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SENTENCING: GUIDANCE AND GUIDELINES

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Irish sentencing law is undergoing significant transformation and it is all happening rather fast. Guideline judgments have now become an accepted part of the legal landscape, while the Judicial Council Act 2019 provides for the introduction of formal sentencing guidelines. Mandatory minimum sentences for repeat firearms offences were found unconstitutional in *Ellis v Minister for Justice.*[1] The 2019 Act also requires that a review of all minimum sentences (whether presumptive or mandatory) be undertaken within the next two years, and that may well result in their abolition. Parole, albeit in a very limited form, has been placed on a statutory footing with the Parole Act 2019, but all existing forms of early release are retained. The new statutory provisions in respect of sentencing guidelines and parole have one thing in common. They were introduced in a policy vacuum, without any detailed consideration of their suitability and operability in Ireland at the present time. In fact, the Judicial Council Bill, one of the most important pieces of justice legislation in a generation, passed all stages in the Dáil in one hour and 55 minutes, a feat which one Deputy praised as a manifestation of efficiency.[2]

Controlling and structuring judicial discretion has been the dominant concern of sentencing reform and scholarship internationally for the past 40 years or so. Yet, it would be premature to assert that we live in an era of sentencing guidelines. Some major common-law jurisdictions, including Australia, Canada and New Zealand, still have no formal guidelines similar to those operating in the United States or England and Wales. The same holds true of most continental European countries. In fact, the grid-centred guidelines favoured in the United States have found no imitators elsewhere. Formal guidelines are nonetheless growing in popularity. At present, 19 American jurisdictions have guidelines of one kind or another.[3] England and Wales has a well-developed set of predominantly narrative guidelines and these have inspired somewhat similar guidelines in countries as diverse as Scotland, South Korea, Nigeria, Ethiopia and some Gulf states.[4] Ireland, as we shall see, now seems set to follow suit. Guidelines are not necessarily indispensable for a coherent and moderate sentencing system. Judicially developed principles, which may include recommended sentence ranges, can also promote

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1 [2019] IESC 30.

2 Deputy Jim O'Callaghan, speaking at the conclusion of the Dáil debate on the Judicial Council Bill (4 July 2019): "It is a sign of the efficiency of this Chamber that we managed to pass it in only one hour and 55 minutes."

3 Richard S. Frase, "Forty years of American sentencing guidelines: What have we learned?" In Michael Tonry (ed), *American Sentencing: What Happens and Why?* (Chicago: University of Chicago Press, 2019), 79.

4 Julian V Roberts, "The evolution of sentencing guidelines in Minnesota and England and Wales" In Michael Tonry (ed.), *American Sentencing: What Happens and Why?* (Chicago: University of Chicago Press, 2019), 187 at 188; Kassahun Molla Yilma, "Out of Africa: Exploring the Ethiopian sentencing guidelines" (2019) 30 *Criminal Law Forum* 309.

consistency of approach, whatever about consistency of outcome.[5] Having said this, guidelines, provided they allow for a reasonable measure of flexibility, can greatly assist in eliminating unwarranted disparity and providing a more transparent sentencing process.

The provisions dealing with the creation of formal sentencing guidelines were inserted in the Judicial Council Bill during the Committee Stage in the Seanad with little debate and, as already noted, all stages of the Bill went through the Dáil in less than two hours. There were no prior reports, investigations or deliberations on the suitability of such a system in Ireland at the present time. What has happened instead is that the English statutory framework has been transplanted to Ireland. By the early summer of 2019, the Court of Appeal and the Supreme Court had clearly shown themselves willing to give guidance in the form of sentence ranges. There was much to be said for allowing this practice to continue for some years so that a body of caselaw could emerge that would provide a useful and reliable basis for more formal guidelines. How the Sentencing Guidelines and Information Committee and the Board of the Judicial Council (which will be the key body in framing guidelines, by virtue of its power of amendment) will proceed and, in particular, how they will go about collecting reliable data on existing practice remains to be seen.

The first part of this paper outlines the history of judicially developed sentencing guidance in Ireland since 2014. The second describes the development and operation of Sentencing Council guidelines in England and Wales. The third describes those provisions of the Judicial Council Act 2019 that establish a Sentencing Guidelines and Information Committee and set out the duty of courts to follow guidelines adopted by the Judicial Council. I am adopting this order because the system now being introduced by the 2019 Act cannot be understood without some knowledge of the genesis and operation of the Sentencing Council guidelines in England and Wales. The fourth part will deal briefly with the Parole Act 2019. This might not be directly related to the guidelines issue, but parole is very much part of the overall sentencing process. The new statute therefore deserves some attention and, indeed, a great deal more than it can be given here.[6]

1. JUDICIALLY DEVELOPED GUIDELINES IN IRELAND

In 1988, the Supreme Court declined an invitation to lay down sentencing guidelines, for rape on that occasion. It did so partly because of the absence of reliable data on existing sentencing practice (a situation that has not improved very much in the meantime) and partly because it doubted the appropriateness of establishing sentencing tariffs, bearing in mind the importance of allowing trial judges to exercise discretion in individual cases.[7] This remained the orthodoxy

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5 Tom O'Malley, "Living without guidelines" in Andrew Ashworth and Julian V. Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (Oxford: Oxford University Press, 2013), Chap. 14; Tatjana Hörnle, "Moderate and non-arbitrary sentencing without guidelines: the German experience" (2013) 76 *Law and Contemporary Problems* 189.

6 This entire paper is derived from draft chapters of a forthcoming book, Tom O'Malley, *Sentencing: A Modern Introduction* (Dublin; Clarus Press, 2020) where parole and other forms of early release are addressed in greater detail.

7 *People (DPP) v Tiernan* [1988] I.R. 250' [1989] I.L.R.M. 149.

for the next 25 years, although during that time the Court of Criminal Appeal and, occasionally, the Supreme Court itself devoted a good deal of attention to general sentencing principles, including the overarching distributive principle of proportionality.[8]

The next major development occurred in March 2014 when the Court of Criminal Appeal, without any prior warning or attendant fanfare, delivered two guideline judgments, one dealing with possession of firearms in suspicious circumstances and the other with causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997. In *People (DPP) v Ryan*[9] (the firearms case), the Court accepted that it should try to maintain a broad level of sentencing consistency. It was properly a function of an appeal court not only "to attempt to establish the broad legal principles by reference to which any sentencing exercise should be conducted but also to give, where possible, some guidance as to the broad range of sentences which should be imposed, all other things being equal, across the spectrum of severity applicable to an offence under consideration."[10] While acknowledging that the Supreme Court in *Tiernan* had doubted the propriety of laying down any "standardisation or tariff of penalty", the court in *Ryan* said that this should not preclude an appeal court from giving "a broad level of guidance" as to the sentence ranges appropriate for various offences. That is precisely what it did in *Ryan* and in the companion case of *People (DPP) v Fitzgibbon*[11] (the assault case). The court in *Ryan* first indicated the range of factors that should influence sentence for possessing firearms in suspicious circumstances. Having considered some existing precedents and the need to respect the presumptive minimum five-year prison sentence to which the offence is subject, the court held that an offence at the lower end of the scale should ordinarily attract a sentence of five to seven years, an offence in mid-range a sentence of seven to 10 years, and an offence in the highest range a sentence of 10 to 14 years (the maximum sentence). The court specified that these were the recommended ranges before credit was given for mitigating factors. In effect, therefore, the guidelines were intended to assist in the identification of headline sentences, although the court did not use that term.

Causing serious harm, the offence in *Fitzgibbon*, was not subject to any presumptive minimum sentence which meant that the Court of Criminal Appeal had more latitude when it came to indicating sentence ranges. On the other hand, while the firearms offence in *Ryan* carried a maximum sentence of 14 years' imprisonment, causing serious carried a discretionary life sentence. In *Fitzgibbon* also the Court reviewed its earlier decisions, of which there were relatively few, on sentencing for serious assaults and once more adopted a tripartite approach in establishing sentence ranges. An offence in the lower range should ordinarily attract a sentence of two to four years, an offence in the mid-range a sentence of four to seven-and-a-half years and an offence in the top range a sentence of seven-and-a-half years to twelve -and-a-half years. In an exceptionally serious case, a sentence exceeding twelve-and-a-half years,

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8 *People (DPP) v M* [1994] 3 I.R. 306; *People (DPP) v Kelly* [2005] 3 I.R. 321; *Gilligan v Ireland* [2013] 2 I.R. 725.

9 [2014] 2 I.L.R.M. 98.

10 [2014] 2 I.L.R.M. 98 at 101.

11 [2014] 2 I.L.R.M. 116.

even up to and including life imprisonment, may be appropriate. Again, these were intended to indicate headline sentences before allowance was made for mitigating factors.

The *Fitzgibbon* guidelines were revisited by the Court of Appeal in *People (DPP) v O'Sullivan*[12]where the sentence ranges for s. 4 assaults in the middle and highest categories were increased. The Court said:

> "The experience of the courts operating under *Fitzgibbon* is that an upper limit of seven and a half years for a mid-range offence is too low and a figure of ten years would be more appropriate. Likewise, we are inclined to the view that a figure of twelve and a half years as pre-mitigation for a high-end offence is too low and should be increased to fifteen years with exceptional cases higher again."

Guidelines, whether judicially developed or otherwise, are meant to be dynamic rather than static in nature. This indeed was envisaged by the Court of Court of Criminal Appeal when it originally decided *Ryan* and *Fitzgibbon.* It would have been preferable, however, if the Court of Appeal had provided an empirical basis for its decision to adjust the guidelines for s. 4 assaults rather than rely on an impression gained from previous cases that had come before it. That impression might well transpire to be supported by the data if it had been analysed and incorporated in the judgment. But because of the significant impact of revised guidelines on later cases, any adjustments should be empirically grounded and objectively justified.

The Court of Criminal Appeal was effectively abolished in late 2014 and replaced by the present Court of Appeal which was slow to issue guideline judgments, though it must be said that, upon its establishment, it inherited an enormous backlog of cases as well as having to deal with a constant stream of new appeals. Eventually in 2018, it issued its first guideline in *People (DPP) v Casey*[13] which involved residential burglary. Like its predecessor, the court chose to offer guidance by way of sentence ranges. Having addressed in some details the factors that are relevant in sentencing residential burglaries, the court said:

> "Against the background of these comments, the court would suggest that mid-range offences would merit pre-mitigation sentences in the range of four to nine years and cases in the highest range nine to fourteen years. The court recognises that the circumstances surrounding individual offences can vary greatly, and that is so even before one comes to consider the circumstances of the individual offender. While a consistency of approach to sentencing is highly desirable, it is not to be expected that there will be a uniformity in terms of the actual sentences that are imposed."[14]

It may be inferred that a burglary falling into the lowest bracket should attract a sentence of up to four years' imprisonment. *Casey* was concerned with residential burglaries only. On the same day as it decided *Casey,* the Court of Appeal handed down judgment in a number of other

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12 Court of Appeal, unreported, 11 October 2019.

13 [2018] IECA 121; [2018] 2 I.R. 237.

14 [2018] IECA 121; [2018] 2 I.R. 337, para. 49.

cases including *People (DPP) v Byrne*[15] where it indicated sentence ranges for both robbery and aggravated burglary (zero to five years; six to 10 years; 11 to 15 years in each instance). Later in *People (DPP) v Samiulis*[16] the same ranges were recommended for the largescale cultivation of cannabis where the charge was one of possessing a controlled drug for sale or supply.

By this time, one major question remained. Would the Supreme Court, in light of its decision in *Tiernan*[17] (admittedly decided 30 years earlier), approve of the practice of guideline judgments? It appears to have done so in *People (DPP) v Mahon*[18] the general tenor of which suggests support for the adoption of sentence ranges to promote consistency. The court was undoubtedly influenced by the availability more statistical data on sentencing patterns than existed when *People (DPP) v Tiernan*[19] was decided in 1988. The offence in *Mahon* was manslaughter, assault manslaughter to be precise. Having considered some statistical data and several earlier appeal court decisions, the court adopted a fourfold categorisation of assault manslaughters: (1) worst cases: (2) cases with high culpability; (3) cases with medium culpability; and (4) cases with lower culpability. It noted that cases in category (1) generally attract sentences of 15 to 20 years, with the possibility of life imprisonment, those in category (2) sentences ranging from 10 to 15 years, those in category (3) sentences ranging from 4 to 10 years, and those in category (4) sentences up to 4 years, with fully suspended sentences in exceptional cases. This part of the *Mahon* judgment is cast in descriptive rather than explicitly prescriptive terms. It concentrates on describing the earlier cases falling into the various categories. However, the court's adoption of the fourfold classification, coupled with its more general observations on the desirability of consistency, strongly suggests that it intended the specified sentence ranges to guide the selection of appropriate headline sentences for assault manslaughters. The English Sentencing Council's Definitive Guideline on Manslaughter, which became effective on 1 November 2018, also adopted a similar four-fold classification for unlawful act manslaughter. This had been drawn to the Supreme Court's attention, among many other authorities.

2. GUIDANCE AND GUIDELINES IN ENGLAND AND WALES

Until the early 1980s, the sentencing system in England and Wales was very similar to that now operating in Ireland. Maximum sentences were specified by statute and courts had extensive discretion in selecting an appropriate sentence in each case. Such guidance as there was consisted largely of general principles that were mainly of common-law origin, although authority for most of them could be found in judgments of the Court of Criminal Appeal, now the Court of Appeal (Criminal Division), which had been established in 1907 and on which the Irish Court of Criminal Appeal, established in 1924, was largely modelled. However, the two

15 [2018] IECA 120.

16 [2018] IECA 316, para. 45.

17 *People (DPP) v Tiernan* [1988] I.R. 250; [1989] I.L.R.M. 149.

18 [2019] IESC 24; [2019] 2 I.L.R.M. 81.

19 [1988] I.R. 250; [1989] I.L.R.M. 149.

systems began to diverge from the 1980s onwards, as England and Wales moved to a more structured sentencing system,

The recent history of sentencing guidance in England and Wales may be divided into four eras, though they overlap to some extent: (1) the guideline judgment era, (2) the Sentencing Advisory Panel era, (3) the Sentencing Guidelines Council era, and (4) the Sentencing Council era. The first of these may be said to have begun in 1974 when the Court of Appeal decided *R v Willis*[20] which involved an appeal against sentence for sexual offences committed against young boys.[21] The single judge who granted leave suggested that this might be an appropriate case in which to give some general guidance on sentencing offences of this nature. The court, presided over by Lawton L.J., agreed with this suggestion, and dealt at some length with factors that might influence sentence in such cases. More significantly for present purposes, it said:

> "In our judgment, the sentencing bracket for offences [of this kind] which have neither mitigating nor aggravating factors is from three to five years; and the place in the bracket will depend on age, intelligence and education. Few offences, however, have neither aggravating nor mitigating factors. Many have both. When this happens the judge has to weigh what aggravates against what mitigates."[22]

This statement, short though it may have been, represented a new frontier in terms of the court's willingness to offer guidance on appropriate sentence ranges. The following year, in *R v Turner,*[23] the Court issued another brief guideline of sorts when it held that the normal sentence for taking part in a bank robbery or similar operation where firearms were carried but no serious injury was inflicted should be 15 years imprisonment. It was not until the early 1980s that the court began to deliver guideline judgments with any degree of frequency. Over the next 30 years, it provided guidance, usually in the form of starting points or sentence ranges, for many offences including drug dealing,[24] rape,[25] burglary,[26] reckless driving causing death,[27]

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20 [1975] 1 W.L.R. 292; (1974) 60 Cr. App. R. 146. In *R v Guilfoyle* (1973) 57 Cr. App. R. 549, the Court of Appeal had given some very general guidance on sentencing for dangerous driving causing death.

21 For a summary and analysis of sentencing developments from the early 1970s until about 2000, see Andrew Ashworth, "The decline of English sentencing and other stories" in Michael Tonry and Richard S. Frase (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press, 2001), Chap. 2.

22 [1975] 1 W.L.R. 292 at 295; (1974) 60 Cr. App. R. 146 at 148.

23 (1975) 61 Cr. App. R. 67. In *R v Taylor* (1977) 64 Cr. App. R. 182, the Court of Appeal gave some guidance, but only of a general nature, on sentencing offences of unlawful sexual intercourse with underage females.

24 *R v Aramah* (1982) 4 Cr. App. R. (S) 407; *R v Djahit* [1999] 2 Cr. App. R. (S.) 142; *R v Twisse* [2001] 2 Cr. App. R. (S.) 37; *R v Aranguren* (1995) 16 Cr. App. R. (S.) 211.

25 *R v Billam* (1986) 82 Cr. App. R. 547; (1986) 8 Cr. App. R. (S.) 48. This was superseded by *R v Millberry* [2003] 1 Cr. App. R. 25; [2003] 2 Cr. App. R. (S.) 31.

26 *R v Brewster* [1998] 1 Cr. App. R. (S.) 181; *R v McInerney and Keating* [2003] 1 Cr. App. R. 36; [2003] 2 Cr. App. R. (S.) 39.

27 *R v Boswell* (1984) 79 Cr. App. R. 277; (1984) 6 Cr. App. R. (S.) 257.

and theft involving breach of trust.[28] The Sentencing Guidelines Council produced a useful summary of Court of Appeal guideline judgments up to 2005.[29]

The second era began with the establishment of the Sentencing Advisory Panel under the Crime and Disorder Act 1998 (s. 81). The Panel was an expert group, eventually with 14 members, appointed by the Lord Chancellor after consultation with the Home Secretary and the Lord Chief Justice. Whenever the Court of Appeal decided to frame or revise a sentencing guideline, it was required notify the Panel which would research the area in question, carry out such consultations as it deemed appropriate and then furnish advice to the court. Effectively, therefore, the court could no longer develop guidelines without having sought advice from the Panel which also empowered to propose to the Court of Appeal that guidelines should be formulated for a particular category of offence.[30] Over the next dozen years or so, the Panel produced some excellent work which strongly influenced Court of Appeal guidelines on domestic burglary,[31] causing death by dangerous driving,[32] rape and other sexual offences,[33] child pornography,[34] possession of offensive weapons,[35] environmental offences[36] and several others.

For the first five or six years of its existence, the Sentencing Advisory Panel furnished its advice directly to the Court of Appeal. This changed, however, with the creation of the Sentencing Guidelines Council (SGC) under the Criminal Justice Act 2003 which marks the beginning of the third era of modern English sentencing.[37] The SGC was established in response to the Halliday Report which recommended the establishment of a mechanism for the development of comprehensive sentencing guidance.[38] It consisted of the Lord Chief Justice, seven judicial members and four non-judicial members. It was charged with drawing up sentencing guidelines that could be either general in nature or limited to a particular category of offence or offender, and allocation guidelines for determining if an offence was suitable for summary trial or trial on indictment. Offence-specific guidelines were required to specify criteria for determining

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28 *R v Clark* [1998]1 Cr. App. R. (S.) 299.

29 Sentencing Guidelines Council, *Guideline Judgments Case Compendium* (2005) available at: www.sentencingcouncil.org.uk/wp-content/uploads/web-case-compendium.pdf.

30 For further information on the Panel (and the Sentencing Guidelines Council), see Martin Wasik, "Sentencing guidelines: Past, present and future" [2003] *Current Legal Problems* 239; Andrew Ashworth, "The struggle for supremacy in sentencing" in Andrew Ashworth and Julian V Roberts (eds), *Sentencing Guidelines: Exploring the English Model* (Oxford University Press, 2013), chap. 2; Andrew Ashworth, "The sentencing guideline system in England and Wales" (2006) 91:1 *South African Journal of Criminal Justice* 1. Professor Wasik was the first chairperson of the Panel and Professor Ashworth the second.

31 *R v McInerney and Keating* [2003] 1 Cr. App. R. 36; [2003] 2 Cr. App. R. (S.) 39, with further clarification in *R v Saw* [2009] 2 Cr. App. R. (S.) 54.

32 *R v Cooksley* [2003] 2 Cr. App. R. 18; [2004] 1 Cr. App. R. (S.) 1.

33 *R v Millberry* [2003] 1 Cr. App. R. 25; [2003] 2 Cr. App. R. (S.) 31; *R v Patterson* [2006] 2 Cr. App. R. (S.) 48.

34 *R v Oliver* [2003] 1 Cr. App. R. 28; [2003] 2 Cr. App. R. (S.) 15.

35 *R v Celeira and Poulton* [2003] 1 Cr. App. R. (S.) 116.

36 *R v Thames Water Utilities Ltd* [2010] 2 Cr. App. R. (S.) 90.

37 Sections 167 to 173 of the Criminal Justice Act 2003 deal with the establishment and functions of the SGC.

38 Home Office, *Making Punishments Work: Review of the Sentencing Framework for England and Wales* (London, 2001), known as the Halliday Report.

offence seriousness, including the weight to be given to any previous convictions of offenders. The SGC was authorised to revise existing guidelines in addition to framing new ones. The Sentencing Advisory Panel remained in existence, but it now reported to the SGC. The Panel could make proposals to the SCG for the framing or revision of guidelines, and the SCG, in turn, whenever it decided to frame or revise a guideline, was obliged to notify the Panel. In either event, the Panel furnished its advice to the SGC rather than, as previously, to the Court of Appeal.

This arrangement represented an important turning point in English sentencing law. The creation of sentencing guidelines was now assigned to a body other than a court, albeit one with a judicial majority. Further, the 2003 Act (s. 172) provided that every court must, when sentencing an offender, "have regard to" any guidelines relevant to the offender's case, and when exercising any other sentencing function, have regard to relevant guidelines. As we shall see, English courts are now ordinarily required "to follow" sentencing guidelines. Between 2004 and 2009, the SGC published definitive guidelines for several offences, including causing death by dangerous driving and attempted murder, as well as two on general matters, assessing offence seriousness and reduction in sentence for a guilty plea. It also produced the Magistrates' Court Sentencing Guidelines.

The guidelines system was overhauled yet again by the Coroners and Justice Act 2009 which ushered in our fourth and final era.[39] Both the Sentencing Advisory Panel and the SGC were abolished and replaced with a new Sentencing Council (SC) which still operates. The SC consists of eight judicial members and six non-judicial members. The Lord Chief Justice is President of the SC, though not a member of it. The SC is charged with framing sentencing guidelines which "may be general in nature or limited to a particular offence, particular category of offence or particular category of offender."[40] Guidelines are first published in draft form to allow for consultation and then, after any appropriate amendments have been made, as definitive guidelines. When exercising its functions, the SC must have regard to a number of specified factors, including the sentences currently imposed by the courts, the need to promote consistency in sentencing and public confidence in the administration of justice, and the impact of sentencing decisions on victims of crime.

Compared with the Criminal Justice Act 2003, the 2009 Act is remarkably detailed in specifying how the SC should go about framing guidelines.[41] An "offence range", namely the overall range of sentence appropriate for the offence must be specified. Domestic burglary, for example, has

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39 Sections 118 to 135 and Schedule 15 of the 2009 Act deal with the establishment, composition and functions of the Council. For analysis, see Andrew Ashworth, "Coroners and Justice Act 2009: Sentencing Guidelines and the Sentencing Council" [2010] Crim. L.R. 389.

40 Coroners and Justice Act 2009, s. 120(2).

41 For more detailed accounts of how the present English guidelines operate, see Julian V Roberts and Anne Rafferty, "Sentencing guidelines in England and Wales: Exploring the new model" [2011] Crim. L.R. 681 (using the guideline on assault occasioning actual bodily harm as an example) and Julian V Roberts, "The evolution of sentencing guidelines in Minnesota and England and Wales" in Michael Tonry (ed.), *American Sentencing: What Happens and Why?* (University of Chicago Press, 2019) 187 at 205-207 (using the guideline on street robbery as an example).

an offence range extending from a community order to six years' custody, while aggravated burglary has an offence range of one to 13 years' custody.[42] In addition, whenever practicable, an offence-specific guideline should describe different categories of case which illustrate the various degrees of seriousness with which the offence may be committed. When this is done, as it usually is, the guideline should go further and specify "category ranges", namely the range of sentence considered appropriate for each category. Guidelines should indicate either a starting point in the offence range or, where there are categories, a starting point in the range for each category. The guideline on domestic burglary, for example, has three categories in descending order of gravity. In category 1 are domestic burglaries with greater harm and higher culpability, in category 2 are those with greater harm and lower culpability or lesser harm and higher culpability, and in category 3 those with lesser harm and lower culpability. The guideline then lists (as required under s. 121 of the 2009 Act) factors indicating greater and lesser harm as well as higher and lower culpability. As reflected in this example, harm and culpability are the key factors for the purpose of identifying the appropriate category.

Once a court has determined the appropriate category, it must then move to the sentencing starting points and ranges specified in the relevant guideline. In the domestic burglary guideline, for example, a category 1 offence has a starting point of three years' custody and a range of two to six years' custody, with lower starting points and ranges for the two remaining categories. The guideline includes a non-exhaustive list of aggravating and mitigating factors to be considered when making any upward or downward adjustment to the starting point. After all, the starting point will usually be about mid-way in the applicable range. Exceptionally, the presence of significant mitigating or aggravating factors might justify moving the offence to a different category from that initially identified. The 2009 Act specifically requires that guidelines should provide guidance on the weight to be given to previous convictions and to such other aggravating and mitigating factors as the SC considers to be particularly significant in relation to the offence or the offender. The domestic burglary guideline, for example, states that "relevant previous convictions are likely to result in an upward adjustment." Finally, allowance must be made for a guilty plea, where relevant, and for other matters such as the payment of compensation.

As noted earlier, the Criminal Justice Act 2003 (s. 172) imposed a duty on courts to have regard to sentencing guidelines produced by the SGC. The Coroners and Justice Act 2009 (s. 125), on the other hand, obliges courts to *follow* any relevant SC guidelines unless satisfied that it would be contrary to the interests of justice to do so. The duty to follow the guidelines is further specified as meaning that, where a relevant offence-specific guideline exists, a court must impose a sentence within the offence range (and that, as we have seen, is usually quite broad), but where a guideline has case categories (as in the domestic burglary guideline described earlier and most others), a court must decide which category most resembles the case at hand in order to identify both the appropriate starting point and the range. However, s. 125 then proceeds to state that, where categories exist, there is no separate duty to impose a sentence within the category range. Thus, a court will have fulfilled its statutory duty if, having taken all

[42] Sentencing Council, *Burglary Offences: Definitive Guideline* (London, 2011).

the steps required by a guideline, it imposes a sentence within the broader offence range rather than a category range. This may seem rather strange, but it was apparently intended to compensate for the imposition of a duty "to follow" the guidelines which had met with considerable judicial opposition when first proposed.[43]

Since 2004, about 20 offence-specific definitive guidelines and several others dealing with more general matters such as the assessment of offence seriousness and the discount for a guilty plea have been published. Many of the offence-specific guidelines cover several distinct offences. The sexual offences definitive guideline, for example, runs to 160 pages and deals with more than 70 separate offences. It has also been updated a few times since being adopted in 2013. About 130 commonly prosecuted offences are now covered by guidelines produced by the SC since 2010. The English guidelines are valuable for comparative purposes and can be used with profit in other jurisdictions because, leaving aside the recommended sentences, they provide a considered and well-researched list of factors that are relevant when assessing the gravity of particular offences and identifying offender-related factors that may influence the final sentence. The same holds true of the generic guidelines such as those on discount for a guilty plea and the totality principle, matters of concern in all common-law jurisdictions. The principles set out in those guidelines broadly reflect existing common law, but they do so in a coherent and structured manner.

3. STATUTORY PROVISION FOR SENTENCING GUIDELINES IN IRELAND

The Judicial Council Act 2019 provides for the establishment of Sentencing Guidelines and Information Committee (SGIC) under the aegis of the Judicial Council, the body charged with promoting high standards of conduct among the judiciary and continuing education of judges. The inclusion of the provisions creating the SGIC at a late stage in the passage of the legislation came as a surprise. When the Judicial Council Bill was first introduced in 2017 it provided for the establishment of a Sentencing Information Committee with the function of collating and disseminating information on sentences imposed by the courts.[44] There was little forewarning about the introduction of sentencing guidelines which resulted from amendments tabled during committee stage in the Seanad. The SGIC is one of the committees which the Sentencing Council is required to appoint under s. 23 of the 2019 Act. It is to consist of eight judges nominated by the Chief Justice (with one of those as chairperson) and five lay members to be appointed by the Government following receipt of recommendations from the Public Appointments Service. Each member of the SGIC is appointed for a four-year term and may not serve more than two full terms. In selecting the lay members, at least two of whom must be women,[45] the Public Appointments Service must try to ensure that they collectively possess knowledge and expertise in certain matters including the prosecution and defence of criminal

43 Andrew Ashworth, "Sentencing guidelines and the Sentencing Council" [2010] Crim. L.R. 389 at 395.

44 Judicial Council Bill 2017, s. 18.

45 Judicial Council Act, s. 24(6).

proceedings, policing, sentencing policy, promoting the welfare of victims, academic study and research in criminal law or criminology, and the rehabilitation of offenders.[46]

The functions of the SGIC, as set out in s. 23(2) of the 2019 Act, are to:

> (a) prepare and submit to the Board of the Judicial Council for its review draft sentencing guidelines;
> (b) prepare and submit to the Board for its review draft amendments to guidelines adopted by the Council;
> (c) monitor the operation of sentencing guidelines;
> (d) collate, in such manner as it considers appropriate, information on sentences imposed by the courts; and
> (e) disseminate that information from time to time to judges and persons other than judges.

In the discharge of its information role, the SGIC may collate information on court sentencing decisions, conduct research on sentences imposed by the courts, disseminate decisions of the court relating to sentence, and organise conferences, seminars and meetings relevant to its function. Any draft guideline drawn up by the SGIC and any proposal for the amendment of an existing guideline must be submitted to the Board of the Judicial Council (which has 11 judicial members) which must review the draft guideline or amendments and make such modifications as it considers appropriate. Guidelines and amendments are then formally adopted by the Judicial Council which consists, in effect, of all serving judges. The Council must adopt new and amended guidelines as submitted to it by the Board as soon as possible but, in any event, not later than 12 months after submission.[47] The judges constituting the Board will therefore have a decisive role in framing guidelines.

The sentencing guidelines adopted by the Council may relate to sentencing generally or to sentences in respect of a particular offence, a particular category of offence or a particular category of offender.[48] The 2019 Act further provides:

> "A range of sentences may be specified in sentencing guidelines that it is appropriate for a court to consider before imposing sentence on an offender in the proceedings before it."[49]

This suggests that guidelines may follow the pattern already established in Court of Appeal judgments such as *People (DPP) v Casey*[50] where sentence ranges rather than starting points were indicated. The 2019 Act, unlike the (English) Coroners and Justice Act 2009, makes no refence to offence categories, but it is sufficiently widely drawn to permit the framing of

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46 Judicial Council Act 2019, s. 25(3).

47 Judicial Council Act 2019, s. 7(2)(h).

48 Judicial Council Act 2019, s. 91(1) which appears to be modelled on England's Coroners and Justice Act 2009, s. 120.

49 Section 91(2).

50 [2018] IECA 121; [2018] 2 I.R. 337.

guidelines similar to those produced by the English Sentencing Council under the terms of the Coroners and Justice Act 2009. When framing draft guidelines and amendments, the SGIC shall have regard to:

> (a) sentences that are imposed by the courts;
> (b) the need to promote consistency in sentencing imposed by the courts;
> (c) the impact of judicial sentencing decisions on victims of the offences concerned;
> (d) the need to promote public confidence in the criminal justice system;
> (e) the financial costs involved in the execution of different types of sentence and the relative effectiveness of them in the prevention of re-offending;
> (f) such factors as the SGIC or the Board considers appropriate relating to the offence concerned and the offender committing the offence for the purpose of specifying a sentence range.[51]

This provision is clearly based on s. 120(11) of the (English) Coroners and Justice Act 2009, save that in the 2009 Act, paragraph (f) refers to the results of any monitoring of the guidelines by the Sentencing Council under s. 128 of that Act. The reference in paragraph (a) to the sentences imposed by the courts suggests that here, as in England and Wales, sentencing guidelines are intended to be broadly reflective of existing practice.

Section 92 of the Judicial Council Act 2019 specifies the extent to which criminal courts will be obliged to implement Council guidelines. It states:

> "A court shall, in imposing a sentence, have regard to sentencing guidelines relevant to the proceedings before it, unless the court is satisfied that to do so would be contrary to the interests of justice and the reasons it is so satisfied shall be stated by the court in its decision."

This section is an amalgam of s. 172 of the English Criminal Justice Act 2003 (which simply required a court to have regard to any guidelines relevant to the offender's case) and s. 125 of the Coroners and Justice Act 2009 which requires a court to follow any guidelines relevant to the offender's case unless satisfied that it would be contrary to the interests of justice to do so.[52] The duty "to have regard to" is, on the face of it, less constraining than a duty "to follow", which was included in the Coroners and Justice Act on the recommendation of the Gage Report.[53] However, while s. 172 of the Criminal Justice Act 2003 was in force, the Court of Appeal had stressed that it was not open to sentencing courts to disregard what the SGC had to say.[54] They could depart from a guideline in appropriate circumstances but not simply

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51 Judicial Council Act 2019, s. 91.

52 Section 92 of the 2019 Act is also very similar in substance to s. 6 of the Criminal Justice and Licensing (Scotland) Act 2010.

53 Sentencing Commission Working Group, *Sentencing Guidelines in England and Wales: An Evolutionary Approach* (London, 2008) (Gage Report).

54 *R v Oosthuizen* [2006] 1 Cr. App. R. (S.) 73, p. 385. See Andrew Ashworth, "Sentencing Guidelines and the Sentencing Council" [2010] Crim. L.R. 389 at 395. The Court of Appeal stressed the same point, even more strongly, in respect of the present duty "to follow" definitive guidelines in *R v Healey* [2012] EWCA Crim. 1005;

because they disagreed with it. A reasoned decision for the departure was required. Section 92 of the Judicial Council Act 2019, especially with its requirement for reasons, is likely to be interpreted in a similar way. For good measure s. 93 of the 2019 Act provides that nothing in the Act is to be construed as operating to interfere with (a) the performance by the courts of their functions, or (b) the exercise by a judge of his or her judicial functions. This was presumably intended to forestall, amongst other things, any challenge to the constitutionality of the judicial obligation to have regard to sentencing guidelines. Section 92 of the 2019 Act, as noted, requires a court to have regard to "sentencing guidelines relevant to the offence before it" which raises the question of whether this includes judicially developed guidelines as well as those adopted by the Judicial Council. It seems to cover the latter only because s. 2 of the Act (the general definitions section) provides that "sentencing guidelines" shall be construed in accordance with s.91 which is exclusively concerned with guidelines adopted by the Council. However, this should not detract from the obligation of trial courts to follow appeal court guidelines until such time as they are superseded by Council guidelines. The English Coroners and Justice Act 2009, in establishing the SC, expressly provides (s. 124(8)) that the Court of Appeal may continue in its judgments to provide guidance on the sentencing of offenders.

The absence of deliberation and consultation before the sentencing provisions were inserted in the Judicial Council Act 2019 was in stark contrast to the sequence of events extending over a decade or more that preceded the introduction of the present English guideline system in 2009 and in Scotland in 2015. Granted, the 2019 Act, unlike the equivalent English legislation, does not prescribe the exact form that the guidelines should take; this will be one of the more difficult choices facing the SGIC and the Judicial Council. What makes the decision of the Government and the Oireachtas to introduce sentencing guidelines in this way even more surprising is that the Fifth Programme of the Law Reform Commission, which was adopted by the Government in March 2019, includes a project on structed sentencing. The programme explicitly states that this would include an examination of the English Sentencing Council guidelines. Yet, a few months later, the Government decided to proceed with this legislation without any advice as to how such a system might work in Ireland.

There has been some debate elsewhere as to whether bodies charged with creating guidelines should have a lay or judicial majority.[55] The answer in this jurisdiction is now clear: the SGIC has a judicial majority while the Board (which has a revising function) and the Council (which will adopt the guidelines) consist entirely of judicial members. Having said this, the regime introduced by the 2019 has the potential to produce a fair and coherent sentencing system,

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[2013] 1 Cr. App. R. (S.) 33, p. 176, paras 5 and 6. More recently, in *R v Whirlpool UK Appliances Ltd* [2017] EWCA Crim. 2186; [2018] 1 W.L.R. 1811, para. 12, the Court of Appeal said, in relation to a guideline for a health and safety offence which included quite detailed tables of fines, that a sentencing court "should not lose sight of the fact that it is engaged in an exercise of judgment appropriately structured by the Guideline but, as has often been observed, not straitjacketed by it." This was later quoted with approval in *R v BUPA Care Homes (BNH) Ltd* [2019] EWCA Crim. 1671, para. 19.

55 Michael Tonry, *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (Cullompton: Willan, 2004), 103, arguing that only a minority or bare majority of a sentencing commission should be judges. Judges are in a minority on most American sentencing commissions.

especially because of the SGIC's obligation to monitor the application of the guidelines. But, to discharge all its duties effectively, the Committee will need considerable resources, including appropriately qualified support staff to collect and analyse data, and assist in guideline preparation. The English Sentencing Council has an annual budget of £1.4 million and its staff costs run to £1.2 million.[56] The Scottish Sentencing Council has an annual budget in excess of £500,000, including more than £300,000 for staff costs.[57] The Irish SGIC would need a budget at least equivalent to that of the Scottish Council if it is to discharge its functions effectively.

Comparative lawyers have debated the viability of legal transplants ever since Alan Watson published his classic book on the topic.[58] He argued that rules and sometimes entire bodies of rules can be successfully transplanted from one jurisdiction to another. The English guidelines, unlike their American counterparts, have proved to be remarkably transplant friendly. Whether they will take root and thrive in Irish soil remains to be seen. There is much to be said for those guidelines. They manage remarkably well to accommodate the competing values of consistency and individualisation. The criteria they employ for assessing offence seriousness and the factors that are listed as aggravating and mitigating in respect of particular offences will certainly prove useful to the SGIC or any other body charged with guideline development. Obviously, when considering recommended sentence ranges, it must be recalled that in England and Wales most prisoners are conditionally released once they have served half their sentence. In Ireland, on the other hand, a prisoner cannot be guaranteed release until he or she has served three-quarters of the prison sentence, and even then, remission is contingent on good behaviour.

4. THE PAROLE ACT 2019

There had long been calls to place our parole system on a statutory basis, and these have now been answered with the Parole Act 2019. This provides for the establishment of a Parole Board and a structured system for considering the conditional release of long-term prisoners. The Board will consist of 12 to 15 members including a chairperson who is to be nominated by the Chief Justice. The system established under the 2019 Act has some commendable features, but it has a few drawbacks as well. Its more positive features include:

- The Board must include a range of relevant expertise, including lawyers, psychiatrists, psychologists, representatives of the prison and probation services and various others (s. 10).
- The Act provides for a high level of procedural fairness (or the possibility of it, at least), including legal representation and legal aid for parole applicants, parolees and victims, the right to any oral hearing and the right to be given reasons for an adverse decision.
- Release decisions will be made by the Board rather than by the Minister on the Board's recommendations. As against this, the Board will be appointed by the Minister and a

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56 Sentencing Council, *Annual Report 2018/2019* (London, 2019), 44.

57 Scottish Sentencing Council, *Annual Report 2018/2019* (Edinburgh, 2019), 28.

58 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Athens, Georgia: University of Georgia Press, 1974). For an opposing point of view, see Pierre Legrand, "European legal systems are not converging" (1996) 45 *International and Comparative Law Quarterly* 53.

> member may be removed by the Minister for any one of a number of stated reasons including that "the removal of the member appears to the Minister to be necessary for the effective performance by the Board of its functions" (s. 12).

However, the Act also has weaknesses, mainly in the form of unanswered questions. Once more, the underlying problem is that the legislation was introduced without any general review of the overall process of early release from prison. Parole is one form, but currently only one form, of early release. The parole system first introduced in England and Wales under the Criminal Justice Act 1967 was based on recommendations of a White Paper, *The Adult Offender* (1965).[59] The new system introduced in the Criminal Justice Act 1991 (which has undergone further change in the meantime) was based on the recommendations of the very comprehensive and widely respected Carlisle Report.[60]

Minimum qualifying sentence and minimum qualifying period

The least that might be expected from a statute establishing a new parole system is that it would specify exactly the category of prisoners who will become eligible for parole and the portion of sentence they must serve before becoming so eligible. In other words, it should specify the minimum qualifying sentence, if any, and the minimum qualifying period. Unfortunately, the Parole Act 2019 does neither. Life prisoners are ineligible for parole until they have served at least 12 years, though it is far from clear how that figure was reached or why it is appropriate for all life sentences, whether mandatory or discretionary. However, in the case of prisoners serving determinate sentences, who typically account for about 88 per cent of the sentenced prisoner population, the 2019 Act (s. 24(1)(b)) provides that, in addition to lifers, there shall be eligible for parole:

> "a person serving a sentence of imprisonment of a term equivalent to or longer than such term as is prescribed in regulations made by the Minister under subsection (3), who has served at least such portion of the sentence as may be prescribed by the Minister in accordance with that subsection."

Subsection (3) then provides:

> "The Minister may, for the purposes of subsection (1), following consultation with the [Parole] Board by regulations prescribe:
>
> (a) a term of imprisonment of not less than 8 years, and

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[59] On the development of parole in England and Wales, see Stephen Shute, "The Development of Parole and the Role of Research in its Reform" in Lucia Zedner and Andrew Ashworth, *The Criminological Foundations of Penal Policy: Essays in Honour of Roger Hood* (Oxford University Press, 2003), Chap. 9; A Keith Bottomley, "Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s" (1990) 37 *Crime and Justice: A Review of Research* 319; Thomas G Guiney, *Getting Out: Early Release in England and Wales, 1960-1995* (Oxford University Press, 2018).

[60] *The Parole System in England and Wales: Report of the Review Committee* (Carlisle Report), Cm 532 (London, HMSO, 1988).

(b) the portion of such a term to be served by a person prior to becoming eligible for parole."

What this seems to mean is that those serving prison sentences of less than eight years will be ineligible for parole, though they will continue to qualify for remission and temporary release under the Criminal Justice Act 1960. Moreover, the minimum qualifying period is left to be determined by the Minister following consultation with the Parole Board. One of the factors to which the Minister is to have regard when making the regulations is the availability to prisoners of other forms of early release and "the extent to which the objective referred to in paragraph (a) [incentivising prisoners to become rehabilitated] is achieved by such other forms of early release."[61]

Let us suppose that the minimum qualifying sentence is left at eight years and the minimum qualifying period is set at one half (and it can scarcely be longer). A person serving an eight-year sentence could then possibly get released, although conditionally, after serving four years. A person serving a seven-year sentence, on the other hand, will not qualify for parole and cannot be guaranteed release until he or she has served three-quarters of the sentence, namely after 5.25 years. Either person might, of course, qualify for temporary release at any point in their sentence.

Co-existence of several forms of early release

When the Parole Act 2019 enters into force, there will be at least six different avenues of early release from prison:

(1) special remission granted by the Government under Art. 13.6 of the Constitution and the Criminal Justice Act 1951;
(2) Standard remission of one-quarter under the prison rules
(3) Possible enhanced remission of one-third under prison rules
(4) Temporary release under the Criminal Justice Act 1960
(5) Parole
(6) Part-suspended sentence.

The Parole Act expressly retains existing forms of remission and early release. It makes no reference to the part-suspended sentence. In fact, s. 24 (which deals with eligibility for parole) states that the Minister, when making regulations for the minimum qualifying sentence and the minimum qualifying period, shall consider a number of matters including:

> "the availability to persons serving sentences of imprisonment of such a term of other forms of early release from prison and the extent to which the objective referred to in paragraph (a) is achieved by such other forms of early release."

[61] Parole Act 2019, s. 24(4)(b).

(The objective mentioned in paragraph (a) is ensuring that prisoners have an incentive to be rehabilitated).

As to the part-suspended sentence, it is used mainly to incentivise rehabilitation (although, unfortunately, it also continues to be used to give credit for mitigating factors, when a reduction of sentence is clearly more appropriate). However, when the parole system becomes operative and assuming the minimum qualifying period is set at eight years or slightly more, a question will arise as to whether a court should ever grant part-suspension to a person being sentenced to a term of imprisonment that will leave him or her eligible for parole. After all, both measures are designed to serve the same purpose – incentivising rehabilitation – and parole is clearly the preferable way of achieving this because it will involve an individualised assessment of the person's suitability for release at a point where he or she will already have served a considerable portion of the sentence.

Suppose a court imposes a nine-year sentence with the last two years suspended. Is this to be treated as a seven-year sentence, in which case the person will not be eligible for parole? Is there not a policy argument to be made that a court should impose nine years simpliciter and let the Parole Board decide on the release date? In England and Wales, the Carlisle Report recommended the abolition of the part-suspend sentence entirely (and this was given effect in the Criminal Justice Act 1991) although there were particular difficulties there in relation to short sentences.

Rationale for parole and the role of the victim

Under s. 27 of the Parole Act 2019, the Parole Board may order release on a parole where satisfied that the prisoner would not, upon being released, "present an undue risk to the safety and security of members of the public (including the relevant victim), and has been rehabilitated and would, upon being released, be capable of reintegrating into society". However, there is another condition as well, namely, that "it is appropriate in all the circumstances that the parole applicant be released on parole." The many factors of which the Board must take account include the nature and gravity of the offence.

The Act clearly provides for victim involvement in the parole application process, even to the extent of furnishing victims with legal representation and legal aid. This is unobjectionable to the extent that it is designed solely to facilitate an assessment of the risk which the applicant may pose to the particular victim. However, it would be entirely contrary to the purpose of parole if victims were allowed to argue that an offender should not be released simply because he had not yet been punished enough. Parole proceedings must never amount to resentencing, a theme that constantly recurs in the international literature on the topic.[62]

Ultimately, the success of the new parole scheme will depend on the quality and independence of those who are appointed to the Parole Board and of the Chairperson in particular. When parole was first introduced in England and Wales in 1967, the first Chairman of the Board was

[62] See, for example, Mike Maguire, "Parole" in Eric Stockdale and Silvia Casale (eds), *Criminal Justice under Stress* (London: Blackstone Press, 1992), Chap. 8.

Lord Hunt who was best known at the time for having almost climbed Mount Everest in 1953. (He was leader of the expedition.) On his appointment, he admitted to knowing little about parole or criminal justice more generally but he was, by all accounts, an excellent chairman because of his independence, organisational abilities and commitment to the entire process. Hopefully we will be equally lucky.