Sentencing Council

Criminal Law Review Conference - 3 December 2015

Lord Justice Treacy

Keynote address

I am pleased to be here today as I think this a good opportunity for me as Chairman, to outline four broad themes which go some way to showing different aspects of the Sentencing Council's work.

- Firstly, I want to look at how the Sentencing Council contributes to justice reform and efficiency, through our work on allocation and guilty pleas.
- Secondly, I want to talk you through our work on the new health and safety offences guideline to demonstrate how we help by providing clear guidance and structures to those working on complex offences.
- Thirdly, I am going to take a closer look at two guidelines – theft and robbery – to explain how the Sentencing Council ensures the consideration of victims within the sentencing process.
- And finally I want to develop some themes about continuing improvement through work which is underway to review existing guidelines.

1. Reform and efficiency

So firstly, justice reform and efficiency – something we are all increasingly conscious of. Now I don't want this to be about money – that is not what I mean by efficiency; I believe the criminal justice community should be trying to move collectively towards better outcomes for victims and witnesses. I believe that two of our forthcoming guidelines will have a positive impact on efficiency and bring benefits for victims and witnesses as well as for practitioners like many of you here today.

- Allocation

The first piece of work I want to talk about is our updated allocation guideline which we are going to publish next week before coming into force on 1 March next year. Of course allocation is not strictly to do with sentencing. It is about the handling of trials before guilt is established, but it falls within our statutory powers to produce a guideline.

Following the recommendations in Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings*, the revised allocation guideline is intended to encourage the retention of jurisdiction by magistrates in more 'either way' cases. We are hearing quite often that there has been a culture of "if in doubt, send it up" amongst some magistrates; this guideline aims to remove that doubt. Where there are no factual or legal complications, the court should bear in mind its power to commit cases for sentence after a trial and may retain jurisdiction even if the likely sentence might exceed its powers.

But even more importantly, the new guideline marks a shift in emphasis and is designed to bring about a change in culture for sentencers, prosecutors and defence representatives. The court will actively seek representations from both sides as to venue and this is something that practitioners must prepare for – not engaging in the allocation process will no longer be an option. We have moved away from taking the Crown's case at its highest. We anticipate that this will result in fewer cases being sent to the Crown Court and that cases will therefore be resolved more quickly.

Consultation responses were largely favourable. The Magistrates' Association said that it would "give magistrates more confidence to retain cases".

I understand that there may be some disquiet in the defence community about this approach. We considered their comments very carefully. There will inevitably be challenges in adapting to new ways of working, but none of us involved in criminal justice are afraid of a challenge. We have to focus on ensuring we have a clear, proportionate and consistent allocation process,

which will result in justice being delivered fairly, swiftly and efficiently in more cases.

- Guilty pleas

Moving on to guilty pleas – again this is not strictly part of the sentencing process but forms part of our statutory duties. We will consult on a new guideline early next year and I would ask you all to consider responding to the consultation so that we get the best possible guideline.

So aside from it being our duty, why are we doing this work? Firstly, consistency: research with sentencers, backed up by Crown Court Sentencing Survey data, suggested that the existing guideline is not always applied consistently and that levels of reductions in some cases appear to be higher than those recommended by the guideline – in other words, what constitutes the 'first available opportunity' is being interpreted differently by different judges. The new guideline will provide clarification.

Where there is overwhelming evidence against a defendant the judge currently may decide not to give the full discount even if the plea is made at the earliest opportunity – this guideline removes that power in the interests of certainty. Defence advocates complained with some justification that judges were taking too elastic an approach. This guideline will lead to a fairer, more structured and more consistent approach to setting reductions for guilty pleas – a clearer process set out for judges will give greater certainty to all involved whether prosecution or defence, victim or defendant.

Secondly, efficiency: encouraging more guilty defendants to plead guilty at the earliest stage of the court process is an important move towards a more efficient justice system. We are not aiming to influence <u>whether</u> an offender pleads guilty, rather <u>when</u> a plea is entered. The purpose of the guideline is to make it clear that 'holding out' and entering a late guilty plea will result in a much smaller reduction in sentence because time has already been wasted, money has been spent and the victim's stress and anxiety has been ramped up. When a guilty plea is entered at the first opportunity, victims and

witnesses are spared having to appear in court and the police and Crown Prosecution Service can get on with investigating and prosecuting other cases.

The guideline will aim to incentivise earlier pleas both by reducing the possibility of different interpretations of the present guideline and also by reducing the reduction available after the first opportunity.

In more detail the proposals we will consult on can be summarised as follows:

- a **one third** reduction will be given for a plea made at the first stage of the proceedings.
    - For summary offences this is the first hearing at the magistrates' court.
    - For 'either way' offences, this will be up to and including the allocation hearing at the magistrates' court.
    - And for indictable only offences, this will be up to and including the first hearing at the Crown Court.
- after this first stage, the maximum level of reduction would be **one fifth**.
    - For offences dealt with in the magistrates' court, that would be up to 14 days after the first hearing.
    - For 'either way' offences sent to the Crown Court for trial, that would be up to and including the first hearing at the Crown Court.
    - For indictable only offences, that would be not more than 28 days after the prosecutor states it has complied with disclosure.
- after this second stage, there would be a sliding scale of reduction. The reduction should be decreased from one fifth to a maximum of **one tenth** for a plea entered on the first day of trial. The reduction may be decreased even further, even to zero if the guilty plea is entered during the course of the trial.

The guideline will allow for some narrow exceptions in the interests of fairness – such as allowing an extra 14 days for a plea in some cases when the initial details of the prosecution case is not served at or before the first hearing.

This approach to guilty pleas is consistent with and should support wider reforms to the criminal justice system such as Better Case Management and Transforming Summary Justice, and the Early Guilty Plea initiatives all of which work together to place a requirement on all parties to engage early, make the right decisions, identify the issues for the court to resolve and provide sufficient material to facilitate that process.

2. Complex offences

Moving on, we have now produced several guidelines to assist in sentencing complex offences –

- our environmental offences guideline came into force in April last year;
- our fraud offences guideline came into force in October last year; and
- we published our new guidelines on health and safety, corporate manslaughter and food safety and hygiene offences last month, coming into force on 1 February next year.

- Health and safety offences

Health and safety offences differ from many others as the offence is in creating the *risk of harm*; harm does not need to have occurred in order for an offence to have been committed. The approach to assessing harm therefore needs to guide sentencers in assessing the *likelihood* of harm occurring – high, medium or low – and then providing a mechanism to move up to a higher category or substantially move within the category range if *actual harm* has occurred.

Beyond the area of assessing risk, the other aspect of these guidelines which has attracted some attention is that they will result in bigger fines for the biggest corporate offenders. Large organisations committing the most serious offences - such as when an organisation is convicted of deliberately breaking

the law and creating a high risk of death or serious injury – will now receive fines which are fair and proportionate to the seriousness of the offence and the means of the offender. This is because in the past, speaking frankly, some offenders did not receive fines that even came close to reflecting the seriousness of the crimes they had committed as the law requires. This principle was upheld by the Lord Chief Justice in the case of R v Thames Water, where the importance of identifying a level of fine that achieves the aims of sentencing given the financial circumstances of the offender was reiterated.

In developing the guidelines, the Council reviewed a sample of offences which all caused death and were broadly comparable in terms of culpability. A micro company, with a turnover of around £1 million, was fined £50,000 following an early guilty plea – the fine being five per cent of its turnover. Whereas a very large company, with turnover in the region of £900 million, was fined £300,000 after trial for a similar offence – the fine being just 0.03 per cent of its turnover. There was an unacceptable degree of compression of the sentencing range.

While the Council does not believe that a strictly proportional relationship to the size of an organisation is required, evidence showed that further guidance was needed on how to take into account the financial circumstances of offenders to ensure fines are more proportionate to their means.

Finally, the guidelines provide detailed assistance to the court in dealing with the complex matter of assessing the means of corporate offenders. Turnover of the offender is used to identify the starting point of the fine. However, turnover is never the only factor taken into account. The guidelines require the court to “step back”, review and adjust the initial fine if necessary. It must take into account any additional relevant financial information, such as

- the profit margin of the organisation;
- the potential impact on employees; or
- the potential impact on the organisation’s ability to improve conditions or make restitution to victims.

This means sentences will always be tailored to the offender's specific circumstances. Fines may move up or down or even outside the ranges entirely as a result of these additional mandatory steps.

- Youth offending

We will continue to take a flexible approach to producing guidelines which assist courts in sentencing the most complex offences: we are currently grappling with a guideline for sentencing youths which requires an entirely different approach to adult guidelines. As we all know, sentencing a youth is not the same as sentencing a mini adult; you cannot simply scale down the sentence you would have given to an adult committing the same offence. The emphasis on sentencing the individual offender, taking account of their circumstances and any mitigating factors, must be greater than when sentencing adults.

3. Victims

Coming on to my third theme, I want to use our recent guidelines on acquisitive crimes to illustrate how we factor in the impact of offending on victims within the sentencing process.

But first I want to illustrate what sort of harm we are talking about. Research conducted as part of the development of our fraud guideline found that a wide range of emotional and psychological impacts were reported by victims including panic, anger, fear, stress, anxiety, self-blame and shame. There were some who reported feeling vulnerable, lonely, violated and depressed and in the most extreme cases suicidal.

- Harm

The structure of each guideline will be carefully considered through research and consultation so the model for assessing harm will be versatile but the common denominator will be that harm is assessed by looking at the impact on the victim. Harm involved does not cease when the offence is complete.

So what did we do with the theft guideline? It came out in October and has an holistic approach to assessing harm – whereby the financial harm is assessed alongside any other significant additional harm caused to the victim or others. It includes examples of significant additional harm, such as where:

- the stolen items were of substantial value regardless of their monetary worth;
- emotional distress was caused to the victim; or
- the theft resulted in fear or a loss of confidence.

- Aggravating factors

The robbery guideline coming out in January will include street and less sophisticated commercial robberies as well as, for the first time, a guideline for violent robberies in the home and a guideline for professionally planned commercial robberies. In the street robbery guideline, physical and/or psychological harm is considered first. The list of aggravating factors at step two then gives judges the opportunity to note additional harm to the victim – such as targeting a vulnerable victim or degradation. Of course we are careful not to 'double' or 'triple count' any of these factors by having them both in the assessment of harm or culpability as well as in the list of aggravating factors.

- Victim personal statements

And the final tool a judge has at their disposal is the Victim Personal Statement. Where a VPS is produced, this can help the judge form a fuller picture of the impact of the crime on the victim, alongside the evidence that has been presented in court.

There has been coverage in the press in recent months arguing that the impact of a crime on the victim should have no bearing on the sentence given. One particular sex abuse case caused a stir because it was wrongly concluded that the ethnicity of the victim had had a direct impact on the sentencing outcome. I say this quite emphatically – sentencing is culture neutral. We don't stereotype but we do look at the impact on individual victims.

I quote Libby Purves in The Times:

> *"Crime is crime is crime. The sentence should reflect what you did and intended. It can't take account of effects the perpetrator could not foresee."*

This is to fail to distinguish between culpability and harm and a central part of our work is to look at harm to the victim at step one. You cannot come to a just sentence by only considering what an offender intended. The impact of some crimes, whether intended or not, have consequences for the victim which extend far beyond the commission of the offence itself.

By making the consideration of harm caused to victims an integral part of the sentencing process, offenders may be encouraged to begin to empathise with the effects of their actions - an important step in the rehabilitation of offenders.

But we still need to see evidence of the impact on the victim and the guidelines deliberately use the phrase '*significant* additional harm' for theft and '*serious* physical and/or psychological harm' for robbery. This enables judges and magistrates to increase the length or change the type of sentence to take these factors into account if the evidence supports this.

4. Continuing improvement

And finally, I want to talk to you this morning about how we review, revise and improve our work. When we publish a guideline we don't just put it out there, close our eyes and simply hope for the best! Our work can be seen as a continuing cycle of research, development, consultation, delivery, evaluation and review.

For example, in October we published a report on the impact and implementation of our first guideline, on assault. This assessment involved:

- a detailed study of the type and severity of sentences passed in the year before and after the guideline came into effect;

- an assessment of the resource effects of the guideline; and
- interviews and group discussions with sentencers, prosecution and defence lawyers to gather evidence about how well they thought the guideline was working and how it was being used for sentencing.

So what did we find? In interview, sentencers and lawyers were positive about the guideline, thought it was clear, and cited many benefits it had brought about. However, the evaluation suggests that there are some issues with how the guideline has been implemented. For example, in spite of a slight decrease in sentencing severity, the impact on sentences for two offences in particular – GBH with intent (section 18) and ABH (section 47) – was different to what was predicted.

For GBH with intent, the guideline resulted in sentences increasing in excess of that estimated. For ABH, sentences increased, despite the estimate that the guideline would result in less severe sentences. For both offences, the research identified concerns about how the harm factor of injury being "serious" or "less serious" in the "context of the offence" is being interpreted, and whether this is contributing to higher than expected sentences. This merits further consideration, and as a result of these findings, we will be revising the assault guideline in due course.

Moving forward, we are starting to gather data from 80 magistrates' courts on some drug and theft offences in order to undertake similar assessments of these guidelines. The approach we take to evaluation and review will vary for each guideline: for example, we are grateful for the assistance of the Environment Agency in collecting data on sentences under the environmental guidelines since they came into effect last year.

For any defence lawyers here today, we are planning to do some research to support our work on guilty pleas early next year and we are looking for volunteers, so please indicate on your feedback sheets whether you'd be willing to take part in that.

Close

In closing, I want to say that despite the many challenges faced by the criminal justice community, I am confident that the Sentencing Council can help accomplish better outcomes, greater clarity and continuous improvements.

Thank you.
