

Sentencing Council

Sentencing Council meeting: 18 December 2015
Paper number: SC(15)DEC05 – Prison Reform Trust
recommendations
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1 ISSUE

1.1 To consider the Prison Reform Trust's discussion paper on the sentencing of mothers, in particular the recommendations directed to the Council; and agree a response.

2 RECOMMENDATION

2.1 That the Council:

- notes the content of the report, in particular the recommendations addressed to the Council;
- discusses the issues raised and agrees a position in response; and
- considers the form and timing of any response.

3 CONSIDERATION

3.1 The Prison Reform Trust informed the Council about its research into the sentencing of mothers and invited the Chairman to a meeting to discuss the draft recommendations. The discussion paper was published at the end of November. It contains a number of linked recommendations, broadly unchanged from the draft. Two are directed to the Council, although the others are also of interest and are summarised at paragraphs 3.9 to 3.14. The full report is available at:

http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing_mothers.pdf

3.2 The Chairman agreed that he would bring the report and recommendations to the Council's attention. While there is no requirement to respond, there is merit in the Council considering its position. The PRT is likely to follow up in due course. The Magistrates' Association has already expressed interest in the Council's reaction and

it is likely that the Government, the Judicial College and the senior judiciary will be interested in the Council's views. It is also possible that the Justice Committee will take an interest and the Ministry of Justice has received Parliamentary Questions linked to the report.

Recommendation 3: Sentencing guidelines should be strengthened by the addition of an “Overarching Principle” setting out the court's duty to investigate sole or primary caring responsibilities of defendants and to take these responsibilities into account in sentencing decisions

3.3 The Council considered the treatment of those with caring responsibilities in October, when it reviewed the draft guideline on imposition of community orders and custodial sentences. It rejected a proposal to include specific guidance to the court requiring it to consider whether the offender is a primary carer (or has mental health or substance misuse issues). The Council felt that to steer judges away from sentencing particular groups to imprisonment would be a policy decision, which should not be a factor in judicial decision making. The guidance emphasises that custody is reserved for the most serious offences, when other options have been considered and rejected; and similarly guides the court to consider whether a fine or discharge would be an appropriate penalty rather than a community order. In the case of both custodial and community penalties the new guidance emphasises the importance of requesting a pre-sentence report.

3.4 We have conducted a light touch review of the *Overarching Principles – Seriousness*, to assess whether the introduction of the new guidance on imposition of sentences could replace them. We have concluded that they contain other material which is useful to sentencers, and that they should therefore remain in effect until such time as the Council revises them (a project on the long term work plan). It may therefore be possible to incorporate more in depth guidance on primary carers in updated Overarching Principles on seriousness in due course.

Question 1: Are you content that this accurately reflects the consensus of the Council? Is there any appetite for producing an Overarching Principle as described in the report, or other forms of guidance?

Recommendation 9: The Sentencing Council should undertake or support targeted research and consultation with magistrates and judges on how sole and primary caring responsibilities are and should be taken into account in court, as well as monitoring sentencing practice and outcomes in this area more closely

3.5 The Council has already conducted some analysis, drawing on CCSS data of the use of the mitigating factor “sole or primary carer” and Sarah Munro presented this to the Government’s Advisory Board on Female Offenders in December 2014. In summary, this found that the mitigating factor ‘*Sole or primary carer for dependent relatives*’ was more likely to be taken into account when sentencing women than men. This was true across all sentence outcomes including when considering sentences of immediate custody only. For example, for GBH section 20 assault offences, women were about six times more likely than men to have this factor taken into account across all sentence outcomes, and almost 7 times more likely when just considering sentences of immediate custody. However, this factor was not the most prevalent mitigating factor taken into account when sentencing women offenders. Mitigating factors of ‘*remorse*’ and ‘*lack of previous convictions*’ were the most common factors taken into account when sentencing women. For example, in GBH section 20 offences, remorse as a mitigating factor was present in 58% of cases, lack of previous convictions in 45% of cases, compared to 20% of cases for sole/primary carer. For the drug offences where the mitigating factor ‘*offender’s vulnerability was exploited*’ is specified in the guideline, women offenders were three times more likely than men to have the factor taken into account when sentencing.

3.6 However, it is difficult to assess the impact of the use of individual mitigating factors as information is only available for Crown Court cases, where women only account for 1 in 10 offenders. This means that for many offences there are insufficient cases to enable robust analysis. We have not published this analysis, but it was considered by the Council in late 2014. It would require further quality assurance were we to publish it.

3.7 For the first time, we are monitoring sentencing practice in the magistrates’ courts. The current data collection exercise will capture the frequency with which this mitigating factor is being taken into account for shop theft and selected drugs offences. We will publish the findings in due course, once the assessments of these guidelines have been completed.

3.8 However, the recommendation goes further than simply conducting research into the use of the existing mitigating factor. It calls on the Council to review how these responsibilities *are and should be* taken into account. This goes beyond the

scope of the Council's analytical strategy, which was agreed following a review of the Council's analytical functions and priorities and is less than a year old. The Council agreed that its analytical strategy would focus on meeting those elements of its statutory duties linked to the cycle of guideline development, which includes monitoring and evaluation. Cross-cutting, general research about how particular factors or circumstances should be taken into account in sentencing is currently outside the scope of the strategy. In light of the constraints on our budget, such research therefore does not appear to be a priority. More immediately the restrictions imposed by the Ministry of Justice on how we spend our budget would prevent expenditure of this nature: we lack the staff resources and are prevented from employing new staff or an external contractor to undertake it.

Question 2: Do you agree that we should not devote resources to the type of research envisaged in the report?

Question 3: Are there other options we might explore, to deliver the research proposed without requiring Council resources (whether staff or financial)?

The other recommendations

3.9 While the other recommendations are not addressed to the Council, they are nevertheless of interest as they all relate to the court's overall approach to sentencing women with caring responsibilities. As noted, the Council has been involved in previous discussions on sentencing women, both internally and through the Government's Advisory Board.

3.10 The Government is encouraged to review the sentencing framework "to ensure appropriate recognition of and provision for an offender's sole or primary care responsibilities" (recommendation 1). It is also encouraged to review arrangements for women in criminal justice more generally, co-ordinating through the Advisory Board (recommendation 2). The Ministry of Justice is considering its response.

3.11 Courts are encouraged to "establish mechanisms to ensure the provision of sufficient information to sentencers where the offender has primary caring responsibilities, including a requirement for a full written pre-sentence report and local directory of women's services" (recommendation 4). While this recommendation is not directed at the Council, the guidelines already include encouragement, but not an absolute requirement, to require a pre-sentence report if considering imposing a community order or custodial sentence, although this will not necessarily be a written report. The new draft guideline on imposition of such orders

emphasises the importance of pre-sentence reports. The Council discussed the challenges currently facing courts in having access to information about the full range of non-custodial options available at its last two meetings; further clarity would no doubt be welcome, but is outside the court's direct control and is likely to require action by the NPS and CRCs.

3.12 The report recommends that sentencers, when imposing non custodial sentences, be required to inquire about family responsibilities and ensure that rehabilitation activity requirements are achievable (recommendation 5). As discussed at the Council in November, the requirements under a RAR cannot be set by the court: this was not Parliament's intention. As above, further information about the options in the local area would no doubt be welcomed by the courts but is not within their (or the Council's) control.

3.13 Recommendation 6 is that sentencers should be required to consider non-custodial sentences for offenders with primary care responsibilities, and in cases when imprisonment is an option, to consider a community order, deferred or suspended sentence. The Council's qualitative research has found that sentencers do take into account a range of personal circumstances when deciding on the appropriate sentence. The existing *Overarching Principles – Seriousness* and the draft guideline on imposition of community and custodial penalties both emphasise that custody is reserved for the most serious cases and remind sentencers that even when the custody threshold has been passed that does not mean that a custodial sentence should be deemed inevitable. The guidance goes on to say that custody can be avoided in the light of personal mitigation or where there is a suitable intervention in the community which provides sufficient restriction (by way of punishment) while addressing the rehabilitation of the offender. At page 18, the recommendation is explained in more detail, to include a presumption that very few cases tried by magistrates will merit a custodial penalty. This is at odds with the direction of travel in the Allocation Guideline. Recommendation 6 also includes a requirement for written reasons in all cases where an immediate custodial sentence is imposed. This is outside the Council's remit but raises questions about practicality and cost.

3.14 The remaining recommendations relate to training and encourage training about taking caring responsibilities into account when sentencing (recommendation 7) and the different impact of imprisonment on men and women (recommendation 8).

Responding to the recommendations

3.15 As noted, there is no formal requirement to respond to the recommendations. However, having agreed to bring the recommendations to the attention of the Council, it is reasonable to assume that the Prison Reform Trust will follow up with us in due course. The Advisory Board has expressed an interest in the Council's views. The Judicial College, also a recipient of recommendations, will wish to be aware of the Council's response and it is reasonably likely that the Justice Committee will touch on these issues when it takes evidence from the Chairman next year.

Question 4: Do you wish to respond formally in any way, or are you content that the Council position be communicated less formally, as the opportunity arises (whether via one of the routes identified, or others)?

Question 5: Do you wish to discuss any of the issues raised by the report in more depth at a future meeting?

4 IMPACT

4.1 There is no resource or other impact arising from this paper, although decisions to pursue new guidelines would have an impact on the work plan and resources. Similarly, if the Council wished to conduct additional research or publish existing unpublished findings, this would also have a resource impact.

5 RISKS

5.1 The report directs attention towards the Sentencing Council and is likely to prompt questions about its approach towards women and/ or primary carers. Some risk arises if the Council does not have a response to such questions, in particular if they are asked by the Justice Committee during a formal evidence session. This can be mitigated by reaching consensus on the issues raised.