



Sentencing Council meeting:
Paper number:

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SC(21)JAN06 - "What next for the Sentencing Council?" legitimacy

Lead officials:

OSC Vision group

1 ISSUE

1.1 Looking at responses to the 'Vision' consultation which relate to the legitimacy of the Council as a body, how it is composed and structured, and the way in which it fulfils its statutory functions.

2 RECOMMENDATIONS

2.1 The below recommendations and any agreement should be provisional until the Council has considered all the areas emerging from the Vision consultation.

2.2 That:

- we consider at the scoping stage of each future guideline whether to draw on external expertise;
- when restrictions ease, we consider meetings held in different regions, and add Local Criminal Justice Boards as standard recipients of consultations;
- we should reach out proactively to offenders and victims (via representative groups as necessary) as part of consultations; and
- a periodic/annual revision of cross cutting elements in guidelines is one way of meeting the suggestion that the guideline process be made more "nimble" and responsive; and
- Council note and consider responses which suggest the Sentencing Council should more actively involve itself in the public and parliamentary debate on sentencing matters, and the ongoing debate on the role of guidelines in influencing the prison population

3 CONSIDERATION

3.1 Looking across all responses, matters relating to the “legitimacy” of the Council can be categorised into three sets of themes. Firstly, there are answers which are specifically about the Council’s structure and governance. Secondly, there are some broadly consistent responses about the role of the Council in acting on and reacting to events (linked with informing the public) and in setting sentence levels. And finally, there are the broader themes which overlap with other parts of the vision consultation.

3.2 A small handful of themes came out strongly across a number of different responses, but much of what respondents said were individual suggestions from quite specific perspectives.

The Council’s structure and governance

3.3 There were no obvious common themes on the makeup of the Council but individuals made the following proposals:

“...given that the vast majority of cases are sentenced in magistrates’ courts and the different experiences of magistrates in, for example, urban and rural areas, we would welcome an increase of magistrate members on the Sentencing Council (in addition to, as currently, a district judge) to give a broader range of views.” (The Magistrates’ Association)

“There is a case for reviewing the criteria for membership of the Council, including whether the judicial members should form the majority (currently eight of the 13 members are full or part-time judges, and the President is the Lord Chief Justice). People with expertise in mental health or addiction, or the media and ex-offenders could make good candidates for membership. The prison system should also be represented, for example by the head of HMPPS. Without the involvement of HMPPS, it is hard to see how the Council can properly understand the impact of sentences on the agencies which implement them” (Transform Justice)

“We endorse Anthony Bottoms’ recommendation that the defence ‘voice’ on the Council, along with expertise on mental health and addictions, should be strengthened through either membership or advice” (Prison Reform Trust)

“The fact that there are no disabled representative reviewing the sentencing guidelines is a glaring omission in the fact that 20% of the population have disabilities and equality issues... the committee [sic] should set up a sub-committee drawing

upon truly disabled members of the Magistracy to review the hidden impact on the disabled and ethnic communities...[You should be reaching out to the] disabled community. Use magistrates who are members of these communities. Have a more diverse sentencing council.” (Ian Pearson, magistrate).

3.4 Attempting to draw a thread through these responses one could note that no one is pushing for more senior judges and lawyers to sit on the Council. Rather, specialist expertise and “lived experience” could be reflected more.

3.5 We are constrained by Schedule 15 to the Coroners and Justice Act 2009 to have eight judicial members and six non-judicial members, and the non-judicial members need experience in certain areas.¹ There is leeway within those categories in terms of emphasis. But there is a suggestion in some responses that short of there being a formal position on the Council for representatives of certain groups, then establishing some more or less formal route to hear such opinions may also be valuable. We have in the past used outside experts to attend Council meetings and help inform guidelines (for example on Health and Safety offences) and could look to do that on a more consistent basis in the future by considering at the scoping stage of each new guideline whether we will need external expertise. For example, we could ensure that we request input from HMPPS more consistently to understand the implementation of sentences. Further, we could then be more explicit in consulting on and publishing new guidelines that we have drawn on this expertise so that interested parties are aware that we have done so.

Question 1: Do you agree that we should consider at the scoping stage of each guideline whether to draw on external expertise?

3.6 In terms of attracting people with disabilities, minority voices etc, all of the Council’s adverts carry the usual wording: “Applications are encouraged and welcomed from women, members of ethnic minorities, and people with disabilities. There is strong commitment to equality of opportunity in the appointments process for all those who are eligible”. Respondents/the public are unlikely to know the extent to which members of the Council have disabilities, including hidden disabilities. However, we could consider ways of demonstrating our commitment to diversity on the Council (the Government’s kitemark Disability Confident system is more aimed at employers, but we could explore similar options).

¹ One of the following: criminal defence; criminal prosecution; policing; sentencing policy and the administration of justice; the promotion of the welfare of victims of crime; academic study or research relating to criminal law or criminology; the use of statistics or; the rehabilitation of offenders.

3.7 A magistrate respondent, valuing consistency, thought that the term of office should be five years. This is something set by statutory instrument (the Sentencing Council for England and Wales (Supplementary Provisions) Order 2010). In practice, many members of the Council have had their three year terms renewed and it is a question as to whether that would happen if the terms were five years. Such a change might have the practical effect of Council members serving *less* time on the Council. Equally, some applicants might regard five years as too long a commitment. Some members of the judiciary might be excluded if they are nearing retirement age.

3.8 In terms of the Council's structure, Professor Nicky Padfield had this suggestion:

"It is worth revisiting Professor Ralph Henham's suggestion in his Sentencing Policy and Social Justice (2018) that regional Sentencing Councils should be established, not least for training purposes and to keep sentencers abreast of "social cost factors"

This would be practically and financially difficult to establish, and we would need a clear view of what the intended outcomes were. On the one hand, it might highlight particular perspectives (rural, inner city etc), and allow prevalence of certain offences in certain areas to be reflected in guidelines. However, it risks inconsistency of approach across the jurisdiction and unfair outcomes for both offenders and victims depending on their location. The proposal also implies a role for these councils in training.

3.9 The Office has tried to guard against being too London-centric. Our advertisements are clear that members do not need to be based in London to apply, and we have deliberately tried to make consultations fully E&W-wide. When pandemic restrictions are lifted we could look to organise meetings in different parts of the country, inviting local criminal justice partners to attend. We could also ensure that Local Criminal Justice Boards are added to the list of standard recipients of our consultations. This links somewhat to the question of publishing sentencing data from local areas, which we will discuss separately.

**Question 2: do you agree that these are good ways of seeking a local/regional view?
Are there any others?**

The role of the Council

3.10 One major theme which emerged from several responses was a fundamental one about how the Council should see itself. These all imply a more active role for the Council and perhaps a different relationship with various arms of the State:

"The Council needs to reinvent itself as an expert body on sentencing which does not simply reflect existing norms but challenges them based on evidence of

effectiveness....These are missed opportunities for the Council to develop its role as an expert body on sentencing which can be looked to by legislators and the executive, as well as the judiciary, for information, data, research and evaluation” (Transform Justice)

“When there are crises of sentencing policy, the Council steps back, or is invisible... Not only the implications of the coronavirus pandemic for custodial sentence regimes but also the sentencing of BAME offenders should be at the top of the Council’s list. Now is the opportunity for the Council to grasp these nettles, and to show leadership on these sentencing issues of the moment.” (Andrew Ashworth)

“Now that the Council is an established part of the criminal justice system it must reflect on the degree to which it can be responsive to such events and assert its position at the forefront of sentencing guidance in this jurisdiction” (Sentencing Academy).

3.11 The Justice Committee also suggested a more proactive role for the Council in contributing to public and parliamentary debate on sentencing. They propose that the Council could “proactively [publish] information or analysis on sentencing that is topical and relevant to public debates on sentencing”. This picks up on the power envisaged by [section 132 of the Coroners and Justice Act](#) for the Council to assess the impact of government policy proposals on prison, probation and youth justice services, albeit it is for the Government to use that power to consult the Council. This has been used once for reforms to suspended sentences under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Committee also proposed that the Chair give evidence on a regular or annual basis as a means of promoting awareness of the work of the Council.

3.12 Other respondents picked up on the related idea of the Council as myth-buster:

“We believe that the best approach the Council could take to promoting public confidence would be to seek to address the lack of knowledge and understanding of the realities of sentencing exhibited by the majority of the public....This may necessitate the Council being more assertive in responding to factors which undermine public confidence, including correcting inaccurate and misleading commentary as well as to promoting accurate commentary.” (Prison Reform Trust)

“It is the role of the SC to take strong leadership role in correcting Government misinformation.” (Prof Nicola Padfield).

The Council already does outreach and myth-busting as part of its communications work, but we might interpret this suggestion as going above and beyond that to getting more actively involved in live debates around sentencing.

3.13 As the Justice Committee themselves acknowledge, this would test the limits of some constitutional boundaries. If the Chair or Council members were to put themselves forward for commentary on 'live' sentencing topics it would be almost impossible for the media or parliamentarians not to seek to draw inferences either for particular cases, or to try and elicit a critique of government policy. The Justice Committee itself may be a somewhat more "controlled environment", where members should be more sensitive to the limits of what the Council can say as part of live debates. A regular scheduled appearance before them may be an appropriate opportunity for the Council to feed in to the discussion.

3.14 A further small way in which we may be able to demonstrate that we are grappling as a Council with live sentencing issues may be to provide some more detail in the published minutes of what is discussed at the start of each meeting when the Chair updates the Council on recent developments. This would deflect criticisms (made most recently by Transform Justice) that the Council is not engaging with current sentencing policy and practice, such as the Government's legislative proposals or the pandemic.

Question 3: to what extent does the Council think it should be more active in public (and parliamentary) debate on matters of sentencing?

3.15 Several respondents picked up on the idea that the Council should be more proactive in tackling sentence inflation:

"Transform Justice considers that the priority for the Sentencing Council in the coming years should be to take a range of measures to challenge and reduce the sentence inflation which has taken place since 2010 ...A priority for the Council should be to rethink its approach to guidelines in order to stabilise or reduce levels of punishment. The Council should be recalibrating the going rate for certain offences to address the inflation in sentence lengths that has taken place in recent years, in most cases in the absence of any change in primary legislation." (Transform Justice)

"... we strongly believe that the Sentencing Council should adopt a stated aim to curb sentence inflation and undertake a periodic review of sentencing trends in relation to specific offences."

This would greatly assist with determining the causes of sentence inflation and improve the effectiveness of sentencing guidelines in addressing it. The process may also help to identify areas where existing guidelines or legislation require amendment.” (Catholic Church)

“As we argued in 2008, the Prison Reform Trust believes that the Council has an important (but as yet unfulfilled) role in addressing the problems of prison over-use and sentence inflation.” (Prison Reform Trust)

“...despite the intention behind its creation, the Sentencing Council has not curbed the use of imprisonment by the courts, and regard for the cost and effectiveness of different sentences is hard to discern in the sentencing guidance produced to date. Instead the Council has focused its efforts on ensuring that its guidelines reflect, and thereby institutionalise for good or ill, current sentencing approaches (Roberts and Ashworth 2016, 340). Transparency and consistency have to an extent been improved, but generally with the result of ratcheting up sentencing levels and length.... The Council has not so much controlled as contributed to the problem of the over-use of imprisonment.” (Howard League)

3.16 For many respondents this was closely linked with the Council’s duty to have regard to the cost of different sentences and their relative effectiveness in preventing re-offending (section 120 (11)(e) Coroners and Justice Act 2009), and pointed to the research on the ineffectiveness of short sentences in preventing re-offending as a basis for the Council to either steer sentencers away from them, or actively call for their abolition.

3.17 Such proposals have been made before. The argument echoes points made by Professor Bottoms²: it is argued that, at the very least, the Council should look to stop upward trends, and view any ongoing upward trend as an unanticipated increase. There is force in that argument, although sentencing trends will be influenced by other factors like case mix and legislative changes.

3.18 In general terms, the Council has thus far tended to focus on ensuring consistency, only seeking to achieve changes in severity one way or another when given evidence of a specific problem (as with the sentences imposed on drugs mules, or Environmental and Health and Safety guidelines). This has left the Council open to the criticism made by the Howard League and others that it is passively entrenching upward trends of severity.

3.19 On the related but separate point made by the PRT on short sentences and “encouraging” or “discouraging” the use of custody, it could be argued that within the current

² “[I]t is recommended that when conducting impact assessments, if there is a pre-existing upward trend and sentence severity continues to rise after the implementation of a guideline, the Council should in future treat this as an unanticipated, and not an anticipated, increase in the sentence level” (para 29, ‘The Sentencing Council in 2017’)

statutory framework the Council is already crystal clear (in the Imposition guideline, and in the principles on sentencing children and young people) that custody is a last resort.

3.20 The Sentencing Academy was a little more circumspect, agreeing firmly that consistency should be a key priority for the Council. However, they suggested that the Council

“could consider simply making these trends (costs; effectiveness [related to short prison sentences]) more widely known to sentencers by publishing them on their website. ... There is a consensus among scholars at least that sentencing in England and Wales could deploy its more expensive sanctions more effectively than at present. All sentencers should be aware of the relative effectiveness of different sanctions at their disposal.”

This hints at retaining the current neutral stance, whilst doing more to publicise the data surrounding costs and effectiveness of different disposals.

3.21 In general, we would not propose moving to a position of seeking actively to influence the prison population one way or the other. Sentencing levels are the result of a wide range of variables - including what Parliament has set as the maximum penalty for an offence, and the case mix coming before the courts - and it is not necessarily the role of the Council to come down on one side of the debate about the use of prison.

3.22 On the other hand, as an established part of the criminal justice system the Council's guidelines undeniably have an influential role in determining the disposals received by offenders and their severity. Looking to the near future, we have yet to see the difference that the new legislation will make to the overall framework, and the impact that new forms of community order might have on the custody threshold and on guidelines. If the final package does provide for what the Government has proposed, the Council will inevitably have a role to play in embedding those new disposals in sentencers' practice.

3.23 We could look to explain with more clarity what we *intend* a guideline to achieve alongside, but distinct from, what we *expect* the result to be. It may be the case that in the past we have not separated these out for our audience as clearly as we could have. In many cases that intention will remain focused on consistency, and ensuring that the right factors are taken into account when sentencing. This ties in with the other vision strand about research and analysis.

Question 4: in what ways (if any) should the Council respond to the debate about increasing sentence severity, the use of custody and the rise of the prison population?

Broader themes on what the Council does

3.24 Some broader ideas emerged from responses about how the Council can retain public confidence. These cover a diverse range of themes. The legitimacy of the Council is linked for some respondents very specifically with the priorities they would like the Council to have. Indeed, the Magistrates' Association suggested that the Council's workplan itself should be consulted on annually.

3.25 However, some common themes can be detected:

- a focus on disparities in sentencing outcomes for minorities and vulnerable offenders;
- different suggestions on the ways in which the Council runs its consultations:
 - making the format engaging and easy to read, including the suggestion from one magistrate that we “do some work with universities to understand what appeals psychologically to the human mind and consult accordingly”;
 - opening up consultation to as wide an audience as possible, including those with a “lived experience” of the criminal justice system, such as offenders and their families, ex-offenders and victims;
 - having a more consistent approach to holding events, building on some that have already occurred (proposed by the Sentencing Academy);
 - beyond formal consultations, a magistrate respondent suggested a mechanism for users to feed back on guidelines in real time.
- during and after consultations, it was suggested by a few respondents that the Council explain better the rationale for why guidelines were drawn up as they were (presumably by setting this out in greater detail in consultation documents and consultation responses) to provide useful reference points for sentencers to understand the thinking behind guidelines;
- some respondents (the MoJ, the Sentencing Academy and a magistrate) thought that the current timeline for publication, assessment and revision of guidelines was too protracted and needed to be “nimble” in modern society;
- linked with responses on research on analysis, many respondents thought the Council should focus more research work on the effectiveness of sentences in preventing reoffending (Transform Justice; Nicola Padfield; Howard League); several respondents suggested the internal document on reoffending studies mentioned in the consultation document be published (Nicola Padfield; Prison Reform Trust; Youth

Justice Board), as well as local sentencing statistics (the Sentencing Academy; Justice Committee).

3.26 We are undertaking work on disparities in a number of areas. Recently, we have published data on racial disparities in sentencing outcomes in relation to selected drugs offences, as well as inserting wording into the new firearms guidelines reminding sentencers of these disparities in relation to firearms offences. Inevitably, we will continue to work on identifying disparities for minority offenders and highlighting them, even though analysing and understanding their root causes is a more complex matter.

3.27 We do attempt to reach a wide range of people via consultations, although this is an area where we could do more. We have a number of criminal justice stakeholders who can be relied upon to provide helpful technical expertise on draft guidelines, but we have not sought in general to reach out to offenders and ex-offenders, or directly to the victims of crime. These groups would provide a particular insight, and help us to understand what is understood about sentencing for offenders and victims, both before and after the point of sentencing, what expectations are and how it matches up against reality.

3.28 If we were to invite responses from these groups, it would be important to be proactive in allowing them to feed in. Our “usual suspect” stakeholders are used to providing responses and are reasonably well resourced to do so. We could, as part of consultations, run more events and meetings (or, for the time being, webinars) with victims and offenders, working in tandem with representative groups as necessary.

3.29 Aside from the question of minor amendments to guidelines which the Council has already considered, we are looking at a mechanism which could make annual revisions to a number of guidelines. This could assist in making the guideline process more “nimble” and allow us to be more responsive to user feedback.

Question 5: do you agree that we should reach out more proactively to offenders and victims as a standard part of consultations?

Question 6: do you agree that an annual process of consultation on cross-cutting revisions is a responsive and nimble way to make necessary changes to guidelines?

Question 7: are there any other proposals above that the Council should consider prioritising in its response to the Vision consultation?