
SENTENCING HISTORIC OFFENDERS

Law, Policy and Practice

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EXECUTIVE SUMMARY

- This paper reviews approaches to the sentencing of non-recent or ‘historic’ offenders in England and Wales. These include – but are not limited to – late prosecutions for historic sexual offending which have dominated the media in recent years.
- The sentencing of historic offenders is a notoriously difficult task, involving an interplay between old and new sentencing regimes as well as careful reference to Article 7 of the European Convention on Human Rights, which requires that the penalty imposed should not be heavier than the one applicable at the time of the offence.
- The complexity of the sentencing exercise – driven by an overarching desire to promote consistency – is compounded yet further by factors including the age and maturity of the defendant at the time of the offence, the passage of time – which can have an aggravating or mitigating effect depending on the circumstances of the case – and the suffering of the victim and the victim’s family in the intervening period, which may, by the time of conviction, have extended to years or even decades.
- In 2011, the Court of Appeal issued guidance on the sentencing of historic sexual abuse in England and Wales. The guidance was codified by the Sentencing Council for England and Wales in its *Sexual Offences Definitive Guideline (2014) Annex B*.
- A key debate in the literature on historic offending is whether the passage of time should have an aggravating or mitigating effect at sentencing. Does an offender deserve to be punished for a crime if a considerable amount of time has elapsed since its commission? There is a tension between, on the one hand, the proper consideration of the personal development of the offender, having due regard to their behaviour in the intervening years and, on the other hand, the public interest associated with the pursuit of serious crime, as evidenced by enduring harm to the victim and the victim’s family, unabated by the passage of time.
- Proportionality – the idea that the punishment should reflect the severity of the crime – is a guiding principle in cases of historic offending, where – in the extended period between crime, conviction, and sentence – there may have been an evolution in the objective or perceived gravity of the conduct coupled with a shift towards more severe penalties. A striking example is to be found in comparing indecent assault on a woman under the Sexual Offences Act 1956 which, until 1985, carried a maximum sentence of two years’ imprisonment, and either sexual assault or rape under the Sexual Offences Act 2003, which carry maximum sentences of 10 years and life imprisonment respectively.
- Notable cases so far this decade include *R v Lamb (Dylan)* [2020] EWCA Crim 881, where the requirement to make ‘measured reference’ to the Definitive Guidelines posed a challenge for the court in sentencing a sports coach who sexually abused boys in his care during the 1970s, 80s, and 90s and *R v Limon* [2022] EWCA Crim 39 where the defendant was convicted of eight counts of indecent assault between 1993 and 1996 and crossed a significant age threshold between committing the crimes and his conviction.

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1. PURPOSE AND SCOPE OF REVIEW

This paper reviews current approaches to the sentencing of non-recent or historic offenders in England and Wales. These include – but are not limited to – late prosecutions for historic sexual offending which have dominated the media in recent years and raised complex issues with which the courts continue to grapple.

The sentencing of historic offenders is a notoriously difficult task, involving an interplay between old and new sentencing regimes as well as careful reference to Article 7 of the European Convention on Human Rights. This provision sets limits on criminalisation and prohibits both retrospective offences and penalties. This means that it would be unlawful to convict an individual whose behaviour was not classified as criminal at the time or impose a penalty heavier than the one applicable at the time of the offence. The complexity of the sentencing exercise – driven by an overarching desire to promote consistency – is compounded yet further by factors including the age and maturity of the defendant at the time of the offence, the passage of time – which can have an aggravating or mitigating effect depending on the circumstances of the case – and the suffering of the victim and the victim's family in the intervening period, which may, by the time of conviction, have extended to years or even decades.

Stone (2017) contemplates the introduction of a Statute of Limitations for young offenders: a law which requires that a legal action must be brought before a set period has elapsed. This may be appropriate, for example, if an individual committed a single offence as a youth and desisted from crime for 15 years thereafter. Summary offences apart, there are currently no statutory limits on the prosecution of crimes in England and Wales, in contrast to Statute of Limitations provisions applying in the United States and in many jurisdictions in mainland Europe. If a Statute of Limitations is not introduced, then guidance from the Crown Prosecution Service – published in consultation with those who have worked with child victims and with experts on desistance from crime – would be welcomed (Rogers 2019).

Reasons for Delayed Conviction

Prosecution, conviction, and sentencing may be delayed by factors relating to the victim, the offender, official inaction, or new evidence coming to light through advances in science and technology, such as DNA and genealogical analysis. In some cases, the offender may have avoided prosecution without taking extraordinary action, whereas in others he may have actively evaded detection by, for example, acquiring a new identity or moving to another jurisdiction (Roberts 2017 and 2019). It is common for survivors of historic child sexual abuse to carry the burden for many years before reporting it to the police in adulthood (Independent Inquiry into Child Sexual Abuse 2018). Other reasons for the increased reporting of historic offences include a shift to the pro-active policing of sexual and domestic abuse offences and 'greater confidence on the part of those abused that their accounts will be listened to by the police' (HM Inspectorate of Prosecution in Scotland 2017, p. 3).

Whatever the reason for the delay, the process of prosecuting, convicting, and sentencing historic offenders is fraught with difficulty due to the diminishing reliability of witness testimony and the physical degradation of evidence over time (Roberts 2019).

2. SENTENCING HISTORIC CRIME

Defining Historic Crime

In England and Wales, the state has for some years been pursuing a series of late prosecutions for historic, non-recent, or cold cases of sexual offending in schools and other institutional contexts, but the formal definition of historic crime is not restricted to offending of this nature (Thomas 2012).¹ The term refers instead to any case in which there is a significant delay between the commission of the crime and its prosecution and sentencing and such cases can vary widely in their nature and seriousness. There is no clear consensus in the law or academic literature as to the meaning of 'significant delay': how many years should have elapsed in order for a case to be deemed historic, or where judges should draw the line between the immediate and distant past.² This lack of clarity is especially problematic in the current climate, where victims of violent and sexual crime in England and Wales are caught up in a criminal justice system with one of the worst backlogs ever seen in the Crown Court. For a trial, parties can expect a delay of at least a year, if not three or four, before a case is heard (see, for example, Law Society of England and Wales 2022).

A high-profile example of historic crime in England and Wales is the 2012 case of Gary Dobson and David Norris, who were prosecuted, convicted, and sentenced for the 1993 racially motivated murder of Stephen Lawrence. Although they were 36 and 35 years old respectively when sentenced, they were 17 and 16 years old at the time of the offence and therefore had to be sentenced as youths according to the legal framework operating at the time. This meant that the starting point for the minimum term was 12 years – as it was for youths at the time of sentencing – as opposed to a starting point of 30 years had they been sentenced as adults in 2012. Dobson and Norris were sentenced to detention at Her Majesty's pleasure, which is the mandatory sentence for children convicted of murder in England and Wales. They received minimum terms of 15 years and two months and 14 years and three months respectively.

The Passage of Time

A key question to arise in the literature on historic offending is whether the passage of time should have an aggravating or mitigating effect at sentencing. If a considerable amount of time has elapsed since the crime was committed, what effect, if any, should this have on the sentence? (Roberts 2019; du Bois-Pedain 2019; Douglas 2019). A tension is readily apparent between, on the one hand, the proper consideration of the personal development of the offender, having due regard to their behaviour in the intervening years and, on the other hand, the public interest associated with the pursuit of serious crime, as evidenced by enduring harm to the victim and the victim's family, unabated by the passage of time.

On one view, the passage of time should matter to sentencers tasked with evaluating an individual's conduct over that period. If an offender committed an offence 30 years ago, the state may well be punishing a very different person 'in the here and now' (du Bois-Pedain, p. 251). If the historic offender can demonstrate that he has rectified his earlier wrongs and led a law-abiding life ever

1 *R v H & Others* [2011] EWCA 2753.

2 [2011] EWCA Crim 2753 at para. 10: 'By definition, in historic cases, [the conviction] will be years after the crime was committed.'

since, then there is some basis for compassion towards that individual and for allowing sentencers to adopt a ‘fully contextualised’ (du Bois-Pedain, p. 250) view of their post-offending compliance. In the same way that first time offenders claim mitigation on the basis that the offence was preceded by a sustained period of compliance with the law, historic offenders could use the same argument to claim mitigation for sustained compliance with the law following the offence. For Roberts (2017), the passage of time often changes our evaluation of both the offence and offender and, when this occurs, the nature of the sentence should change.

Another view is that the sentence should be unaffected by the passage of time. The court should disregard the interval between the crime and sentencing on the grounds that it has no effect on the seriousness of the crime or the offender’s culpability for the offence. For the victim, late prosecutions can offer closure and a form of a moral compensation whose importance supersedes any appeal to the relevance of time, and there should be no leniency afforded to the historic offender.

Categories of Historic Offenders

The Sexual Offender

There are strong moral reasons – among them, respect for victims – for excluding historic sexual offenders from the opportunity to claim a sentence reduction based on the time which has elapsed since the offence. In cases of historic sexual offending, there might even be public support for temporal aggravation at sentencing, if evidence points to a sustained effort by an offender to conceal offending behaviour, frustrate detection and prosecution, and prolong the suffering of the victim.

The Young Offender

Temporal mitigation at sentencing might be more appropriate in the case of young offenders. The idea here is that each sentence must be carefully calibrated to ensure it is ‘developmentally appropriate’ (Scottish Sentencing Council 2019, p. 11): for example, by considering the maturity and mental state of the offender at the time of the offence. This approach would be in line with the individualised, case-by-case approach that pervades youth justice, and the Court of Appeal’s acknowledgement that age and immaturity at the time of offending have a considerable bearing on culpability (Harris and Walker 2017). Yet there are also pragmatic limits on the degree to which sentences can be tailored to individual circumstances. Such fine-grained assessment may simply be unreasonably costly or too prone to bias.

Other matters to consider are changing societal sensibilities in respect of the sanctioned conduct, how a juvenile of the perpetrator’s age would be sentenced, if at all, if they offended in the present day, as well as the perpetrator’s degree of success in diverting themselves from criminal misconduct in adult life.

The Older Offender

A report of the Scottish Sentencing Council (2019) observed that older offenders are frequently in denial about their offending or its seriousness, particularly in historic cases. Douglas (2019) imagines an 80-year-old who committed a serious offence as a 20-year-old but now shares ‘few memories of

and ‘few psychological traits with’ (Douglas 2019, p. 339) their former self. Again, a key issue is whether age – this time, older age – should play a role at sentencing.

The question arises as to whether ‘psychological disconnection’ from a past self (Douglas 2019, p. 356) should be deemed to affect culpability such that an older offender may avoid a custodial sentence for a serious historic offence. For Douglas, even if the perpetrator of a distant past wrong cannot be punished for their original behaviour, they should still be punished for their ongoing failure to rectify earlier wrongs by, for example, expressing remorse, apologising to the victim, or confessing to the police.

The advanced age of the offender is a separate, but related, consideration. For Roberts (2017), there may be utilitarian reasons to modify sentences for elderly offenders, whose age and frailty may mean that they present a very low risk of reoffending, in which case, a mild punishment or discharge may be less burdensome. This approach, however, may put the guiding principle of proportionality – the idea that the punishment should reflect the severity of the crime – at risk. There is a delicate balance to strike between taking an offender’s health into account in determining sentence and perpetuating the false idea that illness excuses punishment.

Proportionality

Roberts (2019) proposes that the principle of proportionality can assist sentencers through the complex task of adjudicating over historic offenders. Where the passage of time is concerned, the offence or the offender must have changed before we can justify a different approach to sentencing on the grounds of proportionality.

The most obvious change is an evolution in the objective or perceived gravity of the conduct. Some crimes have ‘become’ more serious in recent decades – driving while intoxicated, environmental and other regulatory offences – as our evaluation of their harm and relative seriousness has developed. The possession of soft drugs is now deemed less serious, while homosexual activity has been decriminalised entirely. On Roberts’ account (2019), where an offender commits a crime which was previously considered minor but is sentenced after the crime has risen to a higher level of seriousness, this warrants a more nuanced approach at sentencing.

As for offenders who have transformed their lives, the court must be careful not to make too great an allowance for powerful mitigating factors such as good character or a respectable life since the offence.

3. SENTENCING HISTORIC SEXUAL CRIME

In sentencing all historic offending, the court must consider each case in its historic context whilst having an eye to the correct approach for the modern counterpart offence. This means balancing the current sentencing guidelines (for the purposes of assessing harm to the victim and the culpability of the offender) with old law (for the purposes of arriving at the sentence) while also acknowledging the needs and interests of all involved (victims, offenders, their families, and the wider community).

In 2011, having observed that the courts had adopted conflicting approaches to sentencing historic sexual abuse, the Court of Appeal issued guidance and reaffirmed a set of general sentencing principles (*R v H*, see also Sentencing Council for England and Wales 2022). The guidance might be summarised as follows:

- The charges brought against an individual whose crimes were committed historically must reflect the law at the time the offence was committed. This may require the court to refer to the Sexual Offences Act 1956 or other legislation which predates the current law.
- The offender must be sentenced in accordance with the sentencing regime applicable at the time of sentencing. Under section 63 of the Sentencing Act 2020, the seriousness of the offence, assessed by the culpability of the offender and the harm inflicted on the victim, must be the primary consideration for the court. It must also consider the circumstances which brought the offence to light.
- The sentence itself must be limited to the maximum available at the time the offence was committed. This has been reinforced by Article 7 of the European Convention on Human Rights, which sets limits on criminalisation and prohibits retrospective criminal offences and penalties.
- The court must sentence with reference to any supplementary guidance in place at the time of sentencing, namely, the Definitive Guidelines issued by the Sentencing Council for England and Wales. It must have regard to the culpability factors and harm factors set out in any applicable guideline. If the guideline produces a sentence greater than the maximum permitted at the time the offence was committed, the court must make the necessary adjustments. Under sections 265 and 278 of the Sentencing Act 2020, a 'special custodial sentence for certain offenders of particular concern' applies to those who have committed serious sexual offences against children under 13.³
- In cases of historic sexual offending, the time between the offence, conviction, and sentence could be perceived as aggravating or mitigating, and are useful in determining the sentence to be imposed. Aggravating factors include a history of sexual offending in the intervening period or action taken to silence the victim and prevent them from reporting the offence. Mitigating factors include an absence of offending in the intervening period, evidence of good character and exemplary conduct, a self-report to the police, or an early admission upon apprehension by the police. Where apparent good

³ The purpose of the 'special custodial sentence for certain offenders of particular concern' is to ensure that offenders are subject to licence for a period after release even though they had not been found to be 'dangerous' by the sentencing judge.

character had been used to facilitate the sexual offending, then it would be deemed aggravating instead.

- The court must consider the defendant's youth and immaturity at the time of the offence and treat these factors as personal mitigation.
- A reduction for an early guilty plea should be made in the usual manner.

The Sexual Offences Definitive Guideline

When identifying the starting point and sentence range for the equivalent modern sexual offence, the court must refer to the current sentencing guidelines, since offenders should be dealt with in accordance with the applicable regime at the date of sentence.

The continuing importance of the Court of Appeal's guidance handed down in *R v H*, set out above, led to its codification by the Sentencing Council in its *Definitive Guideline on Sexual Offences*, in Annex B. The guidance in Annex B is not exhaustive but refers to several features common to historical cases, including:

- Cautioning the court against identifying the likely sentence had the defendant been convicted closer to the time of the offence.
- The passage of time, which has the potential to aggravate or mitigate depending on the circumstances of the case.
- The absence of offending and/or evidence of good character during the intervening period. In cases of the latter, the mitigating effect may be negligible if this feature was deployed by the offender to facilitate their offending.

Changed Attitudes

The sentencing exercise is sensitive to cultural and historical context. To this extent, it is an arbitrary exercise since attitudes towards crime and punishment evolve over time, as do conceptions of blameworthiness and moral fault (Roberts 2019). One uncomfortable reality of relying on old legislation in the context of historic sexual offences is that the grounds for conviction have changed, and so the labelling of the behaviour and the severity of the punishment imposed may appear inaccurate or even offensive according to modern standards.

The penalties imposed have also become more severe. Sentencing for the offence of indecent assault is one example of this upward drift. A striking example is to be found in comparing indecent assault on a woman under the Sexual Offences Act 1956 which, until 1985, carried a maximum sentence of two years' imprisonment, to an identical offence which today would constitute either sexual assault or rape under the Sexual Offences Act 2003 and carry maximum sentences of 10 years or life imprisonment respectively.

The result is that the process, viewed over time, lacks parity. Offenders convicted of the same crime are treated differently by the courts simply because they acted years apart. Given the marked uplift in sentences for offences under the Sexual Offences Act 2003, practitioners must be vigilant in identifying the relevant maxima and ensuring the sentencing judge is aware of the same, not least because the upper limit for any sentence can significantly temper the final disposal.

Registration Requirements, Notification Requirements and Other Ancillary Orders

Ancillary orders typically added to the penalty for those who are found guilty of historic sexual offences include inclusion on the Sex Offenders' Register and the Victim Surcharge.

The Sexual Offences Act 2003 provides that a person who has been convicted of certain sexual offences is subject to the notification requirements of that Act. The period for which the offender is subject to the requirements is dictated by how they were sentenced, and the court has no further discretion over the length of the notification period for any offender. While the Register was set up in 1997, offenders who committed sexual offences before it was created are still subject to its requirements.

Where the defendant has been convicted of any of the offences listed in Schedule 3 to the 2003 Act, the sentencing court has no discretion as to whether the notification requirement comes into play. For other offences, the notification requirements apply if the sentencing court determines that there is a significant sexual aspect to the offender's behaviour.

When a court passes a sentence, it must also order that the Victim Surcharge is paid. Introduced in 2007, the amount of the surcharge depends on the sentence and whether the offender acted as an adult or a youth. Revenue raised from the surcharge funds victim services through the Victim and Witness General Fund.

Case Law Insight

The following case commentaries map the period between 2011 and 2022 and provide some insight into the highly complex and sensitive issues which routinely arise in cases of historic offending.

R v H and others [2011] EWCA 2753

The leading case of *R v H* – described above – held that a defendant convicted of historic crime – in this case, 22 instances of sexual abuse against three stepsons – must be sentenced according to current regimes and guidelines. The only matter of importance from the time of the offence was that the sentence must be restricted to the maximum *as it then was*.

'What is the judge to do? We must return to first principles... the matters to be taken into account are explained in Chapter 1 of Part 12 of the 2003 Act. This contains general provisions about sentencing. They are well known. Sentencing judges cannot ignore statutory provisions which are currently in force. They apply to each and every sentencing decision, whenever the crime in question was committed, at the date of sentence. No specific provision is made for historic or cold cases.'⁴

R v Forbes and others [2016] EWCA Crim 1388

In *R v Forbes*, a series of nine appeals were heard together, which addressed issues arising from the sentencing of sexual offences committed several decades ago. The significance of the case is clear from the fact that the Court of Appeal sat as a five-judge panel, including the Lord Chief Justice, the Vice-President of the Court of Appeal (Criminal Division), the Chairman of the Sentencing Council

4 [2011] EWCA 2753 at para. 12.

for England and Wales, and the co-author of *Rook and Ward on Sexual Offences: Law & Practice* (Rook and Ward 2010).

It was held, allowing three of the appeals, that sentencing for historic sexual offences is to be governed by Annex B of the *Definitive Guideline on Sexual Offences* (2014) and is subject to the following general principles:

- The court should have regard to the Definitive Guidelines, applying them in a ‘measured and reflective manner’⁵ with reference to the maximum sentence at the time of the offence.
- Judges should guard against ‘too mechanistic’⁶ an approach either in terms of selecting the modern equivalent offence or in adopting the figures in the Definitive Guideline without having regard to the fact that generally higher maxima are provided for modern offences.
- On occasion, the court may consider more than one Definitive Guideline to determine the appropriate sentence.
- Although paragraph 9 of Annex B provides that the offender’s immaturity at the time of the offence may amount to personal mitigation, it is important to note that a significant mistake was made in the drafting of this paragraph. Culpability must be assessed by reference to the age and maturity of the offender at the time of the offending. The court in *R v Forbes*, in acknowledging this error, restated the view expressed in *R v H* where immaturity was deemed relevant to the assessment of culpability. In the absence of reliable evidence of the maturity of a youth offender, maturity should be assessed by reference to the maturity of a youth of the offender’s age at the material time.
- If a defendant was too young at the time of offending to have received a custodial sentence, Article 7 of the European Convention on Human Rights would prevent a custodial sentence being passed now.
- The term ‘abuse of trust’, as used in the Definitive Guideline, implies a trusting relationship that is more than mere association. A breach of trust may occur, for example, between pupil and teacher, as well as in parental or quasi-parental relationships which arise from ad hoc situations. A close examination of the facts is necessary, and a clear justification must be offered if an abuse of trust is found.
- The passage of time has no mitigating value where the offender threatened the victim not to ‘tell’.

Overall, *Forbes* advanced matters. The judgement was welcomed, not least because it obviated the need to infer developments from individual decisions in which the issues may not have been fully addressed (see, for example, Doig 2017 and Harris and Walker 2017). Indeed, the Court of Appeal described the codification in Annex B as a convenient statement of the applicable principles which a court should apply without the need to refer to *R v H* or other case law.

5 [2016] EWCA Crim 1388 at para. 9.

6 [2016] EWCA Crim 1388 at para. 10.

R v L [2017] EWCA Crim 43

The decision in *R v L* provides another example of the complex moral terrain the court must traverse in cases where there has been an evolution in the objective or perceived gravity of the conduct, including a deeper understanding of the longstanding impact of sexual crime on girls and women, and a shift towards more severe penalties.

The appellant, aged 51, was sentenced to 30 months' imprisonment following his conviction for the indecent assault of two female relations when he was aged between 14 and 17 and they were considerably younger. The sentencing judge described the offences as one of the worst cases of indecent assault that could be imagined. The impact upon the victims was long-standing and serious.

Had the appellant committed these acts in the recent past, as an adult, he would have been sentenced to a period of at least 10 years' imprisonment based on current guidelines. The maximum sentence for offences of indecent assault at the time of his offending, however, was five years' imprisonment. The sentencing judge had taken that maximum as a starting point, and then reduced the sentence by 50% to reflect the appellant's youth at the time of the offence.

The question for the Court of Appeal was whether the sentencing judge had the power to impose a sentence of a 30 months. The appellant claimed that the sentence breached Article 7 of the European Convention on Human Rights, on the basis that the judge's powers were constrained by the statutory maximum penalty available at the time of the offence for an offender aged 14, namely, six months for one offence or 12 months for more than one offence.

Dismissing the appeal, the court stated that Article 7 of the European Convention on Human Rights – which is concerned with the retrospective application of the law – was not infringed. The appellant's submission with regards to the limitation placed upon the court's sentencing powers simply misinterpreted the role which Article 7 plays in a historic sentencing exercise.

A custodial sentence was always available for the offender in *R v L*. His age at the time of the offence was relevant only to the court's assessment of culpability. The court is not expected to analyse the nature of the imprisonment for a young offender at the time, the maximum length of imprisonment, or the principles governing the sentencing of young offenders insofar as they go beyond the assessment of culpability.

R v Green (Michael) [2019] EWCA Crim 196

How should courts sentence a historic case when the offender has already been sentenced for similar offences in the past? The Court of Appeal identified the correct approach in *R v Green*, where the offender had engaged in a pattern of predatory behaviour on young boys in his charge as a sports coach. The offender had only recently been released from prison in relation to similar, but more serious offences, which historically overlapped with the offences being adjudicated in 2019. While not exhaustive, the factors that the court should consider may include:

- How recently the previous sentence was imposed.
- The similarity of the previous offence to the present offence.
- Whether the offences overlapped in time.
- Whether the offender could have disclosed his further offending to the police and asked it to be taken into consideration at the time of his first sentencing.

- Whether taking the previous sentence into account gives the offender certain privileges at sentencing that would be contrary to the public interest (by, for example, circumventing a technical rule of sentencing).
- The age and health of the offender at the time of subsequent sentencing and any other relevant circumstances including his conduct while in prison.
- Whether, if no account is taken of the previous sentence, the length of the two sentences is such that, had they been passed together to be served consecutively, they would have offended the totality principle.⁷

The judge, having reached the appropriate sentence for the current offences, then has discretion as to whether to make a further allowance or reduction to take account of the previous offence. The sentence, however, should not give the offender ‘an undeserved, uncovenanted bonus’⁸ following a conscious choice not to disclose other offences. In *R v Green*, rather than asking the court to consider his other offences, the offender put his victims through the ordeal of giving evidence. He remained silent in the hope that his other crimes would go undetected.

R v Lamb (Dylan) [2020] EWCA Crim 881

At the turn of the decade, the sentencing of historic offenders continued to be fraught with difficulty. In *Lamb*, the precise meaning of the requirement to make ‘measured reference’ to the Definitive Guidelines remained elusive.

The appellant, aged 72, took advantage of his position as a coach at football and hockey clubs during the 1970s, 80s, and 90s to carry out acts of sexual abuse against the boys in his care. He was convicted of 21 counts of sexual abuse against five young boys (aged 11 to 17 at the time of the offending) and sentenced to 30 years’ imprisonment.

In determining the appropriate sentence, *R v Forbes* required the court to make ‘measured reference’ to the Definitive Guidelines. This requirement is not intended to prescribe a mathematical exercise but, rather, to prompt the court to reflect the previous maximum sentence in arriving at a sentence based on current guidelines. The court must achieve a proper calibration and thereby some reduction to reflect the statutory maximum available at the time of the offence. In *R v Lamb*, there was a failure to achieve ‘measured reference’ of the kind envisaged in *R v Forbes*. The total term of 30 years was deemed excessive, and a total of 25 years’ imprisonment was substituted.

How should a court approach the balancing exercise between the modern and historical offence, when the maximum sentences are so disparate? This is inevitably an imprecise exercise, requiring some creative input from the sentencer. Given the unfortunate frequency with which courts must sentence offenders under the Sexual Offences Act 1956, perhaps it is time for the Sentencing Council for England and Wales to publish guidelines on the sentencing of the most common repealed sex offences, such as indecent assault.

⁷ The totality principle requires courts, when sentencing for more than a single offence, to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.

⁸ [2019] EWCA Crim 196 at para. 18.

R v Limon [2022] EWCA Crim 39

In *R v Limon*, the defendant crossed a significant threshold – from childhood to adulthood – between committing the crime and his conviction. Limon was granted leave to appeal against his sentences totalling four years’ imprisonment for eight offences of indecent assault between 1993 and 1996, committed when he was aged between 14 and 17, contrary to section 14 of the Sexual Offences Act 1956.

On appeal, it was held that the sentencing judge had fallen into error. The statutory maximum sentence for the offences in question was 10 years’ imprisonment. If the defendant had been convicted of these offences at the time of their commission, the maximum sentence that could have been passed, given the defendant’s youth, would have been 12 months’ imprisonment. The sentences were reduced accordingly. There was no good reason why Limon should be sentenced more severely than he could or would have been sentenced in the 1990s.

The decision in *R v Limon* implies that the approach taken by the Court of Appeal in *R v Forbes* has been called into question by the new Youth Guidelines. The result is that, in all cases where the defendant crosses a significant age threshold between the offence and conviction, the starting point for sentencing purposes should be the maximum sentence that would have been available to the court if had they been convicted and sentenced at around the time they committed the offence as a youth (Jarvis 2022).

With legislation changing frequently, *R v Limon* acts as an important reminder to practitioners to take care in identifying the relevant provisions at the start of the indictment period for the purposes of sentencing. In historic cases, recourse should be made to the Definitive Guideline on *Sentencing Children and Young People* (2017) as well as Article 7 of the European Convention on Human Rights, which requires a judge to arrive at a sentence which is consistent with the maximum sentence prescribed at the time of the offending (Jarvis 2022).

A Quiet Evolution

In recent years, the sentencing of historic sexual offenders has evolved away from the guidance handed down in 2011 in *R v H*. It has been observed that both the lower and appellate courts increasingly focus on the equivalent modern offence and the applicable sentence (having applied the relevant sentencing guideline) (Harris and Bunting 2015). This emerging tendency – which neglects to follow *R v H* strictly by determining the appropriate sentence for the historic offence and making ‘measured reference’ to the sentencing guidelines – generates yet more ambiguity. As we have seen, relatively frequent errors are made and subsequently corrected.

Inevitably, there will be an impact on sentencing levels moving forward. It is likely that defendants sentenced for historic sexual offences not only receive a more severe sentence than they would have if the offence was prosecuted shortly after it had been committed, but they routinely receive the same sentence (or similar) to that which would be imposed had the offences been committed today.

4. CONCLUSION

Cases of historic offending – especially of a serious or sexual nature – raise complex questions about how such offenders are tried and punished by the courts of England and Wales. The development of a clear, principled approach is likely to be made in incremental steps. With a view to increasing awareness and understanding, there must be a move towards greater clarity in the public domain as to how the sentencing of historic offenders works. One issue urgently deserving of clarity is that judges use current sentencing guidelines for the purposes of assessing the harm to the victim and the culpability of the offender, but the law only allows them to pass sentences within the maximum sentence range that would have been available at the time of the offence. It is important too that the public is made aware of registration and notification requirements and their impact on the offender.

Meanwhile, the court must strike a balance the competing rights and interests of multiple parties – of victims, offenders, and the public at large. Sentencers must pay special attention to the passage of time between offence and sentence, not least because the intervening period can put a ‘completely different complexion’ on the sentencing exercise (Flatman and Bagaric 1997, p. 17). It is a matter of continued debate as to whether the sentencing process for historic offenders – as it stands – is satisfactory.

REFERENCES

- Doig, G.A. (2017) 'The Sentencing of Historic Sexual Offences: *R v Forbes and others* [2016] EWCA Crim 1388', *The Journal of Criminal Law* 81(1) 9-19.
- Douglas, T. (2019) 'Punishing Wrongs from the Distant Past', *Law and Philosophy* 38: 335-358.
- du Bois-Pedain, A. (2019) 'Penal Desert and the Passage of Time' in A. du Bois-Pedain and A.E. Bottoms (eds.) *Penal Censure: Engagements Within and Beyond Desert Theory*. Oxford: Hart Bloomsbury.
- Flatman, G. and Bagaric, M. (1997) 'Problems in Prosecuting Cases Involving Historical Child Sexual Abuse: The Victorian Experience', *Deakin Law Review* 4(1) 1-20.
- Harris, L. and Bunting, D. (2015) 'Has the Approach to Sentencing Historical Offences Changed?', *Archbold Review* 4: 5-6.
- Harris, L. and Walker, S. (2017) 'Sentencing Historic Offences Committed by Youths: Can the Court of Appeal Go Further?', *Criminal Law Review* 8: 601-12.
- HM Inspectorate of Prosecution in Scotland (2007) *Thematic Review of the Investigation and Prosecution of Sexual Crimes*. Glasgow: HM Inspectorate of Prosecution in Scotland.
- Independent Inquiry into Child Sexual Abuse (2018) *Interim Report HC 954-I* (2018). London: House of Commons.
- Jarvis, P. (2022) 'The Old and the Young', *Archbold Review* 3: 4-8.
- Roberts, J.V. (2017) *Sentencing Historic Offences*. Oxford: Centre for Criminology Blog, University of Oxford.
- Roberts, J.V. (2019) 'The Time of Punishment: Proportionality and the Sentencing of Historic Crimes' in M. Tonry (ed.) *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* Oxford: Oxford University Press.
- Rogers, J. (2019) 'Prosecuting Historic Sex Offences by Children', *Archbold Review* 6: 7-9.
- Rook, P. and Ward, R. (2010) *Sexual Offences: Law & Practice* (4th edn). London: Sweet & Maxwell.
- Scottish Sentencing Council (2019) *Sentencing of Sexual Offences: Conference Report*. Edinburgh: Scottish Sentencing Council.
- Sentencing Council for England and Wales (2014) *Sexual Offences: Definitive Guideline*. London: Sentencing Council for England and Wales.
- Sentencing Council for England and Wales (2017) *Sentencing Children and Young People: Definitive Guideline*. London: Sentencing Council for England and Wales.
- Sentencing Council for England and Wales (2022) *How Sentencing of Historic Offenders Works*. London: Sentencing Council for England and Wales.
- Stone, N. (2017) "'A Vexed Question": Sentencing Historic Youth Offending', *Youth Justice* 17(1) 73-84.
- The Law Society of England and Wales, 'Unacceptable Delays will Continue without Urgent Funding' Press Release (26th April 2022). London: The Law Society of England and Wales.
- Thomas, D.A. (2012) 'R v H: Sentencing – Historic Sexual Offences – Approach to Sentence (Case Comment)', *Criminal Law Review* 2: 149-57.