 2000: How they work – and why they have not prisoner numbers*, 2015, p.12

¹⁰¹ As above, p.13

¹⁰² Centre for Crime and Justice Studies, *Community sentences since 2000: How they work – and why they have not prisoner numbers*, 2015, p.13

¹⁰³ As above, p.16

¹⁰⁴ Centre for Crime and Justice Studies, *Community sentences since 2000: How they work – and why they have not prisoner numbers*, 2015, P.17

England and Wales

Murder carries a mandatory sentence of life imprisonment under the Murder (Abolition of Death Penalty) Act 1965. The majority of offenders convicted of murder will not spend the rest of their lives in prison, but they will be on licence until they die. The court sets a minimum term, the 'tariff', for each offender who is sentenced to life¹⁰⁵.

Until 2003, the Home Secretary set the minimum term for mandatory lifers following recommendations made by the trial judge and Lord Chief Justice. These powers were removed and minimum terms are now set by the Courts under the Criminal Justice Act 2003.

Murder is the only offence for which the penalty is set by legislation and this has led to some criticism:

The existence of the fixed penalty for murder is clearly anomalous in our sentencing system...The sentence can be attacked on the basis that, at least on the face of it, it permits no judicial discretion in the sentencing of a crime where offender culpability can vary considerably, and where that ought to be reflected in the sentence passed by the court.¹⁰⁶

This is offset somewhat by the responsibility of the judge to set a tariff. In addition, the 2003 Act specifies starting points which will inform the selection of the tariff. The starting points are: whole life; 30 years; 25 years; 15 years and 12 years¹⁰⁷. Section 27 of the Criminal Justice and Courts Act 2015 increased the starting point for murder of a police officer or prison officer from 30 years to whole life.

Republic of Ireland

In the Republic of Ireland, there is a mandatory sentence of 40 years for the murder of a police officer or prison officer. Section 3 of the Criminal Justice Act 1990, which makes special provision in relation to certain murders and attempts to commit any such murders, applies to:

- a. The murder of a member of the Garda Síochána acting in the course of his duty;
- b. The murder of a prison officer acting in the course of his duty;
- c. Murder done on the furtherance of an offence or activities of an unlawful organisation under certain provisions of the Offences Against the State Act 1939;
- d. Murder committed within the state for a political motive of the head of a foreign state, member of government or a diplomatic officer, of a foreign state.

Section 4 of the 1990 Act provides for a minimum period of imprisonment for persons, other than a child or young person, in cases to which section 3 applies. The minimum

¹⁰⁵ House of Commons Library, *Mandatory life sentences for murder*, November 2015.

¹⁰⁶ Martin Wasik, *A Practical Approach to Sentencing: Fifth Edition*, Oxford University Press, 2014, pp. 122-123

¹⁰⁷ Criminal Justice Act 2003

periods are 40 years for murder or treason and 20 years for attempts to commit murder.

Scotland

Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993 as amended, provides that the sentencing court must specify the punishment part to be served by the court to satisfy the requirements of retribution and deterrence.¹⁰⁸ Superior courts in Scotland provided guidance on the calculation of the punishment part of life sentence.¹⁰⁹ The case of HM Advocate and Boyle v Others provides that certain murder cases might be of such gravity - for example, where the victim is a child or where the victim was a police officer acting on the execution of his duty, or where a firearm was used - that the punishment should be fixed in the region of 20 years.¹¹⁰ The Court suggested that there may be cases where a punishment of thirty years or more is appropriate for example in mass murder by terrorist action. The Court also emphasised that 12 years would not be appropriate as a starting point in murder cases unless there were strong mitigatory circumstances and a punishment of 12 years should not be set in the absence of exceptional circumstances, for example where the offender was a child. Where an offender armed themselves, the Court indicated that the punishment expected should be 16 years.¹¹¹¹¹²

¹⁰⁸ Law Commission "Mandatory Sentences" pg 112

¹⁰⁹ Law Commission "Mandatory Sentences" pg 58

¹¹⁰ *HM Advocate v Boyle and others*, [2009] HCJAC 89, <http://www.scotcourts.gov.uk/opinions/2009HCJAC89.html>

¹¹¹ *HM Advocate v Boyle and others*, [2009] HCJAC 89, <http://www.scotcourts.gov.uk/opinions/2009HCJAC89.html>

¹¹² Information on the Republic of Ireland and Scotland has been reproduced from RaISe paper 37-15, Mandatory Minimum Sentences.

