



# Happy anniversary?

**Monica Stevenson** assesses the role of the Sentencing Council, a decade down the line

## IN BRIEF

- ▶ The Sentencing Council's portfolio: proposed and existing guidelines.
- ▶ Sentencing guidelines: transparency and consistency.
- ▶ The Law Commission's proposal for a Sentencing Code.

It remains to be seen what the economic fallout from COVID-19 spells for the state of the criminal justice system. Those working in criminal law could not have anticipated the way in which already limited funding might come to be further depleted.

The different elements which work to deliver criminal justice require political attention and money. The crucial assignment of sentencing criminal offenders is no exception. This month marks the ten-year anniversary of the Sentencing Council. A statutory body set up to promote greater transparency and consistency in sentencing decisions, it also has a statutory duty to carry out analysis and research into sentencing.

To mark the first decade of its work, the Council has announced plans to hold a public consultation on ideas for future projects and work. Any such mandate will of course be subject to the limitations of the Councils' budget, which at present comes via the Ministry of Justice.

The sentencing landscape of criminal law has undergone major change in the last two decades. An obvious example is the sentencing of sexual offences, with today's regime almost unrecognisable from 20 years ago.

A further change has been the introduction of sentencing guidelines for individual offences and sentencing principles. With fewer cases now determined on the basis of appellate guideline judgments or the predilections of individual judges, the guidelines have set a template for the approach to be adopted when sentencing a range of criminal offences.

At the time of writing, the Sentencing Council's portfolio includes proposed guidelines for the sentencing of firearms offences (long overdue) and a revision of the existing guidelines for drugs offences.

In respect of the latter, these were

introduced in 2012 and have recently been the subject of a public consultation. Changes in the way drugs offences are committed (eg county lines), a plethora of new drugs on the market (such as synthetic opioids) and increased use of the internet to sell drugs (such as via the dark web) mean that current guidance does not properly reflect the patterns of offending in this field of crime. The need for reform in this area is an apt illustration of the organic nature of all sentencing guidance and the requirement for ongoing correction and review.

The rationale underlying the sentencing guidelines is two-fold: to foster transparency of and consistency in the sentencing process.

Whatever the merits of individual guidelines, most criminal practitioners would agree that they have injected greater clarity into the decision-making process behind sentences. Transparency is arguably achieved by defendants now being aware of the reasoning which leads to their punishment. With all sentencing guidelines published online, defendants can and often do access them first-hand; understanding, if not always agreeing, with how their sentence has come to be passed. For criminal practitioners, the guidelines have helped in advising clients with improved accuracy on the expected sentence range.

The second endeavour—greater consistency in sentencing—is arguably less straightforward. Some national consistency in sentencing for like offences is a proper goal but has some tension with the premise that each case turns on its facts.

A key concern when sentencing guidelines were first introduced was the fear they would fetter judicial discretion. They are not intended to do that and state that the court does not need to follow them 'where it would

be contrary to the interests of justice to do so'. Some though would argue that they foster a conformist culture which inhibits judges from making bolder decisions in individual cases.

## Review of sentencing guidelines for drugs offences

Given the aim for greater consistency in sentencing, it is ironic that the *Lammy Review* unearthed a disparity in the sentences handed out to White and Black and Minority Ethnic offenders for drugs offences. The Council is to consider this thorny issue during its review of the drugs guidelines and has confirmed it will be consulting with the Race Disparity Unit and Government Equalities Office Guidance on the point.

The Sentencing Council notes that the reasons for the disparity remain unclear but that it has found nothing within the language or detail of the guidelines to account for the imbalance. This issue arguably hints at the 'shadow side' of sentencing, that is, the extent to which subliminal factors come to shape sentencing decisions.

Designed to complement rather than rival the sentencing guidelines is the Law Commission proposal for a Sentencing Code. First published in November 2018, the code would form a single reference point for sentencing law and procedure.

A labyrinth of statutory provisions and layers of historic legislation have developed over the years, resulting in a regime that has seen a proliferation in unlawful sentences and subsequent burden on the appeal courts. In its summary report on the Sentencing Code, the Law Commission stated: 'it is simply impossible to describe the current law governing sentencing procedure as clear, transparent, accessible or coherent.'

This damning indictment resonates with anyone practicing in crime and most would welcome a simplification of the process. At the time of writing, Parliament is yet to decide whether to enact the draft Sentencing Code.

When it comes to the efficacy of sentencing law, the stakes are arguably too high for it never to be a political priority. In an address to federal judges, US Senator Robert Kennedy described the responsibility of sentencing as 'a difficult, soul-searching task at best'.

Every sentencing decision has import. From the seemingly minor to the life-altering, decisions about what form punishment should take have the potential to shape lives in ways the courts cannot always predict.

It is to be hoped that this vital aspect of criminal justice work will continue to receive the attention it deserves in the years to come.

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