THE EVOLUTION OF ENGLISH SENTENCING GUIDANCE IN 2016

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When the task of sentencing an offender in England or Wales falls to magistrates, a district judge, a recorder or a judge, there are two primary sources of guidance (within the applicable legislative framework) that must be consulted. One is the relevant output of the Sentencing Council for England and Wales ("definitive guidelines"), and the other is the corpus of judgments of the Court of Appeal (Criminal Division). This article raises questions about the relationship between the two bodies and between the two sources of guidance. In particular, given that the Sentencing Council has now been in existence for some seven years, what should be the role of the Court of Appeal in relation to the Council's guidelines?

The Sentencing Council for England and Wales "was set up to provide greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary."[1] From its creation in 2010 to the end of 2016 the Council produced 15 definitive guidelines,[2] to be added to (or to replace) guidelines laid down by the Sentencing Guidelines Council between 2004 and 2009, and by the Court of Appeal before that.[3] In 2016, the year with which this enquiry is primarily concerned, the Council published three definitive guidelines (on Robbery, on Dangerous Dog Offences, and on the Imposition of Community and Custodial Sentences). In relation to these and other definitive guidelines, s. 125 of the Coroners and Justice Act 2009 sets out the relevant duties of courts, starting with s. 125(1):

> "every court
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> (a) must, in sentencing an offender, follow any guidelines which are relevant to the offender's case, and
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> (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,
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> unless the court is satisfied that it would be contrary to the interests of justice to do so."

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1 See www.sentencingcouncil.org.uk/about-us/

2 The text of all guidelines can be found at www.sentencingcouncil.org.uk

3 For further discussion of the history, see A. Ashworth and J. Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (2013), ch. 1.

Parts 1 and 2 below will illustrate the courts' approach to this provision by examining judgments of the Court of Appeal reported in 2016. There will be further reflections on the role of the Council in parts 7 and 8 below.

Sentencers must also take account of judgments of the Court of Appeal (Criminal Division). In 2015 there were 4,444 applications for leave to appeal against a sentence imposed in the Crown Court; of those, some 1,385 were granted leave to appeal; those statistics have been roughly similar for the last few years, so we can take them as approximations of the likely figures for 2016 (which were not available at the time of writing). The information base for this article is constituted by the [2016] Criminal Appeal Reports (Sentencing) volumes 1 and 2, which contain the reports of some 118 judgments. It is not claimed that they form a representative sample of sentencing appeals in 2016,[4] but it is likely that they include most of the judgments that are important to sentencers. Of the wide variety of sentencing issues dealt with in those reported 2016 judgments, six main classes of case may be identified:

1) Application and Interpretation of Definitive Guidelines
2) Assessing Departures from Definitive Guidelines
3) Creating or Developing Offence-Specific Guidance
4) Creating or Developing Guidance on General Principles (including Sentencing Procedure)
5) Interpreting Sentencing Legislation
6) "Common Law" Sentencing

Classes 1 and 2 recognize the prominence of sentencing guidelines in contemporary sentencing. The highest number of reported cases comes within class 1, which tends to suggest that a majority of the cases that Crown Court sentencers deal with involve definitive guidelines laid down by the Sentencing Council or its predecessor. This article will examine the Court of Appeal's approach to the tasks of application and interpretation of the definitive guidelines.[5] Classes 3 and 4, on the other hand, recognize that the Court of Appeal still has the power to create sentencing guidelines and guidance to fill in gaps left by the definitive guidelines: this article will ask questions about how and why the Court chooses to take this course. Class 5 includes those cases in which the Court is hearing appeals based on the terms of sentencing legislation, such as mandatory minimum sentences and minimum terms for murder. Class 6 recognizes that there are still some offences which have not been overtaken by any form of sentencing guidance apart from an accumulation of Court of Appeal precedents.

After exploring classes 1 to 6 of the Court of Appeal's sentencing jurisprudence, the article returns to reconsider the roles of the Court and of the Sentencing Council in relation to the task of guiding sentencers.

[4] Indeed, judgment in many of the cases reported in volume 1 was delivered in 2015.

[5] The focus here is on the Court of Appeal (Criminal Division). The Cr. App. R. (S.) also contain reports of a small number of cases that reach the Supreme Court, and some decisions of the Divisional Court.

1) Application and Interpretation of Definitive Guidelines

Around half of the appellate judgments reported in 2016 concern the application or the interpretation of definitive guidelines. We will deal first with those relating to offence guidelines, and will then move on to judgments on other guidelines, such as those dealing with overarching principles.

(a) Offence-Specific Guidelines: The offence-specific guidelines that attracted the highest number of reported cases in 2016 were those on Sexual Offences. The issue in most of the reported cases (10) was whether the judge had placed the offence in the correct category range. Only one reported case concerned the interpretation of the guidelines: the question in *Ashton* [6] was whether it should be considered to be an "abuse of trust" for an employer to commit an offence against an 18 year old employee, and the Court held (referring to two previous decisions) that this was not a breach of trust of the kind envisaged by the definitive guideline. The result was that this moved the culpability component of the offence down from table A to table B.

Some of the seven reported cases on the Drug Offences guideline turned on the categorisation of the offender's role. The Court of Appeal did not attempt to offer further guidance on the meaning of "leading role", "significant role" and "lesser role", but it was willing to reconsider the trial judge's categorisation, and was sometimes content to place the offence on a borderline between two categories.[7]

The five reported cases on the Assault guideline focused on the s.18 offence of wounding or causing grievous bodily harm with intent. All the judgments concerned the appropriate category range, but three of them also turned on the interpretation of the guideline itself. In *Smith* [8] three questions of interpretation were raised and dealt with – the meaning of an injury "which is serious in the context of the offence", of "vulnerable victim", and of "sustained or repeated assault". In *Smith* and in the later judgments in *Thompson* [9] and in *Beaumont* [10] the Court of Appeal agreed that the offences, serious as they were, were not "serious in the context of the offence" so as to be placed in Category 1. It seems from these judgments that the wide difference in starting points between Category 1 (12 years) and Category 2 (6 years) has led the Court to take the view that "the sorts of harm and violence that will justify placing a case within Category 1 must be significantly above the serious level of harm that is normal for the purpose of s.18."[11] In practical terms, the judgments in *Smith* and in *Beaumont* appear to have inserted an intermediate starting point of 9 years between categories 1 and 2.

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[6] [2016] 1 Cr. App. R. (S.) 193, especially at [22-24]; see also the remarks in *Forbes* [2016] 2 Cr. App. R. (S.) 472, at [16-18] on the interpretation of "abuse of trust".

[7] E.g. *Bakewell* [2016] 1 Cr. App. R. (S.) 201, *Arslan* [2016] 2 Cr. App. R. (S.) 33.

[8] [2016] 1 Cr. App. R. (S.) 49

[9] [2016] 1 Cr. App. R. (S.) 162

[10] [2016] 1 Cr. App. R. (S.) 392

[11] *Smith* [2016] 1 Cr. App. R. (S.) 49, at [14].

The five reported judgments on robbery all pre-dated the Sentencing Council's definitive guideline, which came into force on April 1, 2016. The governing guideline was therefore that laid down by the Sentencing Guidelines Council (SGC) in 2006, which covered three categories of robbery and left the two highest categories with only general guidance and signposts to Court of Appeal decisions. In those two highest categories fell *Attorney General's References (Nos 53, 54 and 55 of 2015),*[12] dealing with a professionally planned commercial robbery, and *Neville*,[13] dealing with a violent personal robbery in the home. However, two further Court of Appeal judgments dealt with the sentence for robbery without any mention of guidelines at all,[14] which is not merely unacceptable but also not compliant with s. 125 of the 2009 Act. As stated above, s. 125(1) requires courts to follow any relevant guidelines (which presumably imposes a duty to refer to the relevant guidelines), subject to the "interests of justice" exception; similarly, s. 125(3)(a) states that the court has "a duty to impose on P, in accordance with the offence-specific guidelines, a sentence which is within the offence range" – again, implying that the court should refer to the relevant guideline. It is therefore arguable that a sentence imposed without reference to the relevant guidelines is unlawfully imposed.

Four reported judgments dealt with the Fraud guideline. All of them concerned the appropriate category for the offence, but two of them also raised the question of what "targeting a vulnerable victim" means. It was decided, for example, that targeting a weakness in the Oyster Card system did not fall within this description.[15]

What emerges from the judgments on these offence-specific guidelines, and from the few judgments on other offence guidelines, is that the principal ground of appeal seems to be that the judge has placed the case within the wrong category range.[16] Beyond that, there are a few matters of interpretation on various guidelines. It seems from the judgments that the Court of Appeal has reservations about the provisions in the Assault guideline on section 18 sentences, regarding the starting points in Category 1 (12 years) and Category 2 (6 years) as too far apart to turn on the phrase "serious in the context of the offence". No doubt this is a matter that the Council may take into account when revising that guideline.[17]

One general issue on offence-specific guidelines that the Court of Appeal has considered is the approach to be taken when there are no definitive guidelines precisely on point, but there

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[12] [2016] 1 Cr. App. R. (S.) 99

[13] [2016] 1 Cr. App. R. (S.) 228 (not mentioning the guideline at all).

[14] *Adeogun* [2016] 1 Cr. App. R. (S.) 243, *Mattis* [2016] 1 Cr. App. R. (S.) 499.

[15] *Bouferache* [2016] 1 Cr. App. R. (S.) 158; see also *Wharf* [2016] 1 Cr. App. R. (S.) 326

[16] S. 125(3)(b) of the 2009 Act requires the court "to decide which of the categories most resembles P's case in order to identify the sentencing starting point in the offence range". In *Thelwall* [2016] EWCA Crim 1755 (a case reported later than the research period) Lord Thomas CJ laid down that "the citation of decisions of the Court of Appeal Criminal Division in the application and interpretation of guidelines is generally of no assistance" (at [21]). Cf. the critical comments from Lyndon Harris at [2017] Crim.L.R. 242-243.

[17] The Council's own research identified the same problem: see www.sentencingcouncil.org.uk/wp-content/uploads/Assault-assessment-synthesis-report.pdf at pp. 5-7, cited by R. Allen, *The Sentencing Council for England and Wales: brake or accelerator on the use of prison?* (London: Transform Justice, 2016), at [55].

are other offence guidelines which may be relevant. In *Ormiston* [18] O had been convicted of smuggling drugs into a prison. There were no guidelines for the Prison Act offence of which he was convicted, and the judge decided that deterrent sentences were needed in view of the harmfulness of introducing drugs into prison. The Court of Appeal held that the use of the Council's Drug Offences guideline would not have been appropriate in this case, because of the special dangers of drugs in prisons. However, a differently-constituted Court in *Hamilton* [19] took the view that the Drug Offences guideline was relevant to Prison Act cases: a sentencer should have regard to that guideline, with the prison context regarded as a "highly aggravating factor". In taking this approach the Court in *Hamilton* pointed to the requirement in s. 125(1) of the Coroners and Justice Act 2009 "to follow *any guideline which is relevant to the offender's case*," although taking account of the "interests of justice" proviso noted earlier.[20] Thus the Drug Offences guideline was relevant, but should not be applied in an "over-mechanistic" way. In a case of conspiracy to breach immigration law by fraudulently procuring false certificates for visa applications, the Court held that the Council's guideline on Fraud, Bribery and Money Laundering Offences was of limited use since the gravamen of the case was a flouting of the immigration rules rather than making money.[21] However, the Court in *Che* [22] held that, where the applicable SGC guideline for robbery failed to deal with a particular type of case (robbery in the home), the judge was right to consider the provisions of the Burglary Guideline relating to aggravated burglary. The Court also re-stated the principle that guidelines published but not yet in force should not be used.[23]

(b) Generic Guidelines: we turn now from definitive offence-specific guidelines to other types of guideline, including overarching guidelines and generic guidelines. What stands out here is the frequency with which sentencers and the Court of Appeal proceed without reference to the relevant guideline. Two of the four cases involving youths were sentenced at first instance without reference to the relevant guidelines,[24] one of those resulting in the offender being sentenced and dealt with on appeal without reference to the SGC's Overarching Principles – Sentencing Youths (2009),[25] which was clearly not compliant with s. 125(1)(a) of the 2009 Act.

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[18] [2016] 2 Cr. App. R. (S.) 16, at [12]; cf. *Cano-Uribe* [2016] 1 Cr. App. R. (S.) 210, where the Court was uncertain about the relevance of the Council's Fraud, Bribery and Money Laundering Offences guideline to sentencing for forgery.

[19] [2016] 2 Cr. App. R. (S.) 7

[20] Ibid, at [13], author's italics.

[21] *Attorney General's References (Nos. 49 and 50)* [2016] 1 Cr. App. R. (S.) 14.

[22] [2016] 2 Cr. App. R. (S.) 366

[23] Ibid., at [13]. The Council's Robbery guideline, which now covers robberies in the home, was not in force at this time. The principle was articulated in *Boakye* [2013] 1 Cr. App. R. (S.) 6, and followed in *Hodgkins* [2016] 2 Cr. App. R. (S.) 95.

[24] *GB* [2016] 1 Cr. App. R. (S.) 127, where the judge used the adult guideline on Sexual Offences, without being reminded that that guideline makes specific provision for offences by young people. Note that there is now a new guideline: Sentencing Council, *Sentencing Children and Young Persons: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery* (February 2017).

[25] *Mattis* [2016] 1 Cr. App. R. (S.) 499. In other judgments the Court of Appeal did use the SGC's guideline: see *H* [2016] 1 Cr. App. R. (S.) 94 and *Attorney General's Reference (No. 32 of 2016)* [2016] 2 Cr. App. R. (S.) 171.

Nine judgments dealt with the appropriate reduction for pleading guilty. Only one of those judgments referred explicitly to the SGC's guideline on Reduction in Sentence for a Guilty Plea,[26] but the other eight judgments showed awareness of the guideline by using its terminology and its sliding scale of reductions. Thus the frequent omission to refer to the SGC guideline is born of familiarity, a sign that this generic guideline is embedded in sentencing practice.[27]

However, the same cannot be said of the Sentencing Council's guideline on Offences Taken Into Consideration and Totality. This definitive guideline, which came into force in 2012, was not mentioned in 12 of the 14 judgements that dealt with an issue of totality, and in one of the remaining two judgments the guideline was listed (alongside two other guidelines) but, unlike the other guidelines, was not discussed.[28] Although terms such as concurrent, consecutive and totality are well known to sentencers, there is little evidence that the principles set out in the Totality guideline are widely known. The guideline sets out situations in which concurrent sentences or consecutive sentences would ordinarily be appropriate, states the test of whether the overall sentence is "just and proportionate", and adds an injunction to structure the sentence in a way that will be best understood by all concerned. There is little evidence that any of this is embedded in sentencing practice: of course judges are familiar with the basic terms, but the point of issuing the definitive guideline was to re-structure the approach to this important aspect of sentencing. The guideline does state that "there is no inflexible rule governing whether sentences should be structured as concurrent or consecutive components",[29] but it goes on to set out various principles, and these should be prominent in practice and in appellate judgments in the same way as the principles on the guilty plea reduction. Thus, for example, the Court of Appeal's decision on sentence in *William* [30] turned on the concurrent/consecutive issue, but there was no mention of the Totality guideline. And in *Hayes* [31] Lord Thomas CJ recognised that the trial judge had used consecutive sentences to avoid a statutory maximum that was considered too low, but made no reference to the provisions of the Totality guideline which discuss the permissibility of this manoeuvre.

Thus it seems that in practice the focus is on offence-specific guidelines, and that there are some generic guidelines that are prone to be overlooked. The guideline that ought to be the foundation of English sentencing – the SGC's Overarching Principles: Seriousness (2004) – rarely receives a mention, and its articulation of the key principles of the Criminal Justice Act

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[26] *O'Leary* [2016] 1 Cr. App. R. (S.) 66, at [10].

[27] In *Sanghera* [2016] 2 Cr. App. R. (S.) 135, however, the Court of Appeal commented adversely on the trial judge's failure to indicate what credit had been given for any of the pleas of guilty. Note that a new definitive guideline on "Reduction in Sentence for a Guilty Plea" (2017) has now been issued, with some changes in substance and in terminology.

[28] *Attorney General's Reference (No. 32 of 2016)* [2016] 2 Cr. App. R. (S.) 171, at [20].

[29] Sentencing Council, *Offences Taken Into Consideration and Totality*, p. 5. In an earlier judgment that did engage with this guideline, *Dang* [2014] 2 Cr. App. R. (S.) 391, the Court of Appeal stated at [38] that "the guideline reflected good practice as it existed before the guideline existed", but it rightly did not treat that as removing the need to discuss the details of the guideline.

[30] [2016] 2 Cr. App. R. (S.) 12

[31] [2016] 1 Cr. App. R. (S.) 449, at [94-97], not citing the Totality guideline, p. 7.

2003 and its sentencing thresholds has attracted little attention from the Court of Appeal over the years.[32] However, in *Bondzie* [33] Treacy LJ drew attention to the stipulations in the Seriousness guideline about the circumstances in which courts might take account of the local prevalence of the offence when sentencing, and he gave further guidance on appropriate procedures for assessing prevalence.[34]

2) Assessing Departures from Definitive Guidelines

It was noted above that s. 125(1) of the 2009 Act requires a court to follow the definitive guidelines unless it would be "contrary to the interests of justice to do so." In this context, "following" means sentencing within the offence range stated in the guideline, so that if a court goes above the top of the highest offence category or below the bottom of the lowest offence category it must justify this by reference to the "interests of justice" test.[35] At least 8 appeals reported in 2016 involved sentences outside the offence range, mostly above. The one departure that was below the relevant offence range (a sentence of 18 months for a s. 18 assault, whereas the lowest offence category runs from 3 to 5 years) was held to be clearly unjustified, with no reference to the statutory test.[36] The seven departures that were above the offence range were also discussed by the Court of Appeal without reference to the statutory test. In the two appeals against sentences that were considerably above the highest category range for drug importation (which is 12-16 years' custody, based on 5 kilogrammes of cocaine or heroin), the Court of Appeal referred to the passage in the Drug Offences guideline which states:

> "Where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, sentences of 20 years and above may be appropriate, depending on the role of the offender."[37]

This recognizes that courts will occasionally be justified in selecting a starting point above the top of the offence range where the importation is on a massive scale.[38] According to s. 125(1) of the 2009 Act any such departure must be justified on the "interests of justice" test. In drug importation cases the Court of Appeal is accumulating precedents that indicate much higher starting points for much higher quantities of drug importation. If the Sentencing Council is unwilling to extend its guideline structure to indicate starting points for these

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[32] One notable exception was *Seed and Stark* [2007] 2 Cr. App. R. (S.) 436.

[33] [2016] 2 Cr. App. R. (S.) 261, at [9-20].

[34] At [11]; the original guidance is to be found in the SGC's *Overarching Principles: Seriousness*, [1.38 - 1.39].

[35] Thus in the part of the Assault guideline dealing with s. 18 wounding with intent, the highest category (1) has a range of 9-16 years' custody, and the lowest category (3) has a range of 3-5 years' custody, which means that the offence range runs from 3 to 16 years, and any sentence below or above that range must satisfy the "interests of justice" test.

[36] *Attorney General's Reference (No. 126 of 2015)* [2016] 1 Cr. App. R. (S.) 525, at [29].

[37] Sentencing Council, *Drug Offences* (2012), p. 4.

[38] The two 2016 judgments are *Haxihaj* [2016] 1 Cr. App. R. (S.) 532, at [51]; and *Sanghera* [2016] 2 Cr. App. R. (S) 135, at [22].

unusually serious cases,[39] this may be an appropriate topic on which the Court of Appeal should formulate guidance (see Part 3 below).

Even if the courts choose not to use the statutory language of "the interests of justice" in relation to departures, they should continue to apply the various guideline principles. As Julian Roberts has argued, sentencing in what he calls "the departure zone" should continue to reflect the structure and contents of the guidelines. Referring to the SGC's guideline on Overarching Principles: Seriousness,[40] he points out that this, and indeed the offence-specific guidelines, "contain much more guidance than merely the category-based sentence ranges", such as lists of factors relevant to harm and culpability.[41] Elsewhere in sentencing law the Court of Appeal has developed a jurisprudence on the meaning of key statutory phrases such as "exceptional circumstances"[42] and "unjust to do so".[43] If the Court were to focus on the "interests of justice" test, this would enable it to carry out its function of "amplification and explanation"[44] rather than leaving the areas outside the offence range as a rather blank canvas.

3. Creating or Developing Offence-Specific Guidance

From time to time the Court of Appeal still takes it upon itself to lay down guidance for sentencers. The Court has laid down guidelines since at least 1982;[45] in the period 1998 to 2003 it was only authorised to lay down guidelines if it had first notified the Sentencing Advisory Panel and had considered the Panel's advice;[46] but the Criminal Justice Act 2003 removed that restriction. The Court is therefore free to lay down sentencing guidelines. It cannot lay down definitive guidelines – only the Sentencing Council can do that. Only definitive guidelines must be followed (s. 125(1)), subject to the "interests of justice" test. Whether we refer to the Court's formulations as guidance or as guidelines, they have the force of judicial precedent (and are not subject to any "interests of justice" exception).

Three of the Court's judgments in 2016 stand out. In *Attorney General's Reference (Kahar); Ziamani* [47] the Lord Chief Justice presided over a Full Court of five judges, to deal with six

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[39] Compare the offence of robbery: the SGC guideline on *Robbery* set out guidelines for 3 levels of robbery but left two higher levels (robbery in the home, professionally planned commercial robbery) to the relevant case-law, whereas the Sentencing Council's guideline on *Robbery* (2016) sets out guidelines intended to cover the whole range.

[40] A guideline which has rarely been referred to by the Court of Appeal: see notes 32-34 above and accompanying text.

[41] J.V. Roberts, "Points of Departure: Reflections on Sentencing Outside the Definitive Guideline Ranges" [2012] Crim.L.R. 439, at p. 445.

[42] For example, in relation to the mandatory minimum sentence for certain firearms offences: see A. Ashworth, *Sentencing and Criminal Justice*, 6th ed (Cambridge: Cambridge University Press), p. 106, and M. Wasik, "Time to Repeal the Firearms Minimum Sentence Provision" [2017] Crim.L.R. 203.

[43] See Ashworth, *Sentencing and Criminal Justice*, pp. 235-236.

[44] The words of Leveson P. in *Dyer* [2014] 2 Cr. App. R. (S.) 61, at [15]; see note 84 below.

[45] *Aramah* (1982) 4 Cr. App. R. (S.) 407.

[46] Crime and Disorder Act 1998, ss. 81-82.

[47] [2016] 2 Cr. App. R. (S.) 304

unconnected appeals against sentences imposed for offences of engaging in conduct preparatory to terrorism, contrary to s. 5 of the Terrorism Act 2006. The judgment surveys previous appellate judgments relating to this very wide offence, sets out a number of factors relevant to sentence, and then indicates six levels of offending, each with examples from the case-law and with an appropriate range of sentences indicated. Why did the Court of Appeal undertake the considerable task of formulating this detailed guidance? Two reasons are suggested. First, the Court had been informed that the Crown Prosecution Service was providing judges with details of first instance cases under s. 5, and also that for case management purposes a schedule of Crown Court sentences for s. 5 was made available to judges. The Lord Chief Justice held that:

> "It is not in the public interest that judges should be guided by unauthoritative decisions or by the use of such a schedule for sentencing. Open and fair justice requires that all guidance is in the public domain and given by either the Sentencing Council or decisions of this Court."[48]

Secondly, the Court was informed that it was unlikely that the Sentencing Council could produce definitive guidelines on this offence "for some time". The Court therefore decided to formulate guidance for sentencing under s. 5 "until the Sentencing Council can address the issue in guidelines." However, without doubting the considerable experience of the five judges in the Full Court, it is surely preferable that guidelines on such an important and wide-ranging offence should be subject to public consultation and the other processes of the Council. The question is therefore one of the priorities, workload and resources of the Council. The Court has, effectively, stepped in on a temporary basis.[49]

Similar considerations apply to the second judgment, that in *RH*.[50] A court presided over by Treacy LJ observed that there were no guidelines on sentencing for offences of child abduction: "the offences can vary widely in terms of gravity and we consider it appropriate to give some guidance to sentencers." Treacy LJ went on to set out nine paragraphs of guidance, and presumably the Council will develop a guideline in the near future.

The third of the major judgments in 2016 is *Forbes*.[51] Once again, a Full Court of five judges was assembled, and the Registrar of Criminal Appeals had drawn together nine unrelated appeals. Some five years earlier, in the case of *H.*,[52] the Court of Appeal had given guidance on the sentencing of historic sexual offence cases. That guidance was incorporated into the Sentencing Council's definitive guideline on Sexual Offences (2014) as Annex B. It was now apparent that "various issues" had arisen in relation to the guidance, and the purpose of this judgment was to clarify five particular issues. Should this have been the task of the Court of Appeal rather than of the Council? Two points may be made. First, while the

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[48] At [1]; to similar effect, see the strictures of Lord Thomas CJ in *Thelwall* [2016] EWCA Crim 1755, at [23].

[49] At its meeting in November 2016 the Council agreed to start consideration of guidelines for a number of terrorism offences: www.sentencingcouncil.org.uk/wp-content/uploads/web-18-11-2016.pdf

[50] [2017] 1 Cr. App. R. (S.) 165: this case was decided in 2016 but was not reported until 2017.

[51] [2016] 2 Cr. App. R. (S.) 472

[52] [2012] 2 Cr. App. R. (S.) 21

Council has the power to review and revise its guidelines,[53] neither the Council nor its predecessor bodies have taken this to include interstitial revisions to small parts of a wider guideline – save in respect of the Magistrates' Court Sentencing Guidelines, which have been re-issued periodically with amendments.[54] Secondly, the status of an Annex to a definitive guideline is unclear: it could be argued that it is not part of the guideline itself and therefore does not have binding force. This particular Annex is based on a Court of Appeal decision and it may therefore be apposite for the Court to undertake any revisions.

4. Creating or Developing Guidance on General Principles (including Sentencing Procedure)

The Sentencing Council appears to have left largely untouched much of the terrain of preventive orders and other ancillary orders[55] – on what may be an understanding that the Court of Appeal will give guidance on these matters. This was probably the busiest sphere of sentencing work for the Court of Appeal in 2016, and a few examples will demonstrate the role adopted by the Court.

Several appeals raised issues about confiscation orders and compensation orders. In *Boyle Transport (Northern Ireland) Ltd* [56] the question of "piercing the corporate veil" in confiscation proceedings was raised, and the Court of Appeal (presided over by Davis LJ, who delivered the lengthy judgment) set out seven principles to guide judges in dealing with confiscation proceedings against companies.[57] Earlier, in *Davenport*,[58] the Court (also presided over by Davis LJ, who delivered the judgment) set out nine points for Crown Court judges in cases where the Crown seeks both a compensation order and a confiscation order. In *Parkinson* [59] the Court of Appeal revisited the question whether it was right to make a compensation order if the result would be to force the sale of the matrimonial home, holding that this is not wrong in principle.[60]

A few years ago in *Smith* [61] Hughes V-P (as he then was) gave detailed guidance on the making of Sexual Offence Prevention Orders. That influential judgment was applied in two 2016 appeals in respect of its successor order, the Sexual Harm Prevention Order.[62] Two judgments discussed aspects of the Criminal Behaviour Order, introduced by the Anti-Social Behaviour, Crime and Policing Act 2014.[63] The judgment of Treacy LJ in *Needham* [64] was

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[53] Coroners and Justice Act 2009, s. 120(9).
[54] For the most recent version, see www.sentencingcouncil.org.uk, January 24, 2017.
[55] Except in relation to breach: see Sentencing Council, *Breach Offences Guideline Consultation* (2016).
[56] [2016] 2 Cr. App. R. (S.) 43
[57] Two other judgments interpreting the legislation on confiscation orders were *Harvey* [2016] 1 Cr. App. R. (S.) 406 in the Supreme Court, and *Johnson* [2016] 2 Cr. App. R. (S.) 403 (Davis LJ presiding).
[58] [2016] 1 Cr. App. R. (S.) 248
[59] [2016] 1 Cr. App. R. (S.) 24
[60] The case involved a confiscation order as well as a compensation order, and Davis LJ (presiding) delivered the judgment.
[61] [2012]1 Cr. App. R. (S.) 470
[62] See *Bingham* [2016] 1 Cr. App. R. (S.) 10 and *McDonald* [2016] 1 Cr. App. R. (S.) 307.
[63] See *DPP v. Bulmer* [2016] Cr. App. R. (S.) 74, a detailed judgment of Beatson LJ in the Divisional Court, and *Janes* [2016] 2 Cr. App. R. (S.) 256.

designed to give guidance on the new provisions for disqualification from driving in cases where there was also a custodial sentence.[65] Similarly, the judgment of Treacy LJ in *LF* [66] was designed to give guidance on the "special custodial sentence for certain offenders of particular concern",[67] and culminated in an 8-point checklist for sentencers. One of the difficulties with the new provisions for "offenders of particular concern" is that courts (and counsel) may occasionally overlook them. The problem with another statutory requirement – that of giving credit to an offender for time served on remand subject to curfew – was, according to Hallett V-P, that it was simply being ignored. The guidance given by the Court of Appeal in two earlier judgments was not being followed, and therefore a special court was convened to re-affirm and re-emphasise the relevant principles.[68]

In several judgments over the years the Court of Appeal has developed the law relating to credit given for an offender's assistance to the police or the prosecution.[69] Although there is also a statutory scheme under ss. 73-75 of the Serious Organised Crime and Police Act 2005, the common law system (based on "texts" prepared by the police and submitted to the court confidentially) remains in full vigour. In *N* [70] Lord Thomas CJ presided over a strong Court (Hallett V-P and Treacy LJ) to deal with two unrelated appeals that raised three questions about the precise obligations of the police to supply "texts". The Court of Appeal had also considered aspects of the "text" regime in two judgments earlier in the year.[71]

5. Interpreting Sentencing Legislation

Many of the cases discussed in part 4 involved the Court in interpreting sentencing legislation, as well as creating or developing guidance. This is true of all the judgments in the third paragraph of part 4, and of the judgments on confiscation orders.[72] Further examples may be found in the cases on "exceptional circumstances" for not imposing a mandatory minimum sentence for the possession of firearms, where the Court of Appeal has developed a jurisprudence around the legislative terminology.[73] The same may be said of the

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[64] [2016] 2 Cr. App. R. (S.) 219

[65] The provisions originated in the Coroners and Justice 2009, but were not brought into force until amended by s. 30 of the Criminal Justice and Courts Act 2015.

[66] [2016] 2 Cr. App. R. (S.) 271

[67] The provisions are in s. 236A of the Criminal Justice Act 2003, inserted by Schedule 1 to the Criminal Justice and Courts Act 2015.

[68] *Marshall* [2016] 1 Cr. App. R. (S.) 282, repeating the guidance laid down in *Hoggard* [2014] 1 Cr. App. R. (S.) 239 and *Thorsby* [2015] 1 Cr. App. R. (S.) 443.

[69] See e.g. *Sivan* (1988) 87 Cr. App. R. 407, *X* [1999] 2 Cr. App. R. (S.) 294, and *P and Blackburn* [2008] 2 Cr. App. R. (S.) 16.

[70] [2016] 2 Cr. App. R. (S.) 341

[71] *Z* [2016] 1 Cr. App. R. (S.) 107, with Lord Thomas CJ presiding, and *Emsden* [2016] 1 Cr. App. R. (S.) 444.

[72] On which, see notes 56-58 above.

[73] "Exceptional circumstances" were confirmed in *Attorney General's Reference (No. 91 of 2015)* [2016] 1 Cr. App. R. (S.) 270, *Benson* [2016] 2 Cr. App. R. (S.) 37 and *Rogers* [2016] 2 Cr. App. R. (S.) 370, although in *Attorney General's Reference (No. 115 of 2015)* [2016] 2 Cr. App. R. (S.) 201, Hallett V-P stated at [24] that "there has been a clear steer from this court in recent years that the word 'exceptional' is not to be diluted;

legislative provisions on the minimum term for murder, interpreting Schedule 21 to the Criminal Justice Act 2003: four judgments in 2016 apply and/or develop the statutory framework.[74] A final example of the Court of Appeal interpreting legislation on sentencing concerns the dangerousness provisions in the Criminal Justice Act 2003 as amended: three judgments involved a review of the trial judge's assessment of whether the offender was "dangerous" within the meaning of the 2003 Act,[75] and a fourth reiterated the Court's view that the link between downloading indecent images of children and the possible harm done to children is too remote to satisfy the requirement that it be the appellant's re-offending which causes the serious harm.[76]

6. "Common Law" Sentencing

There remain several offences for which there is neither a definitive sentencing guideline nor consolidated judicial guidance, and where the Court of Appeal proceeds as it did before the advent of guidelines – considering previous decisions of the Court in order to determine the "going rate". Many of these offences are common law crimes. One that has attracted considerable attention from the Court of Appeal in recent years is manslaughter at common law, particularly unlawful act manslaughter.[77] Two 2016 judgments involved sentencing for the common law offence of perverting the course of justice.[78] However, some of the offences without guidelines or guidance are statutory, and among those are arson endangering life,[79] and causing bodily harm by furious driving contrary to s. 35 of the Offences Against the Person Act 1861, which resulted in a custodial sentence for furious cycling in *Gittoes*.[80]

7. The Relationship between the Sentencing Council and the Court of Appeal

Having examined in some detail the work of the Court of Appeal in judgments on sentence appeals, we are now in a position to assess the relationship between its role and that of the Sentencing Council. The Council's main pre-occupation is with the production of offence-specific definitive guidelines, preceded by a considerable period of research and preparatory work, the draft of a consultation paper, a consultation period for stakeholders and the wider

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sympathy for an offender is not enough to prevent a judge from doing their statutory duty." See further Wasik, "Time to Repeal the Firearms Minimum Sentence Provision" [2017] Crim.L.R. 203, at pp. 208-209.

[74] *Attorney General's Reference (No. 73 of 2015)* [2016] 1 Cr. App. R. (S.) 187, *Jefferson* [2016] 1 Cr. App. R. (S.) 278, *Jones* [2016] 2 Cr. App. R. (S.) 1, and *Wadkin* [2016] 2 Cr. App. R. (S.) 442.

[75] *Neville* [2016] 1 Cr. App. R. (S.) 228, *Seddon* [2016] 1 Cr. App. R. (S.) 322, *Sarwar* [2016] 1 Cr. App. R. (S.) 344, and *Newland* [2016] 1 Cr. App. R. (S.) 553.

[76] *Hayes* [2016] 2 Cr. App. R. (S.) 208, at [12], following *Terrell* [2008] 2 Cr. App. R. (S.) 292.

[77] *Jones* [2016] 1 Cr. App. R. (S.) 360, following *Attorney General's Reference (No. 60 of 2009)(R. v Appleby)* [2010] 2 Cr. App. R. (S.) 311. The Council is currently preparing guidelines on unlawful act manslaughter and gross negligence manslaughter: www.sentencingcouncil.org.uk/wp-content/uploads/web-16-12-2016.pdf

[78] *Attorney General's Reference (No. 123 of 2015)* [2016] 1 Cr. App. R. (S.) 479, and *Ratcliffe* [2016] 1 Cr. App. R. (S.) 488.

[79] On which see *Attorney General's Reference (No. 56 of 2015)* [2016] 1 Cr. App. R. (S.) 57.

[80] [2016] 1 Cr. App. R. (S.) 150.

public, and a response to the consultation. The Council does have the power to prepare or revise guidelines in urgent cases, without going through the normal consultation process,[81] but this power has never been exercised. The consultation process was instituted in order to ensure that sentencing guidelines receive analysis and critical attention from a wide range of practitioners and others *before* they become definitive. Similarly, the reason for having non-judicial members on the Council is to help broaden the experience base of those formulating the guidelines.

The Council has set a target of the production of offence-specific guidelines for all major groups of offences by 2020,[82] and it has begun to publish some significant guidelines on generic issues or overarching principles. While it has left the Court of Appeal to develop guidance on ancillary and preventive orders such as the Sexual Harm Prevention Order, the Criminal Behaviour Order and many others, it has recently published definitive guidelines on such generic matters as the Imposition of Community and Custodial Sentences, on Reduction of Sentence for a Guilty Plea, and on Sentencing Children and Young Persons. However, the Council has not yet demonstrated a close interest in other groups with special needs, such as women offenders, mentally disordered offenders, and young adult offenders.[83]

What should be the role of the Court of Appeal? It is sometimes capable of moving more swiftly than the Council,[84] but even if the Council were to invoke its "urgency" powers there should be time for a truncated consultation process. Reflecting on the Court of Appeal's role, the former chairman of the Council (Sir Brian Leveson P) stated:

> "Amplification and explanation is precisely the function of this Court, as is issuing guidelines in areas or circumstances not covered by a Definitive Guideline. If the interests of justice demonstrate that a guideline requires revision, the Court will undoubtedly identify that fact: it will then be for the Council, pursuing its statutory remit, to revisit the guideline and undertake the necessary consultation which precedes the issue of all guidelines. Given the composition of the Council, we doubt that substantial differences of approach are likely ever to emerge."[85]

The role of amplifying and explaining definitive guidelines is certainly for the Court of Appeal. Whether the issuance of guidelines in areas or circumstances not covered by a definitive guideline should be for the Court of Appeal is for discussion. The latter part of the quotation from Sir Brian Leveson is confined to the revision of existing guidelines, but it is difficult to see why revision should be for the Council but the creation of guidelines (in areas where there are gaps) should be for the Court of Appeal.

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[81] Coroners and Justice Act 2009, s. 123.

[82] Sentencing Council, *Annual Report 2015-2016*, p. 3.

[83] Some of these topics were discussed in the last Advice issued by the Sentencing Advisory Panel, *Overarching Principles of Sentencing* (2010).

[84] The Halliday Report took the view that it was unsatisfactory if the Court had to wait for a suitable case before issuing guidelines (Home Office, *Making Punishments Work* (2001), chapter 8), but there are some examples above of the Registrar of Criminal Appeals drawing a group of similar cases together: see notes 48, 52 and 69.

[85] *Dyer* [2014] 2 Cr. App. R. (S.) 61, at [15].

In principle, therefore, the focus of the Court of Appeal should be on applying and interpreting the guidelines, assessing departures from guidelines, and interpreting sentencing legislation (that is, on categories 1, 2 and 5 above). In carrying out these tasks the Court ought to support the guideline system by being more assiduous in its citation of the guidelines. Delivering judgment without mentioning a relevant guideline is not compliant with the 2009 Act,[86] but we noted in part 1(b) above that this appears to be the norm in appeals relating to concurrent and consecutive sentences and totality. Also, when assessing departures from the guidelines, the Court ought surely to have regard to the statutory "interests of justice" test.

Where there is confusion at present is when a gap in guidance is identified or where new legislation calls for guidance (or the amendment of guidance). There is no established system for deciding whether the gap should be filled by the Council or by the Court of Appeal, and the matter appears to be resolved behind closed doors and without published reasons.[87] Two examples of the current confusion may be produced. The well-known example relates to sentencing after the 2011 riots: eventually it was the Court of Appeal that gave guidance, but many courts had to pass sentence before authoritative guidance was forthcoming, and the Council did not invoke its "urgency" powers.[88] Secondly, in November 2016 the Council published a document providing guidance to courts on "Drug Driving". The Council states that it had received a large number of requests for a sentencing guideline, but that it currently lacks the data needed for the preparation of a full guideline. It therefore issued this document, but "it is important to note that this guidance does not carry the same authority as a sentencing guideline, and sentencers are not obliged to follow it."[89] Helpful as this document may be, it is noticeable that in 2016 it was left to the Court of Appeal to formulate guidance on two other new developments – disqualification from driving combined with a custodial sentence, and the additional sentence for "offenders of special concern."[90] This guidance was no doubt welcome, but should not the Council have issued it?

If the Council as currently constituted and resourced is unable to take on the tasks discussed in parts 3 and 4 above, even by using its "urgency" powers, then two consequences follow. First, the Court of Appeal will be left to produce interim guidance on certain topics – on the understanding that the Council should "fill the gap" as soon as possible. Secondly, there should be a review of the Council, its workload, its membership, and its powers and duties.[91] This article has raised a number of questions about the Council's priorities: it may require greater resources if it is to fulfil its statutory remit, although overall savings could be made if

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86 For examples in 2016, see notes 14, 24, 30 and 31 above.

87 Cf. the Lord Chief Justice's remarks on "open and fair justice", n. 48 above.

88 *Blackshaw* [2012] 1 Cr. App. R. (S.) 114, on which see A. Ashworth, "Departures from the Sentencing Guidelines" [2012] Crim.L.R. 81, and J.V. Roberts, "Points of Departure: Reflections on Sentencing outside the Definitive Guidelines Ranges" [2012] Crim.L.R. 439.

89 Sentencing Council, *Drug Driving* (2016), p. 1.

90 See notes 64-67 above and accompanying text.

91 On which see Allen, *The Sentencing Council for England and Wales: brake or accelerator on the use of prison?* (Transform Justice, 2016).

it were to devote more attention to its duty to have regard to "the cost of different sentences and their relative effectiveness in preventing re-offending".[92]

8. Conclusions

In this article the sentencing workload of the Court of Appeal (Criminal Division) has been examined, using mostly cases reported in 2016 to illustrate the variety of grounds of appeal. It was argued that, in principle, the Court should focus on appeals coming within categories 1 (application and interpretation of guidelines), 2 (departures from guidelines) and 5 (interpreting sentencing legislation), and that the Sentencing Council ought to bear the principal responsibility for dealing with categories 3 (offence-specific guidance) and 4 (guidance on general principles and procedure). The Council has set a target of producing offence-specific guidelines for all major offence groups by 2020, but there appears to be confusion when a sentencing appeal is brought in respect of an offence still without guidance, and also when new sentencing legislation comes into force without guidance being given.

There is a need for a formal and transparent mechanism for determining the response to these and other sentencing problems requiring guidance. At the very least, there should be periodic meetings between the Lord Chief Justice and the chair of the Sentencing Council to discuss these matters, with minutes taken and reasons recorded. No doubt the judges who sit in the Court of Appeal have great sentencing experience, but since 1999 the production of sentencing guidance and guidelines ought to involve not only judges' experience but also the perspectives of the other criminal justice experts who sit on the Council. Also since 1999, the production of guidelines should be based on a wide public and professional consultation process. This indicates that, so far as possible, the Council should be preferred to the Court as the vehicle for sentencing guidance.

[92] Coroners and Justice Act 2009, s. 120(11)(e); cf. the Letter to the Editor from the current chairman of the Council, Treacy LJ, at [2016] Crim.L.R. 489, which includes the proposition that "we [the Council] cannot issue guidelines which ignore … clear guidance issued by the CACD".