

**Meeting date:** 5 March 2021  
**Paper number:** SC(21)MAR06 – What next for the  
Sentencing Council?  
**Lead official:** Emma Marshall

## **ISSUE**

1.1 Responses put forward in the Vision consultation in relation to the Council's analytical work.

## **RECOMMENDATION**

2.1 That the Council considers the issues raised and provides indicative responses to the questions posed; in particular, that the Council agrees to devote some time in the Analysis and Research (A&R) team to scoping out an enhanced approach to data collection which in the longer term may facilitate improvements to some of the issues outlined in this paper.

## **CONSIDERATION**

3.1 As discussed in previous Council meetings, one of the overarching themes of the Vision consultation was analysis and research. Of the 23 questions asked, six covered this work and included issues such as whether there were any technical aspects of the Council's analytical work that could be improved, whether the focus and prioritisation of the work was appropriate and whether there were any other areas the Council should be considering as part of its programme of analytical work. There was also a question on whether there are any areas of work that would be more suitable for an academic institution or external organisation to undertake.

3.2 This area of the Council's work attracted a lot of comments. Some of these have already been discussed in previous meetings and views/ actions already noted:

- The agreement that, subject to resources and availability of data, more analytical work should be undertaken in relation to specific groups, most notably those with

protected characteristics. It was noted that in order to do this, we may need to seek money from elsewhere and/ or collaborate with external partners.

- That to facilitate further work in the area of ethnicity we would seek permission to include case identifiers in future data collections to permit data linking.
- That the Council would consider undertaking more qualitative work with offenders and victims, and other relevant groups, on a case by case basis.
- That we would provide information around how to obtain sentencing transcripts, given that the Council cannot share these with external people/ organisations.

3.3 The new Equality and Diversity working group, along with the Analysis and Research subgroup, will steer work in these areas to ensure that the relevant issues are considered in our analytical work. This paper will therefore cover issues not yet raised in feedback to the Council.

#### ***The prioritisation of the Council's analytical work***

3.4 Although very few people specifically addressed the question around whether the Council had correctly prioritised its duties in relation to analytical work, the volume and diversity of comments more generally indicated how important this area is regarded in terms of the overall functioning of the Council.

3.5 Of the small number that did address this question, there were contrasting views. The MA felt that the *“correct balance has been achieved in this regard”*, whereas, the Prison Reform Trust felt that work to evaluate guidelines should be prioritised more highly than work on developing new guidelines. The Justice Select Committee also felt that whilst guidelines should continue to be a core part of the Council's work, it should rebalance *“so that it can dedicate more resources to evaluating the impact of guidelines, producing research and analysis on sentencing trends and promoting public confidence in sentencing”*.

3.6 One member of the judiciary was, however, less supportive of a high priority being given to this area: *“the sentencing guidelines are the priority. Analytical work comes a very poor second and so it should”* (although arguably, this may more reflect the need to be clearer about the role of research and analysis in guideline development).

3.7 In terms of more specific comments, respondents felt there should be further work undertaken in the following areas:

- Assessing the impact and implementation of guidelines, including resources and consistency of sentencing;
- Data issues;
- Local area data;
- Sentencing and non sentencing factors reports;
- Other areas for research and analysis; and,
- Collaborating with others and seeking external sources of funding.

### ***Assessing the impact and implementation of guidelines***

3.8 The need to more fully assess the impacts of guidelines was raised in several submissions. This covered assessment of resources, as well the impact on sentencing outcomes (generically and for specific groups, as discussed previously in relation to groups with protected characteristics). It was felt that we should not only be evaluating more of our guidelines, but undertaking fuller and more informed evaluations.

*The Council has neglected its duties to monitor the operation and effect of its sentencing guidelines and consider what conclusions can be drawn from the information obtained... The Council has not reliably been able to fulfil its core function of estimating the impact of its guidelines on prison and probation resources. For most of the offences covered in the arson and criminal damage guideline, for example, it was not possible to predict whether the guidelines would have an impact because of a lack of available data on how cases would be categorised under the new guidelines; on breach of a suspended sentence order it was not possible to assess previous sentencing practice or to make any realistic or informative estimate of the impact of the guideline on prison or probation services. Transform Justice thinks that much more priority needs to be given to assessing the resource impact of guidelines and monitoring what happens after they come into force. Indeed, there is a strong case that guidelines should not be developed in relation to a particular offence unless and until sufficient data is available to assess current sentencing practice, Transform Justice*

*We would also suggest that more work could be done to assess the impact of sentencing guidelines once they have been implemented. This is crucial in ensuring that they are being implemented consistently and having the intended effects. This may be particularly important in magistrates' courts, where there is a large volume of cases and a relative lack of available information on sentencing decisions, Magistrates' Association*

*To-date, the Council's work has been too descriptive and not sufficiently explanatory. Without a good understanding of the mechanisms explaining the effect of the guidelines on sentencing practice, the Council's efforts to improve the guidelines (and practice) are lacking the relevant evidence and consequently unlikely to succeed. Examples of research questions that could be pursued in order to adopt a more evidence-based approach to the monitoring and evaluation of guidelines include: (1) Why do sentencers depart from the guidelines (not simply "the frequency/extent to which courts depart from sentencing guidelines")? (2) What is the effect of specific legal and extra-legal factors on sentencing, controlling for the effects of other factors, and examining their interactions (not simply "factors that influence the sentencing imposed by the courts, Professor Mandeep Dhani*

*We agree with Anthony Bottoms that the Council has fulfilled its statutory duty to assess the impact of every guideline "only to a limited extent"... We note with concern that two of the three impact assessments for assault and burglary revealed unexpected increases in sentencing for some offences. Rightly, the Council is now conducting a further review of the assault guideline in order to address these anomalies. However, a concern remains that, as with the guidelines on assault and burglary, other guidelines will have had similar and unexpected consequences for sentencing practice which will not have been identified because of a lack of resource available to monitor their impacts... Guidelines for high volume offences, which the Council has prioritised over the past 10 years, will have a disproportionate impact on sentencing practice overall. Therefore, it is vital that the Council has a good understanding of their impact in order to address any unintended outcomes. We therefore believe this work should be prioritised over fresh analytical work on proposed new guidelines, Prison Reform Trust*

3.9 Both the Justice Select Committee and Transform Justice also recommended that all legislative and policy proposals which could have an impact on the prison population should be subject to a resource assessment by the Council at an early stage.

3.10 For several respondents, a view was expressed that there was also a need to assess the impact of guidelines on consistency in sentencing, and consequently to address more fully the duty in this area. The Sentencing Academy also noted the relative lack of analysis of the impact of overarching guidelines.

*To date, the Council's research has concentrated on projecting the impact of an impending guideline on prison capacity or evaluating the impact of an existing guideline on trends in sentence severity, including prison admissions and sentence lengths. The Council's guideline assessments have overlooked the question of consistency, Sentencing Academy*

*The Council also needs to have a clear definition of consistency, and it should examine alternative types of consistency so it can conduct a more accurate and nuanced analysis of the "the effect of guidelines in promoting consistency". The main examples of alternative types of consistency include variation (1) across different areas, courts, and judges, as well as (2) within areas, courts, and judges. Statistical analyses of consistency could also distinguish between consistency achieved by chance v. intention. Analysis along these lines could pinpoint the areas where more or less intervention is required to promote consistency, Professor Mandeep Dhami*

3.11 In conducting assessments of impacts, some respondents felt that the Council needs more fundamentally to reconsider what it regards as "success" and therefore how it interprets its evaluation evidence.

3.12 The Prison Reform Trust (PRT) in particular questioned the way in which we interpret our evaluation findings. Citing the burglary evaluation, they flag that this found an upward trend in sentence severity prior to introduction of the guideline and consequently concluded that the continuing increase after introduction of the guidance was in line with anticipated results. However, in support of a point made by Professor Sir Anthony Bottoms in his review of the Council<sup>1</sup>, they feel that any pre-guideline increases in sentencing severity that continue after implementation of a guideline should be regarded as an unanticipated outcome. Other comments are below:

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<sup>1</sup> The Prison Reform Trust: "As Anthony Bottoms highlights, however, "This judgement is open to question. It can be argued, to the contrary, that the purpose of a guideline is to set sentencing levels, and if there is a pre-existing upward trend for the particular offence, and the guideline recommends (broadly) the existing sentencing levels, then the intention of the guideline is to stabilise the upward trend. Accordingly, it 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."

*The effectiveness of sentencing appears to focus on reoffending rates whereas maybe a focus on positive outcomes and how sentences influenced that outcome and why... I think the general approach of the Council in providing guidance is ok at the moment but the measure of success is in my view very flawed, Magistrate*

*The goals of sentencing are multi-fold and often competing i.e., to give offenders their just deserts, incapacitate or deter them from committing crimes in the future, rehabilitate them, or enable them to make reparations. Therefore, the Council could examine the extent to which these goals are met, perhaps with reference to different subgroups of offences and/or offenders, Professor Mandeep Dhani*

*Prevention of offending should be the main consideration of the Council, Member of the public*

3.13 The issue of effectiveness in sentencing will be discussed in more detail at the April Council meeting and any decisions on this can be fed into the impacts that we consider in our future evaluations (caveated with the fact that for some areas data may be limited).

3.14 For all of the areas flagged here under the general theme of assessing the impact and implementation of guidelines, the two key constraints for any future work is availability of data and the capacity of the analytical team to undertake more in-depth work, as outlined below.

#### *Assessing resources*

3.15 From a data perspective, our earlier resource assessments were less problematic. Early guidelines produced by the Council – e.g. assault, burglary and drugs – related to offences where more data, particularly on volumes and outcomes, were available. However, for later guidelines, there has not been as much data available on which to base these assessments.

3.16 Resource assessments are also particularly problematic for guidelines that cover lower level offences as the data on non-custodial sentences is poorer, or for overarching guidelines which tend to cover broader areas or areas which are not offences in their own right (e.g. the mental health guideline and the domestic abuse guideline). This means that our resource assessments tend to focus on prison places, as noted by the MoJ who felt that

this should be broadened out: *“I would be interested in further information on how fine levels are likely to be used and distributed across the courts for draft and definitive guidelines. This would be particularly helpful for low level offences in the magistrates’ court”*.

3.17 The lack of data we often have is explicitly acknowledged when we publish resource assessments, and is an area that has been flagged in the past by others (for example by the JSC in response to specific guideline consultations). We do, however, endeavour to collect as much information as possible. This includes conducting our own data collection exercises, liaising with other agencies and stakeholders to establish what other data might be available (e.g. NHS England for data on mental health disorders), conducting road testing exercises to explore the potential behavioural implications of guidelines, and buying in transcripts of sentencing hearings wherever possible and using these to “re-sentence” cases using draft guidelines. However, it remains the case that the information that we have to draw on for resource assessments is problematic.

#### *Assessing impacts and implementation issues*

3.18 In terms of our evaluations, we again endeavour to cover as much as possible based on the data and resources we have available. Although each evaluation is different, we generally explore both the impact and implementation issues, using a range of different approaches. These include time series analysis to look at trends in sentencing severity before and after a guideline came into force, regression analysis to explore the impact of different guideline factors on outcomes, and qualitative research to ascertain sentencers’ views on guidelines and whether they have experienced any issues with using the guideline in practice.

3.19 Over time, we have worked to make improvements to our evaluations, where possible. This has included starting to look at sentence outcomes for different ethnic groups (as we did in the Children and Young People guideline evaluation), making improvements to our data collections to anticipate what we might need for future evaluations and exploring what other data we might be able to draw on (e.g. we now have an agreement to access Court of Appeal data). We are also currently in discussions with an external academic to update our sentencing severity scale<sup>2</sup> after which we plan to consider changing our approach to the time series analysis.

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<sup>2</sup> For our statistical analysis, we need to convert sentences to enable meaningful comparisons to be drawn. Sentences are converted into a continuous “severity scale” with scores ranging from 0 to 100, representing the full range of sentence outcomes from a discharge (represented by 0) to 20 years’ custody (represented by 100); this allows the creation of a consistent and continuous measure of sentencing severity that can be used to evaluate changes in sentencing.

3.20 There is undoubtedly more we could do to enhance our evaluations; as highlighted by some respondents, we could look in more detail at impacts on specific groups and could try to build in analysis that could potentially attempt to isolate the impact of the guidelines on outcomes, as opposed to, for example, case mix or legislative changes. However, this would require access to more data (assuming it exists in all areas) and would be extremely resource intensive if we were to do this for every evaluation. The gap between the implementation of a guideline and its evaluation is already longer than we would want, due to the pressure of other analytical work in the team, and without more resources, any more in-depth work would further widen this gap. We would also need to spend some time developing a suitable methodology for this type of analysis which is potentially complex.

3.21 This means that as resources currently stand, it will be difficult to conduct more in-depth evaluations, and even if we maintain our current approach, it will be difficult to conduct more evaluations on a more frequent basis. If we were to do this, other work would need to be slowed down, for example, the rate of new guideline production. If more evaluative work is to be a priority, then some reprioritisation of other work will be needed.

3.22 On the specific point raised by Transform Justice - that all legislative and policy proposals which could have an impact on the prison population should be subject to a resource assessment by the Council at an early stage – again, set against the Council's resources and other priorities, this would not seem to be a possibility. Civil servants in the relevant department would also be better placed to make this assessment than the Council's officials.

#### *Assessing consistency*

3.23 On consistency, the Council has adopted an approach that focusses on consistency of approach rather than outcome. This makes measurement problematic as it relies on having information on starting points (which is only available through our data collections) rather than outcome data (which is more readily available through administrative data sources).

3.24 The area of consistency is also an extremely complex one, as will be outlined in a report that we plan to publish later in 2021 (this will be circulated for comment in due course). In addition to a literature review of recent work in this area, the report outlines a methodology to measure consistency of approach to sentencing that was developed and applied to data covering three Sentencing Council guidelines – domestic



burglary, supply/possession with intent to supply a controlled drug, and theft from a shop or stall - to understand whether the guidelines have achieved the Council's aim of improving consistency in sentencing.

3.25 To date, we have not included an assessment of consistency as a routine part of our evaluations; the assessment in relation to the three offences mentioned above is the first time we have done this. This is because the whole area of measurement of consistency is complex, it can be measured in a variety of different ways, and it requires data that we sometimes do not have available to us. More work needs to be done in this area (including on a methodology as the one used previously has some limitations) and this will be flagged in the report referred to above.

### ***Data issues***

3.26 Respondents were asked to consider whether there are any improvements we could make in terms of the data sources we draw on and the time we give to accessing different types of data.

3.27 In general, respondents called for more of most things: a greater volume of data (mainly quantitative, but also qualitative), a greater diversity of data and more robust data. The overall sense that the Council needs to improve the data and evidence it draws upon was also something that was emphasised in the recent Justice Select Committee evidence session. In their response to the consultation they also said that "*improving the quality of information and analysis on sentencing, including the sentencing decision process and on sentencing outcomes, should be a key priority for the Sentencing Council over the next decade*".

3.28 Responses on data clearly have a large overlap with the issues presented above: if we are able to improve our data sources, then arguably some of the issues raised in relation to resource assessments and guideline evaluations could more easily be addressed.

3.29 Specific comments included the need to include specific subsamples in work (e.g. the YJB felt that there should be a standard youth subsample in all data collections) and others that more data on groups with protected characteristics was needed. Some people flagged the need for more qualitative work (although note that this was at odds with others' views, who clearly felt that the focus should be on larger scale quantitative work):

*I am convinced that you should do a lot more small-scale qualitative research: it remains striking that one of the very rare times when you decided to ‘nudge’ sentences down was when your researchers had actually spoken to some drugs ‘mules’ in prison. The Sentencing Council and its staff (as well as judges and magistrates, as part of their training) should spend more time speaking with offenders and their families, and victims, to understand what works, and what people consider to be appropriate punishments, Professor Nicky Padfield*

3.30 Some of the specific points mentioned are likely to be covered in the actions agreed in the Equality and Diversity working group; for example we agreed to consider more qualitative work with victims and offenders on a case-by-case basis.

3.31 More commonly, respondents called for a more ambitious programme of data collection, analysis and publication – one that would facilitate more evaluation of guidelines and more analysis of their impact. Some felt that a Crown Court Sentencing Survey (CCSS)<sup>3</sup> should be resurrected (or something akin to this) or they stated that it had been a loss to have stopped this exercise in the first place.<sup>4</sup>

*Improving the quality of information and analysis on sentencing, including the sentencing decision process and sentencing outcomes, should be a key priority for the Sentencing Council over the next decade, Justice Select Committee*

*Sentencing Council to facilitate ongoing data collection and monitoring of sentencing, ... Given that ongoing data collection about sentencing practice is key to monitoring the operation and effect of sentencing guidelines, it is regrettable that the CCSS was ended... The revised approach - bespoke data collection in the Crown Court and magistrates’ courts to inform the development of (offence) specific guidelines – represents a loss of*

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<sup>3</sup> Between 1 October 2010 and 31 March 2015, the Council conducted the CCSS, a census survey in all Crown Courts collecting data on the majority of offences sentenced. The CCSS was a paper-based survey and was completed by the sentencing judge. It collected information on the factors considered by the judge for the principal offence involved in the case, including harm and culpability, aggravating and mitigating factors, sentence starting points, end sentences and guilty plea reductions.

<sup>4</sup> Due to resource constraints, it was decided to cease the CCSS from March 2015 and to move to targeted bespoke data collections to permit a continuation of data collection in Crown Courts, whilst also collecting data in magistrates’ courts where most cases are sentenced (previously there had been no data collection in magistrates’ courts). We now tend to run an exercise once every 18 months or so, in either the Crown Court or magistrates’ courts. These exercises are targeted in the sense of covering specific offences, a sample of courts, and specific time periods (generally three to five months).

*transparency in monitoring how sentencing impacts upon minority and disadvantaged groups and limits insight into changing practices over time, Dr Carly Lightowlers*

*We believe that an increased use of data collection exercises in the magistrates' courts could assist the Council's analytical work, Justices' Clerks Society*

*The Sentencing Council's Crown Court Sentencing Survey (CCSS) was very useful in stimulating external research. The publicly available database has been used by a significant number of scholars...However, the CCSS is now over five years old. The SC discontinued the survey in 2015 and replaced it by periodic, bespoke data collections. If these data were made publicly available, they would also be useful to external researchers. Otherwise researchers will have to work with data which too old. Sentencing Academy*

3.32 People also wanted the data that we collect to be more routinely published.

*Periodic, bespoke data collections...If these data were made publicly available, they would also be useful to external researchers. Otherwise researchers will have to work with data which too old, Sentencing Academy*

*Please publish the data. You do not have to interpret it, nor control it. We may be able to inform some of our own questions ourselves!, Member of the Judiciary*

*Sentencing Council to facilitate ongoing data collection and monitoring... and facilitate the transparent release of these. In order to deliver on a commitment to justice and to allow for ongoing evaluation of the work of the courts, "a robust strategy for data collection, analysis and sharing must be in place"...As well as quantitative data, the Council themselves have showcased how the analysis of sentencing transcripts can be illuminating. I encourage the Council to consider whether these can be made either open access or available to accredited researchers for their own content analysis, thus allowing the potential of these data to be more fully exploited and for furthering our understanding of sentencing practice, Dr Carly Lightowlers*

3.33 As previously discussed, we are planning on publishing data from our bespoke data collections on a regular basis and the first of these – on theft from a shop or stall – was published in December. However, the work involved in cleaning, quality assuring and

publishing these datasets is substantial and if this was to be prioritised more highly, then we would need to slow down other aspects of the team's work (we already have a backlog of data to be cleaned because the 3.5 statisticians in the team are covering higher priority work in relation to producing resource assessments, analysing evaluation evidence and providing statistics for guideline development etc). We therefore currently work on the publication of data when resources permit and prioritise these other areas to a greater extent.

3.34 In relation to transcripts of sentencing remarks, as discussed previously, we are unable to facilitate access to these given the sensitive nature of some of these and the data sharing agreement we have with HMCTS. However, in a previous Council meeting, we agreed to publish information on our website to this effect and to advise people on how they may access these independently.

#### *Enhanced data collection*

3.35 The Council's Vision working group discussed data collection issues in their January meeting and the Analysis and Research subgroup have also fed into this. It was agreed that enhancing our data collections would yield benefits in a number of areas:

- It would permit more robust and meaningful analysis in some areas, based on potentially larger sample sizes.<sup>5</sup>
- It may permit us to undertake more analysis on key areas, for example, the exploration of whether any disproportionality in sentencing exists in relation to particular guideline offences.
- It would allow us to publish more in-depth data, thus promoting greater transparency in our work.
- It would create further opportunities for research in the MoJ and academia, which would not only further analysis more generally in the area of sentencing, but may lead to work being conducted that would directly benefit the Council.

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<sup>5</sup> Professor Dhimi argued that "the Council ought to recognise the fact that some data collection methods (e.g., focus groups, interviews, observations) as well as data analysis techniques (e.g., simple descriptive statistics) are less rigorous and reliable than others (e.g., statistical modelling, randomized controlled trials).

3.36 Crucially, in the context of many of the consultation responses, it could provide data to help strengthen our resource assessments, facilitate more robust and in-depth evaluations and explore issues around consistency of approach to sentencing more.

3.37 There are, however, some general constraints to any improvements we could consider making in this area:

- the type/ volume of data that could be collected (e.g. in some areas – particularly on protected characteristics – data/ sufficient data may not exist).
- if we wanted to increase the scale of frequency of our data collection in courts, we would need to obtain permission for data collections from the SPJ and HMCTS and agree any changes to the current approach.
- If we wanted to increase the scale and frequency of our data collections, we would need to ensure we had sufficient participation from sentencers to justify the increased effort (the MA pointed out the need to consider the timing and burden of any exercise on magistrates)<sup>6</sup>.
- The resources available in the analytical team. At this stage, without an agreed new model of data collection, it is difficult to estimate the resource impacts. However, any increased collections – beyond that which we already take forward – is likely to require the equivalent of an additional 0.5-1 FTE analyst.<sup>7</sup>

3.38 The vehicle through which we collect our data (i.e. as a survey hosted on our website/ app as is currently the case) or through digital court systems will also be dependant on our discussions with HMCTS on the Common Platform. We are currently discussing the type of information the system holds/ may hold in the future and the ways in which we might use this to feed into our guideline development and evaluation work.

3.39 Ideally, we would want to draw all the data needed from the Platform so that we do not have to ask for additional information from sentencers. However, it is likely that

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<sup>6</sup> *“It is important for the Council to consider the timing of any research targeted towards magistrates to take account of any other consultations or data collection exercises that might be ongoing. In addition, it should be remembered that there is less time during sittings in magistrates’ court to respond to surveys or fill in feedback forms”.*

<sup>7</sup> It should be noted however, that the financial requirements for the data collection has decreased substantially (from around £89,000 per annum to less than £8,000 per exercise). This is due to the move from paper-based surveys to electronic surveys.

whatever data we could get from the Platform would need to be supplemented by additional information added by sentencers – for example data that relate specifically to harm, culpability, aggravation and mitigation, which are very specific to individual sentencing guidelines<sup>8</sup>. Anything that might be possible will also be subject to the timing of existing planned development work for the Common Platform, including its pilot. We have arranged a meeting with the HMCTS Transformation Director in order to push forward with these discussions.

3.40 Regardless of whether the Common Platform can fully meet our needs in the future, there are several different approaches that we could adopt for future data collection. These span retaining our current approach of bespoke targeted collections at one end of the spectrum, through bringing back a census survey in the Crown Court only with bespoke surveys in the magistrates' courts, to census surveys in both courts at the other end.

3.41 The final decision regarding which approach will be optimal will depend on a variety of issues, including the constraints outlined in paragraph 3.37 and available resources. The working group considered some of these of their recent meeting, but concluded that more detail would be needed, as well as a clearer sense of what the Common Platform might offer. It was therefore recommended that the A&R team devote some short-term resource to working up a clearer proposal for an enhanced approach to data collection which can then be considered alongside all of the priorities emerging from Vision discussions. Given the comments above regarding the need to potentially cover more elements in our evaluations (e.g. more subsample analysis, analysis of consistency etc), we suggest that part of this review is a consideration of how we might broaden out our evaluations in the future.

3.42 Although undertaking this review will require some resource from the A&R team, which may necessitate slowing down other work briefly<sup>9</sup>, it would be a useful exercise to inform our future direction in this area.

***Question 1: does the Council agree that the A&R team should devote some time to scoping out possibilities for future data collection/ evaluation, even if this***

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<sup>8</sup> One magistrate respondent emphasised this point: “One concern I have is that data drawn from court resulting does not capture issues that can affect sentencing and therefore does not identify issues requiring guidance. An example would be where magistrates consider public interest, illness of the offender or issues that lead to an absolute discharge. I am concerned that sentencing results do not capture the issues that affect final decisions”.

<sup>9</sup> If this was agreed, we would discuss in our planning meetings how to do this without impacting on the overall work programme of the Council.

***necessitates slightly slowing other down work? We will then discuss options more fully with the Analysis and Research subgroup and Vision working group.***

***Question 2: Does the Council agree that enhancing our data collections, and improving our evaluations and resource assessments, are priority areas?***

***Question 3: In the context of stretched staffing resources, is the Council content with the current situation regarding the publication of data (that we work on this when resources permit and prioritise other analytical work to a greater extent)?***

### ***Local area data***

3.43 The Council has a statutory duty to publish, at intervals the Council considers appropriate, information regarding the sentencing practice of magistrates in relation to each local justice area and the practice of the Crown Court in relation to each location at which the Crown Court sits.

3.44 The Council carefully considered this duty when it was first set up and to date has not formally gathered or published information of this nature<sup>10</sup>. This is mainly due to the difficulties with interpreting data produced on a local level (it could be potentially misleading if the analysis were not able to control for other factors that may have an influence, for example, the type of case load, socio-economic status of the population in the area, and the type of area). In addition, in the early days of the Council, it was felt that publishing local area data might be seen as a way of monitoring different courts, which might lead to a lack of support for the CCSS.

3.45 Only a small number of respondents addressed this, but those that did tended to feel that the rationale for not producing this type of information – especially given that it is a statutory duty - was inadequate and could be overcome.

*We agree that publishing misleading statistics is worse than not publishing data. However, the solution is rather to ensure that the comparisons are appropriate. Local statistics are published for a wide range of issues; sentencing statistics should not be excluded. The problem appears to be that the Council has the mandate to publish these statistics but not*

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<sup>10</sup> We have, however, looked at the specific court where the offender was sentenced as part of a wider piece of work on consistency in sentencing (this work will be briefly covered in the review due to be published later in 2021). The findings do not identify or comment on specific courts.

*the resources, while the Ministry of Justice has the resources but not the mandate. The impasse should be resolved, and these statistics published on a routine if not annual basis, Sentencing Academy*

*The reasons given are not convincing: of course “interpreting data produced on a local level would be potentially misleading” but so what? That is not a reason to hide the data, particularly given concerns about racial, sexual and class-based discrimination. Personally, I think much more local data would be useful. As long as there are the ‘critical friends’ with time to critique and deconstruct it, Professor Nicky Padfield*

3.46 Again, resources and priorities are key here. Whilst it may be possible to analyse at a more local level in the future, we do not feel this is the highest priority issue at present. Given the greater emphasis we are now placing on exploring issues such as disproportionality in sentencing, and the likelihood that we will need to improve our resource assessments and evaluations, we would recommend that our limited resource is focused in those areas instead. We can, however, return to this issue at a later date when we are clearer what data we will have to draw on in the future. In the meantime, it may be worth considering whether we can provide information on what data is actually available elsewhere and to signpost people to this.

***Question 4: Does the Council agree that the analysis and publication of data on a local area level basis should continue to currently be lower priority, but that this can be reviewed if resources in the future permit?***

***Question 5: If more resources were available would analysis and publication of data at a local level be a priority for the Council?***

#### ***Sentencing and non-sentencing factors***

3.47 The Coroners and Justice Act 2009 requires the Council to produce, as part of its annual report, a sentencing factor report (s130) and a non-sentencing factor report (s131).

3.48 The sentencing factors report is required to contain an assessment of the impact of the Council’s guidelines on prison, probation and youth justice services. The Council complies with this by including in the annual report a summary of the resource assessments for definitive guidelines that it has published during the reporting year.



3.49 The non-sentencing factors report requires the Council to identify the quantitative effect that non-sentencing factors are having or are likely to have on the resources needed or available to give effect to the sentences imposed by the courts. These factors include the volume of offenders coming before the courts, recall, breaches (of community orders, suspended sentence orders and youth rehabilitation orders), patterns of re-offending, decisions by the Parole Board, early release from prison and remand.

3.50 The Council complies with this requirement in each annual report by providing short summaries of the data available on each of these topics, where available, and providing links where users can find further information.

3.51 Only a small number of respondents commented on the way in which the Council has chosen to fulfil these duties. However, when comments were put forward these suggested that the Council should do more work in these areas and that a less narrow view should be taken of the way in which it complies with its duties.

*It would also be helpful to include some more detail on the youth jurisdiction within the sentencing factors and non-sentencing factors reports within the Annual Report, or elsewhere, should that be deemed inappropriate, YJB*

*The Council has taken a very narrow and technical approach to the sentencing and non-sentencing factors reports...The first considers changes in the sentencing practice of courts and their possible effects on the resources required in the prison, probation and youth justice services. However, the Council considers only changes in sentencing practice caused by changes in sentencing guidelines, ignoring changes in law or Court of Appeal guidelines. A more comprehensive analysis would be much more useful. The non-sentencing factors report aims to identify the impact on prison and probation resources of any changes in the volume of offenders coming before the courts or of alterations in release provisions resulting in prisoners spending longer or shorter periods in prison when serving a particular sentence. Because of technical complexities the Council has not attempted to untangle the interactions between different non-sentencing factors to explain the causes of observed changes and their impact on resources, Transform Justice*

3.52 The way in which the Council has addressed these two duties thus far again reflects the general analytical constraints that it faces: a lack of data in some areas and a lack of capacity to undertake more detailed analysis.

3.53 For the sentencing factors report, the “narrow” approach taken is necessary, given that we currently have very little information in some areas (for example, on lengths of suspended sentence orders, levels of community orders and bands of fines) and there are no continuously collected data sources on the relative seriousness of offences (for example, the culpability of the offender and the harm caused by the offence). We also confine the work here to the impact of guidelines in order to retain analytical resource for other more pressing work.

3.54 In the future, if we are able to enhance our data collections, it may be possible to consider more data when we undertake resource assessments, and thus to feed this into the sentencing factors report. Improvements to the data collected by the Ministry of Justice (for example, more detailed data on suspended sentence orders and community orders) would also help to facilitate this. We now also have a data sharing agreement that allows us to access Court of Appeal data and are intending to build an analysis of that into future evaluations. However, the extent to which we can widen out this aspect of our work will be limited by how quickly we can obtain more data and the more general resources in the team.

3.55 Regarding the non-sentencing factors reports, whilst it is relatively straightforward to analyse the available data on non-sentencing factors, it is extremely difficult to identify why changes have occurred and to isolate the resource effect of any individual change to the system. This is because the criminal justice system is dynamic and its processes are interconnected.

3.56 Improvements to the data collected by the Ministry of Justice would go some way to improving the Council's ability to comply with this requirement (for example, on breaches of community and suspended sentence orders). However, we would also need more staffing resources to undertake this work every year (in the first three years of the Council, a more comprehensive analysis of these factors was attempted for the Annual Report, but the work required was disproportionately large and had an impact on other work the team could conduct).

3.57 At this stage, without more data and more analytical staff, it is therefore unlikely that the Council will be able to provide more detailed or extensive sentencing and non-sentencing factors reports. Again, we may be able to review this when we are in a position to access more data.

**Question 6: Does the Council agree that in the short to medium term the way in which it addresses its sentencing factors report is an appropriate and proportionate approach to this duty? This can be reevaluated at a later stage if and when more data becomes available.**

**Question 7: Does the Council agree in the short to medium term the way in which it addresses its non-sentencing factors report is an appropriate and proportionate approach to this duty? This can be reevaluated at a later stage if and when more data becomes available.**

**Question 8: if more resources were to become available, would further work on the sentencing and non-sentencing factors report become a higher priority?**

#### **Other areas for research and analysis**

3.58 There were a number of other more specific areas that people raised for attention. Some of these will be covered as part of other workstreams/ discussions (e.g. the need to obtain more evidence on female offenders when we come to scoping out a guideline/ guidance in this area, the need for more information on patterns of reoffending when we come to discuss the broader comments on effectiveness in sentencing.) However, there were also the following suggestions for future work:

#### Information on aggravating and mitigating factors

3.59 The MoJ called for more information on aggravating and mitigating factors to be available:

*As a Department, we are regularly approached by stakeholders seeking to add or strengthen aggravating factors in sentencing for certain offences such as for assaults on retail workers. Whilst I note some information on aggravating and mitigating factors is made available as part of the Annual Report, I would like the Council to consider making more of the information it collects on the impact of aggravating and mitigating factors on sentencing outcomes publicly available. This would help to improve public understanding around the impact these factors are having on sentencing, MoJ*

3.60 Dr Carry Lightowlers also felt that there should be a specific review of the impact of the aggravating factor of intoxication and how it is implemented.

3.61 If we are able to collect more data generally, then it would be possible to analyse and publish more data on aggravating and mitigating factors. However, this would need to be obtained through the Council's data collections, rather than administrative data sources, as this is the only source of information on these factors. Our proposed work to scope out an enhanced data collection will therefore impact on this. In terms of evaluating the impact of any specific factor/ set of factors, this would be covered in an evaluation of the expanded explanations, which we hope to start scoping out later this year.

#### Analysis on multiple offences

3.62 Professor Mandeep Dhani encouraged the Council to move away from analysis based on the principal offence only and to consider sentencing across all offences. The Council's assessment of sentencing practice is currently based on data for the offender's principal offence; we do not collect any further information about secondary/non-principal offences or the sentences imposed for them. This approach has been considered the most effective and pragmatic way of assessing this, given the data that is available and the difficulties of disentangling the effect of secondary offences on the overall sentence.

*In my recent analysis of CCSS data (Dhani, 2020), I found that multiple offence (MO) cases represent common court business – they represented approximately half of the sentenced cases in the CCSS datasets examined. Therefore, the Council currently does not know the sentences meted out at least half (and likely to be much more) of the offences that appear before the Crown Court. Given that offences in MO cases are subject to the offence-specific guidelines, this means that the extant findings of the Council's work on the monitoring and evaluation of its guidelines are unreliable and invalid; they provide only a partial and skewed picture. This oversight of the sentences given to the non-principal offences in MO cases also means that the Council cannot properly consider the implications of the implementation and application of guidelines. It also means that other criminal justice bodies (e.g., probation and prisons) cannot make fully-informed resourcing decisions, Professor Mandeep Dhani*

3.63 We have not done our own analysis of this, so are unable to verify the proportion of cases to which this applies. However, it is the case that there is an argument for us exploring this in the future, especially given that there are examples of situations that could be concealed behind the principal offence. This might include where there is more than one count of the same offence against different victims on the same occasion e.g. where a single act of dangerous driving causes the death of multiple victims, or where there is more than one count of different offences against the same victim on the same occasion e.g. an assault and criminal damage in a domestic abuse situation. There may also be various counts of

the same offence on different occasions e.g. several shoplifting offences and a mixture of counts of various offences on several different occasions.

3.64 We have already started discussing within the Office the possibility of ascertaining if there is a more sophisticated methodology that we can use to assess current sentencing practice and that would consider all offences dealt with in a sentencing occasion and the impact of the totality on the final sentence outcome. The work is likely to involve an in-depth review of the way in which sentencing data is recorded in the relevant datasets (e.g. is it consistent and accurate, how many offences are typically dealt with in one hearing, are sentences consecutive or concurrent, does recording vary across different offences etc), with comparison against sentencing transcripts (where available).

3.65 It will not be possible to use data from the Crown Court Sentencing Survey (CCSS) for this, as although the CCSS recorded whether the offence was sentenced as a single offence or alongside other offences, no information about the other offences was collected, and so the CCSS cannot be used to answer the questions posed. We would therefore need to explore other data sources and/ or build extra questions into future data collections.

3.66 We would recommend undertaking such a review at some point in the near future in order to ensure we can fully account for all impacts on sentencing outcomes. Given that this will inform any future revision of the totality guideline, we propose that the scale and remit of this is considered after we have reviewed the findings from the small-scale piece of qualitative work that we are currently undertaking on totality (possibly some time towards the end of this year). This will again be subject to overall priorities and resources within the analytical team (a review of the data in this area would not be a quick or simple review) and our general progress on improving our data sources.

***Question 9: Does the Council agree that, subject to overall resources, we should consider building in some resource for a review of the data/ potential methodologies for future analysis of multiple offences?***

#### Research on behavioural insights

3.67 Whilst acknowledging the need for resources, The MA suggested that the Council consider “*research on behavioural insights in determining how best to achieve desired behaviours through effective communication (as recommended by Sir Anthony Bottoms in a previous review of the Sentencing Council)*”. The Sentencing Academy said it is “*unaware of*

*any research which has explored users' perceptions and experiences with the guidelines. Are the guidelines applied in practice in the ways expected by Council?"*

3.68 It is likely that this type of information could be derived through our proposed work on user testing which we have already developed a specification of requirements for. In this, the stated aim of the project is to test how sentencers use, access and experience digital sentencing guidelines. The project will investigate whether digitisation of guidelines has had any impact on the way in which the guidelines are used and propose any potential changes to improve the provision of digital sentencing guidelines and ensure they are used in line with the intentions of the Council.

3.69 An Invitation to Tender for this project was issued in late 2020, but unfortunately we received no bidders. We have not yet reissued this tender as the delay in the work will now necessitate funds from next year's budget which are currently not confirmed. However, if and when these funds are confirmed as available from the budget, we will pick this up again and reissue it for tender.

#### Research on attitudes to sentencing

3.70 Transform Justice stated that: *"Consideration should be given to undertaking more surveys and research studies to understand the complexity of attitudes to particular offences"*. We have in the past commissioned such work – e.g. on public attitudes to drug offences and to guilty plea reductions, and in 2019 we published Comres research on public knowledge and confidence in the criminal justice system and sentencing.

3.71 As highlighted above, we plan to consider qualitative research with victims and offenders on a case-by-case basis and could also include these types of surveys. We also plan to repeat some of the survey questions included in the Comres research to look at trends over time (again subject to resources).

#### Research on Victim Personal Statements

3.72 The Sentencing Academy felt there should be more research on Victim Personal Statements (VPS) to ascertain if more guidance is needed in this area: *"Research with sentencers would provide clarification on the issue by revealing whether they share a common understanding of the role of the VPS and whether they are satisfied with current levels of guidance. Additionally, CoA guidance is now rather dated, and produced at a time*

*when VPSs were used less frequently than at present*". They recommended we undertake a survey to look into this issue.

3.73 As discussed in December, in relation to the similar comment made by the Sentencing Academy on areas in which further guidance was required, the expanded explanations cover this to a limited extent, and we would be able to pick up on related issues through any evaluation of those.

#### Research on protective and preventative orders

3.74 A member of the public called for this, saying this is *"An area of sentencing that has been neglected... I don't think that any research has been done into how frequently some of these orders are made/how effective they are"*. This linked to their view that more guidance was needed in this area. This was flagged in the December Council paper, but was not considered a priority area.

#### A survey to identify areas for future guidance/ guidelines

3.75 More generally, the Sentencing Academy suggested that the Council should conduct a survey with judges and magistrates *"to help identify areas of sentencing law where there is a perceived need for greater guidance. This might take the form of a new guideline or the revision of an existing guideline"*.

3.76 Given that the Council already has a full workplan going forward and is considering proposals for further guidance/ guidelines put forward more generally as part of the Vision consultation, we do not recommend putting in place such a survey.

***Question 10: Does the Council agree that we have sufficient information on this and that a further survey is not necessary?***

#### ***Collaborating with others and seeking external sources of funding***

3.77 As highlighted several times, many of the issues presented above are extremely dependant on the resources available to the Council, particularly the staffing resources in the analytical team, and in the context that covering even our current work programme is becomingly increasingly problematic. Many responses acknowledged this. Accordingly, there were several respondents who felt that the Council could benefit from collaborating with external partners and/ or seeking funding from elsewhere.

*Analysis of the impact of sentences on reducing reoffending, as well as understanding of victims' views about the process, could be appropriately carried out by academic institutions, YJB*

*The Council should continue to work alongside academics to apply for funding from research councils to support its research and analysis as this will increase its capacity to look at a range of priority issues and base the development of guidance on rigours research findings. Such external critical input from academics, adds a level of rigour and in turn public trust and support in the work of the Council, Carly Lightowlers*

*The Sentencing Council has conducted several seminars in conjunction with academic researchers, the last being in 2018 in conjunction with City Law School. We encourage the Council to continue this collaborative activity and the Sentencing Council could identify a list of research questions for which it is particularly interested in seeking answers...Sentencing Council support for research projects conducted by academics and other organisations could be key to unlocking philanthropic/research council funding, Sentencing Academy*

3.78 As discussed in the November Council meeting, specifically in relation to research and analysis on diversity and equality issues, we are increasingly working with external academics and will continue to do so. We already endorse applications for research funding where applicable to the work of the Council (most recently in late 2020 we endorsed a project to look at disproportionality in sentencing amongst different ethnic groups and, subject to the Council's agreement, we plan to endorse a second similar project later in 2021). We are also strengthening our links with MoJ analysts and in the first week of March are attending a meeting to discuss future work with academics.

3.79 We also plan to continue our engagement with external academics/ organisations in the form of seminars and workshops. Our anniversary event would have been a good opportunity to do this, but unfortunately needed to be cancelled. The current plan – to convene a number of workshops on relevant issues over the course of this year - will, however, be an opportunity to engage more fully.

3.80 Again, as noted in November, enhancing our links with external organisations and collaborating on more work is not resource free and it will require some staffing resources. This was also flagged by Professor Padfield:



*You should encourage more academic researchers to use your data. But remember that Universities are probably even more short of money than you are. And one risk with working with “external organisations” is the additional costs (e.g. huge data protection issues). Working with other organisations is of course a good thing – we all need critical friends, ‘deconstructors’, who can peel back our onion skins and challenge our ways of thinking – but it is not a way of saving money.*

3.81 On balance, however, although collaboration with others requires some staffing resources, it does have the potential to provide access to data and generate findings without any financial input. We would therefore recommend that we invest time into having these wider discussions with external organisations and academics and to explore opportunities to collaborate on work/ obtain additional funding.

***Question 11: Does the Council agree that the Office should invest the necessary time into enhancing our links with external organisations and academics and considering the opportunities for future collaborative work?***

## **RISKS AND IMPACT**

4.1 Whilst enhancing future data collections will be welcomed by other departments, organisations and academics, this is likely to require additional resources and it will be important not to raise expectations before securing this. The early scoping work on potential future approaches to data collection and methodologies for taking account of multiple offences will also require a relatively large amount of resource from the analysis and research team in the short to medium term. This will need to be taken into account when planning other work.

4.2 The other areas of work flagged for development will also require resource and it will be important that once we have indicative views from Council we look across the piece to ensure that we can effectively plan our resources for the forthcoming period.

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