

**The Sentencing Council for  
England and Wales: brake or  
accelerator on the use of prison?**

By Rob Allen  
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# Foreword

I am delighted to welcome this contribution to the important debate on the role and purpose of the Sentencing Council. Rob Allen raises many important points. His report is certainly provocative: it is designed to provoke a response. He asks, for example, whether the Council's failure to tackle the question of "effectiveness" is its biggest weakness. He is certainly right that you can't measure "effectiveness" simply by counting the likely effect that any change in sentencing law or practice might have on the demand for prison places. That misses the point about what sentences are meant to effect. The report pulls together a number of imaginative ideas of ways in which the Council could seek both to reduce the demand for prison places, and to make sentencing more "effective". No-one wants, I think, a Sentencing Council which simply endorses current practice, or one which encourages higher levels of punishment, or longer periods of imprisonment, without some very clearly articulated justifications. Its job is not to reflect the increases in sentence levels that have occurred over recent years, but to worry about these increases: to offer advice based on sound evidence of what works to reduce re-offending. The late Nigel Walker once called himself an "economic reductivist". This sounds a wise starting point to me.

So Rob Allen seeks to encourage the Council to look at some fundamental questions about the ways in which sentences of varying types and lengths, both custodial and non-custodial, contribute to the purposes and effectiveness of sentencing, both in theory and practice. The Council's spokespeople might reply that it is not adequately resourced to develop a much broader perspective. It has proved difficult enough (impossible, in fact) to collect reliable sentencing data. What academic wouldn't welcome his suggestion that the Council should conduct more empirical research (particularly interviews with offenders) when producing or updating guidelines? And perhaps it is not just a question of money, but

a question of priorities. Should the Sentencing Council not be paying more attention both to its statutory duty to have regard to the cost of different sentences and to their relative effectiveness in preventing re-offending? To the impact of changes on different sub-groups of offenders? To questions of (in)equality, discrimination and (un)fairness? What is the Council really for? How about educating sentencers and the public about ethical sentencing in practice as well as in law? Perhaps they could re-imagine parole, and point out the real problems with joining-up the custodial and non-custodial parts of sentences of imprisonment?

Sentencing is too important to be left to sentencers or Sentencing Councils, or to academics. Let's hope that this report can help provoke a lively public debate.

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# Summary

Prisons in England and Wales are facing a major crisis, with serious questions being raised about whether they can accommodate the current population safely, let alone help to reduce re-offending. Ten years ago, the Sentencing Council was conceived as a way of helping to control the growth of prison numbers. But, by the time it started work in 2010, its objectives were limited to making sentencing more effective, predictable and consistent. While prison numbers have been fairly stable over the last six years, this is mainly due to large falls in the numbers appearing in court. Those that do are more likely to go to prison, and to stay there longer.

Most of the Council's work has involved the production of guidelines which require courts to take a step by step approach to sentencing, starting at the same point, and taking into account the same kinds of factors in assessing the seriousness of a particular offence. Despite some reluctance on the part of judges and magistrates, guidelines are widely accepted – unsurprisingly given the considerable range of discretion that still exists, and the courts' ability to sentence outside the guidelines if it is in the interest of justice to do so.

Guidelines have sought to reflect the existing practice of the courts, rather than recalibrate sentencing levels based on effectiveness and cost. However, in the case of assaults and burglary (the guidelines whose impact the Council has evaluated), sentence levels have risen more than anticipated. This may not have been solely a result of the guidelines, but concerns have been expressed that the Council has not done enough to challenge increasing sentence lengths, or to give more explicit assistance to courts in determining when offences are so serious that only prison will do.

While the Council may have helped to make sentencing more transparent, consistent and proportionate, it has neglected its' potential to curb the ineffective use of imprisonment, adopting a narrow focus to its work.

We recommend that both the membership of the Council, and its range of responsibilities, are widened. On the one hand, it could use its current remit to issue guidelines on a wider range of common issues facing sentencers, such as the weight to be attached to previous convictions, and the challenges involved in sentencing women, young adults or people with mental health problems. On the other, its mandate could be extended so that it advises more broadly on sentencing policy, projects prison numbers, and uses its guidelines to keep them in line with available prison places.

In the late 2000s the government backtracked on explicitly linking sentencing levels with available resources, but now could be the time to revisit the issue. Prisons are in crisis now as then, and the increasing length of sentences is one of the causes. The Council could play a key role in reducing this population crisis.

# 1. Introduction

**1.** Over the last 25 years the prison population in England and Wales has almost doubled from 44,000 to 86,000. Unlike many countries in which there are large numbers of defendants in prison awaiting trial, in England and Wales prison growth reflects a rise in the number of people sentenced to immediate custody, and the length of time they spend there.<sup>01</sup> By far the most expensive sanction available to the courts, prison sentences are used more frequently, and for longer periods, in England and Wales than in comparable Western European countries.<sup>02</sup>

**2.** Individual sentencing decisions are made by judges and magistrates but, since the early 2000s, courts have not had an entirely free hand (see Appendix A for a short history of sentencing guidelines). In 2003 the Sentencing Guidelines Council (SGC) was set up to assist courts to approach the sentencing of any case from a common starting point, so that similar cases could be expected to receive similar treatment.

**3.** The SGC was replaced at the end of the decade by the Sentencing Council for England and Wales. Conceived at a time when the prison system was struggling to keep pace with the demands placed upon it, the Council was originally intended to provide “a more effective, integrated and transparent planning mechanism that reconciles prison capacity with criminal justice policy”.<sup>03</sup> The idea in Lord Carter’s 2007 report, that guidelines should be drafted with a view to keeping prison numbers in check, alarmed both judges and parliament, and the Council’s main aims in the end turned out to be “promoting greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary”.<sup>04</sup> When introducing proposals for the Council in Parliament in 2009, Lord Chancellor Jack Straw told Parliament that “ensuring the effectiveness of sentencing will be an important role of the Sentencing Council”.<sup>05</sup> This led some observers to hope that the Council might prove “an opportunity to address the prisons crisis in England and Wales”,<sup>06</sup> by producing guidelines which are “norm

changing, not simply norm-reinforcing”, altering the practice of courts rather than just reflecting it.<sup>07</sup>

**4.** With prisons yet again in crisis, it is important to ask what impact sentencing guidelines have had since their introduction, and whether the Council could play a more active role in curbing the ineffective and unnecessary use of prison.

**5.** In terms of numbers, after the creation of the Sentencing Guidelines Council in 2003, the prison population continued to grow rapidly from 73,000 to 85,000 in 2010. But it has stabilised over the last few years with the population in June 2016 at a similar level to that of June 2010. This may give the impression that the Council has served to halt the rise in prison numbers. As Figure 1 shows, since 2010, 25% fewer people have been sentenced by the courts for more serious offences.<sup>08</sup> But the proportion of offenders imprisoned for serious offences rose from 22.5% to 27.2%. The average length of these sentences went up too, from 16.2 months to 19 months. Sentences have got longer for violent, sexual, theft and drug offences (figure 2), on all of which the Council has produced guidelines.

In the 12 months leading up to March 2016, the courts sentenced 89,000 offenders to prison, almost 10,000 fewer than they had six years before. But because on average sentences got longer by a fifth, demand for prison places actually increased by 6.5% during the period. The custody rate also rose from 22.5% to 27.2% between March 2006 and March 2016 for indictable offences. These increases occurred for all types of crime, apart from public order offences. The custody rate in the magistrates’ courts stayed the same for non-motoring offences (2.7%), and fell slightly for motoring cases. In more serious cases therefore, since the Sentencing Council started work, offenders are more likely to be imprisoned and serve longer terms.

**Figure 1**

**Numbers Sentenced to Prison for indictable and triable either way offences and Prison Population 2010-2016**

Source: 09

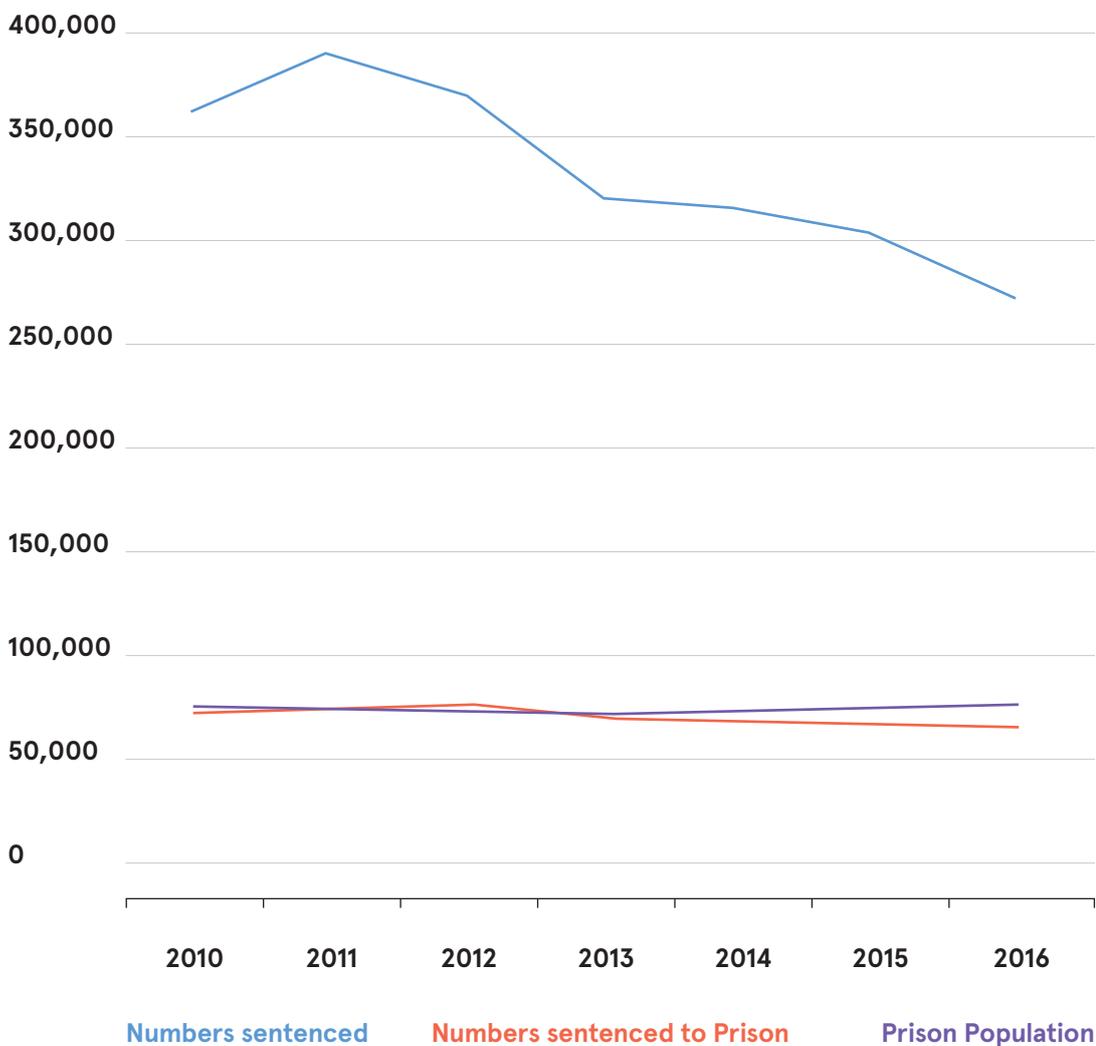
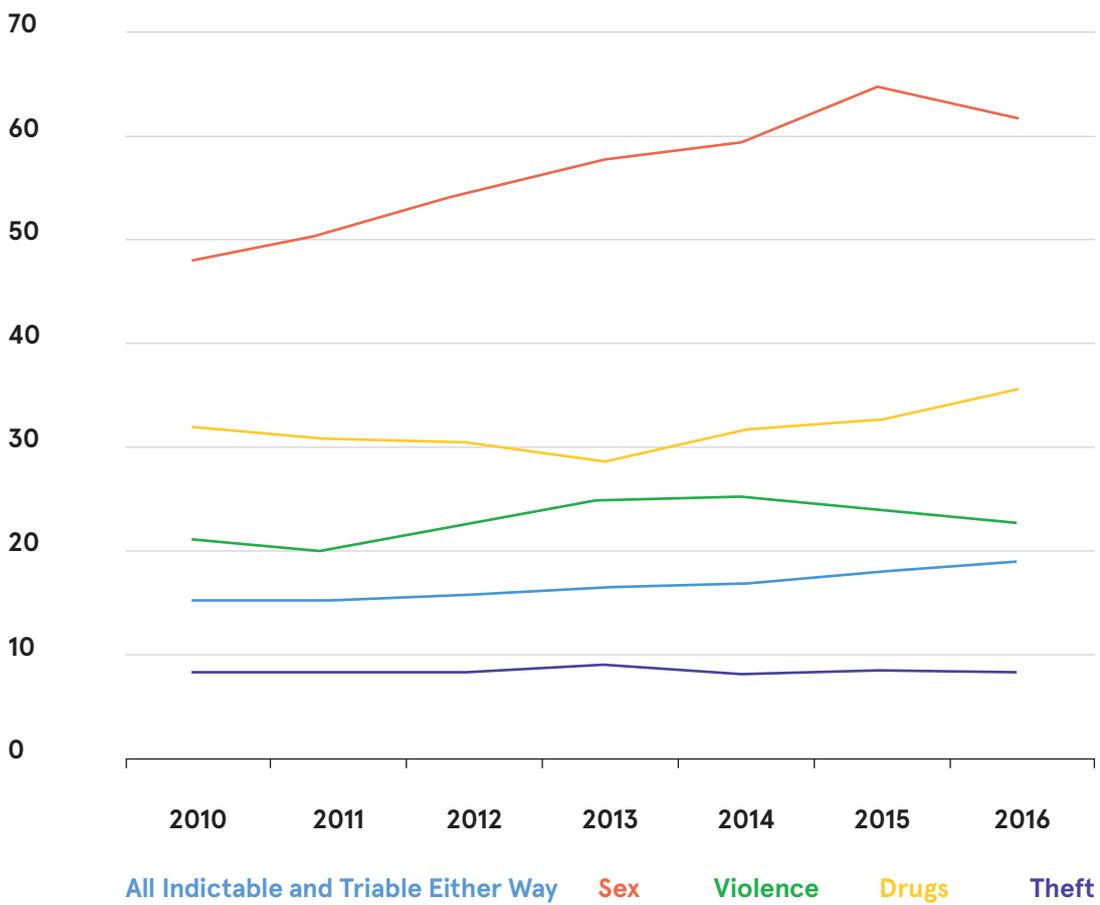


Figure 2

### Average Length of Custodial Sentences for Serious Offences 2010 to 2016 (months)

Source: 10



6. The current Council Chairman Lord Justice Treacy, takes the view that “generally guidelines are anticipated to be neutral in their effect upon the prison population.”<sup>11</sup> It is true that “growing, but still limited, research suggests modest positive effects on consistency and proportionality in sentencing”.<sup>12</sup> Such effects, however, may have served to increase imprisonment. More consistent sentencing (when similar offenders who commit similar offences in similar circumstances can expect to receive similar outcomes), can lead to a greater use of prison, if it is achieved by more upward adjustments to sentences than downward ones.<sup>13</sup> More proportionate sentencing can also lead to more prison sentences, if particular types of crimes are deemed worthy of more severe punishment. There is evidence of substantial sentence inflation for certain crimes in recent years, whether or not this can be attributed directly to the Council. As former Justice Secretary Michael Gove told the Longford Trust in November 2016, “we have been sentencing individuals to significantly longer sentences over time in the last few years.”<sup>14</sup>

7. While the Council accepts that guidelines are a key driver of change in sentencing practice, such change “can also occur in the absence of new sentencing guidelines and could be the result of many factors such as Court of Appeal guideline judgments, legislation, and changing attitudes towards different offences”.<sup>15</sup> In England and Wales, increases in the mid-2000s in the minimum terms to be served in murder cases have played a strong part in driving up sentencing severity for less serious offences of violence.<sup>16</sup> Parliament has continued to amend legislation increasing, for example, the tariff for murder when a knife is taken to the scene, from 15 to 25 years.

8. Should the Sentencing Council be trying to counter this relentless increase in sentence lengths, and make an impact on the use of prison? A recent article in the Criminal Law Review suggested “it is time to think again about the role of the Council—what is it really for?”<sup>17</sup>

**This report aims to help answer that question.**

## 2. The need for sentencing guidelines

**9.** Decisions about whether to send individual offenders to prison and, if so, for how long, are made by the 17,500 magistrates and 3,200 judges who sit in courts across England and Wales. For each offence the law sets a maximum sentence, for example, life imprisonment for robbery, or 14 years for house burglary and, in a small number of cases, a minimum or mandatory one.<sup>18</sup> By law, judges must not pass a custodial sentence unless they think that the offence was so serious that neither a fine alone nor a community sentence can be justified. Magistrates and district judges cannot impose more than six months in custody for a single offence, or a total of 12 months for multiple offences. Within these limitations, historically, courts have enjoyed wide discretion in deciding the right sentence in a particular case.

**10.** As a result, in the past, offenders convicted of similar offences might find themselves sent to prison by a court in one part of the country, and receive a fine in another. Tough judges might impose lengthy terms of imprisonment on an offender, more sympathetic ones much shorter prison sentences, or even community based orders such as probation. While justice requires that courts can use their discretion to meet the wide variety of individual circumstances, and to an extent differing local conditions, it also demands that like cases are treated alike. Defendants, victims, the media and the public find it hard to understand when a radically different approach is taken to seemingly similar cases.<sup>19</sup>

**11.** Whatever sentences are imposed, responsibility for their implementation does not of course lie with the courts. Providing enough prison places and probation services is a matter for the executive – the Home Office until 2007, and the Ministry of Justice since then – and paid for out of general taxation.

**12.** The government and parliament therefore both have a strong interest in the decision-making of courts,

on the one hand because of the potentially open ended and unpredictable financial commitment it entails, but also because of their overarching responsibility for an effective penal policy, and for a criminal justice system which enjoys a reasonable level of public confidence and support.

**13.** Judges have historically been less enthusiastic, for some because any guidelines smack of unjustified interference with judicial discretion, for others because “government is often too concerned with votes – and the civil service too concerned with the Treasury – when it comes to sentencing considerations”.<sup>20</sup> As recently as 2011, the Court of Appeal, while stressing that its relationship with the Sentencing Council proceeded on the basis of “mutual respect and comity”, reminded the lower courts that their duty to follow the Council’s guidelines did not require slavish adherence to them. By contrast, when the Court of Appeal promulgates judgments relating to the principles and approach to be taken to sentencing decisions, they bind sentencing courts.<sup>21</sup>

**14.** Judges and magistrates at all levels seem to have accepted the role of guidelines, with the proviso that they are guidelines not tramlines. However, some continue to feel that Council guidelines reduce their autonomy and do their job for them, discouraging courts from passing individualised and creative sentences they might otherwise have imposed. Others find them unnecessarily rigid and complex. But they look like they are here to stay.

# 3. What is the Sentencing Council?

## a) Membership

**15.** The Sentencing Council is an arm's length body, sponsored by the Ministry of Justice.<sup>22</sup> It comprises 14 members, eight judicial members and six non-judicial. The non-judicial members are appointed after a process of advertising and recruitment. Unlike some public appointments, neither the Chairman nor members of the Sentencing Council are subject to confirmation by the Justice Committee.

The Chairman and Deputy Chairman, both senior judges, and the four other judicial members are appointed by the Lord Chief Justice with the agreement of the Lord Chancellor. The six non-judicial members are appointed by the Lord Chancellor, with the agreement of the Lord Chief Justice. The judicial members must include at least one Circuit judge, one district judge and one lay magistrate, and—at least one judicial member should have experience of training. Non judicial members should have experience in one or more of: criminal defence, criminal prosecution, 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 and the rehabilitation of offenders.

**16.** When the Council was being established, judges argued that its main role as the producer of guidelines meant that they should comprise the majority. Others suggested a need to avoid "judicial dominance"<sup>23</sup>, arguing that a majority of members should come from "other criminal justice professions and (to a limited extent) from outside the criminal justice system".<sup>24</sup> The judges won the argument. The built-in judicial majority has in practice been bolstered by the fact that some of the legal practitioners, who have been

members of the Council, have also been part time judges. Currently one of the "non judicial" members is a part-time recorder, thus there nine judges and five non-judges as members. The architects of New Zealand's Sentencing Commission consider the Council in England and Wales to be "too weighted" to judges in general, and senior judges in particular. In the proposed New Zealand model, for example, the Deputy Chair would not be a judge.<sup>25</sup>

**17.** It is not inevitable that a commission issuing guidelines should be dominated by the judiciary. In the US state of Minnesota, only three of the eleven members of the Sentencing Guidelines Commission are required to be judges.<sup>26</sup>

**18. There is a case for reviewing the criteria for membership, including whether the judicial members should form the majority. 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 the National Offender Management Service.**

## b) The role of the Council

### Guidelines

**19.** The Sentencing Council describes its aims as being to promote a clear, fair and consistent approach to sentencing, produce analysis and research on sentencing, and work to improve public confidence in sentencing. The Coroners and Justice Act 2009 sets out in some detail what the Council should do, and how it should do it. Its main job is to prepare guidelines. It *must* do so about two issues: the reduction in sentence that an offender should get for pleading guilty, and how to deal with people convicted of more than one offence, or who ask to have cases taken into consideration<sup>27</sup>. Achieving a consistent approach in these matters is important, not only because of the impact which they have on sentence lengths, but so that victims of crime and the public can understand why these might be shorter than they might otherwise expect. The Council may also prepare sentencing guidelines on “any other matter”. Most its work has consisted of guidelines on specific offences.<sup>28</sup>

**20.** Unlike much stricter guidelines in some American states<sup>29</sup>, guidelines in England and Wales “promote consistency by prescribing a sequence of steps for courts to follow, while also allowing a significant degree of discretion”<sup>30</sup>. The 2008 Working Group, chaired by Lord Justice Gage, which considered the proposal made by Lord Carter for a Sentencing Commission, found the ranges in American systems too narrow, and compliance requirements too restrictive to be compatible with judicial traditions in England and Wales.<sup>31</sup>

**21.** The law in England and Wales encourages guidelines on a particular offence, not only to include a range of appropriate sentences but, to break the offence down into categories of seriousness, specifying an appropriate “category range” for each. In most of the guidelines, there are three categories, with

Category 1 comprising greater harm and higher culpability, through to Category 3 (lesser harm and lower culpability).

**22.** In the Council’s burglary guideline, the range for the whole offence is between a community order, and six years imprisonment. For category 1 the range is 2–6 years imprisonment, for Category 2 a high level community order to 2 years imprisonment, and for Category 3 a low level community order to 26 weeks prison. Within each category the guideline specifies a sentence as a starting point for consideration. While this may sound a restrictive regime, courts continue to enjoy substantial discretion. For one thing, courts must follow the guideline, unless it would be “contrary to the interests of justice to do so”.<sup>32</sup> For another, following the guideline means they should sentence within the guideline range as a whole, rather than within the category range into which the offence falls. So for any burglary offence, a sentence between a community order and six years imprisonment complies with the guideline; and if the court considers it is the interests of justice, they can depart downwards to a fine or upwards to a prison term of more than six years.

**23.** When the council was created, it was suggested that for courts “what appears at first glance to be an onerous mandatory duty is diluted ... to the point of meaninglessness”<sup>33</sup>, and that the bite of the guidelines on sentencing discretion is “pitifully loose”<sup>34</sup>. Yet some judges and magistrates continue to see guidelines as too rigid and demanding.

**24.** The guidelines must also list aggravating or mitigating factors to be taken into account and “include criteria, and provide guidance, for determining the weight to be given to previous convictions and such other aggravating or mitigating factors as the Council considers to be of particular significance in relation to the offence or the offender”.<sup>35</sup>

Guidelines require courts to take a total of six steps before reaching a decision about the main sentence and a further three steps thereafter. The first and most significant step is to allocate the case to one of three seriousness categories based on the harm caused and the culpability of the offender. Courts should then determine a provisional sentence, taking account of a range of mitigating and aggravating factors which may apply (Step 2).

The court should then consider if this provisional sentence should be reduced to reflect assistance offered or provided to the prosecution (Step 3) or a guilty plea. (Step 4). There is then the need to consider whether the offender meets the criteria for an indeterminate or extended sentence (Step 5). If more than one offence is involved, the totality principle must be applied to ensure that the total sentence is just and proportionate to the total offending.

The final steps involve considering whether to make a compensation order and/or other ancillary orders, explaining the sentence and its effect on the offender, and deciding whether to give credit for time on remand or bail.

**25. The structured approach to sentencing seems to have been accepted on the whole, particularly by new magistrates and judges. Some say they find the guidelines over complicated and elaborate, but may simultaneously want more clarity on certain topics. Consideration could be given to producing more generic guidelines so that offence specific guidelines are not further complicated.**

#### Monitoring and Assessment of Resources

**26.** The Council must work on three other areas relating to sentencing. First, it must monitor the impact of all its guidelines by establishing whether Courts are applying them, and whether the resulting sentencing levels turn out as anticipated. It undertook this by commissioning a Crown Court Sentencing Survey, and by conducting two specific assessments of the effect of the guidelines on assault and on burglary. The Crown Court Survey was discontinued in March 2015 in favour of “more focussed and targeted” guideline-specific data collection in both magistrates’ courts and the Crown Court.<sup>36</sup>

**27.** Second, on resources, when publishing guidelines the Council must publish an assessment of their likely impact on prison, probation and youth justice services. These have been attempted for each guideline, although they all carry significant warnings about their likely accuracy. For example, the Council admits that although almost 60,000 offenders a year are given suspended sentences, so little is known about the number which are currently activated, that it cannot estimate the potential impact of new guidelines<sup>37</sup>. Whether the lack of data is the responsibility of the Ministry of Justice, or the Council, such a conclusion looks somewhat feeble, six years after the Council came into being.

**28.** The Council must also make an annual assessment of the broader effect on penal resources made by changes to sentencing practice<sup>38</sup> (whether brought about by the Guidelines or otherwise), and by other factors – such as recalls to prison, breaches of court orders, patterns of re-offending, actions by the Parole Board, early release and levels of remands in custody.<sup>39</sup> Apart from signposting Ministry of Justice Statistics on these topics in its annual report, the Council has done little proactive work. Only once has it been asked to assess the resource impact of a government policy proposal or proposal – the extension of suspended sentences in what became the LASPO Act 2012. This is despite the fact that the former Chairman of the Council saw the assessment of policy and legislative proposals as “particularly interesting; legislation comes at a cost and it is vital that the true cost of proposals is publicly foreshadowed so that Parliament understands that this cost must be met”.<sup>40</sup>

**29.** The third area of activity is the publication of information about local sentencing patterns, both in magistrates’ court areas, and at Crown Court.<sup>41</sup> This forms part of an over-arching duty to promote public awareness of sentencing and, although the Council has made some efforts in this direction, local data about sentencing has not been published by the Council. A 2007 study found that custody rates, average custodial sentence lengths, and the use of indeterminate sentences varied “significantly” across the 42 Criminal Justice Areas (CJAs) in England and Wales.<sup>42</sup> But it is not possible to judge whether these local variations in the use of prison have narrowed or widened since then.

**30.** It is clear that the bulk of the Council’s work has been on the production of guidelines. As an arm’s length body, the Sentencing Council would normally have been subject to a formal evaluation, a so-called triennial review – along the lines of that carried out on the Parole Board<sup>43</sup>. The government have exempted the Council from the requirement to undergo a review

“due to its unique role in maintaining the constitutional balance between the executive, legislature, and the judiciary”.<sup>44</sup> This means that the performance of the Council has not been subject to any form of scrutiny.

**31. The government should prioritise carrying out an evaluation of the Council, looking at whether it has made the most of its remit – to consider the cost and effectiveness of sentencing, publish information about local variations between courts in how much they impose prison sentences, and make comprehensive predictions about the impact of sentencing on the need for prison, probation and youth justice services.**

## 4. What has the Council done?

**32.** The Sentencing Council has published 15 definitive guidelines since April 2010. 11 deal with specific crimes, ranging from sexual to environmental offences, and robbery to fraud. Four deal with generic questions that apply across crime types. The current Chairman told the Justice Committee that the Council plans to have issued guidelines on all the major offence groups by 2020. When the Council started, it endorsed the existing guidelines prepared by the Sentencing Guidelines Council, until such time as it were able to revisit them itself. Where there are no guidelines, the Court of Appeal has continued to issue guideline judgments, for example on terrorism offences earlier this year.<sup>45</sup> These have been produced without the benefit of the research and analysis that the Sentencing Advisory Panel provided prior to 2010 (and which the Council could conceivably provide).

**33.** There have been some oddities in the way that the Council has chosen the topics upon which it has issued guidance. While independence from the Ministry of Justice is to be welcomed, it seems strange that the Council is currently preparing a guideline on the sentencing of children, just as the Ministry is reviewing the youth justice system. There is a risk that, as with the guideline on dangerous dogs, any primary legislation arising from the government's review will require the Council to revisit the guideline. The Council had little choice but to suspend the development of their guideline on early guilty pleas in 2011, once it became clear that the Ministry of Justice were proposing to legislate on the subject. After the Ministry's proposal foundered, the Council returned to the question, issuing a draft guideline in 2016. Both the Ministry and the Justice Committee were taken aback by its estimate that the new guidelines might increase the prison population over time by up to 4,000, "which would involve the construction of around four large new prisons".<sup>46</sup>

**34.** While the law allows for the fast track preparation or revision of guidelines in urgent cases, the Council has not taken the opportunity to do so. The Council did not intervene after the 2011 riots which saw comparatively severe sentences handed out for both adults and children, although it subsequently added an aggravating factor into its burglary and other guidelines in a "context of general public disorder". Nor did it have anything to say about how courts should respond to the addition of mandatory post release supervision to sentences of less than 12 months. There have been concerns that courts might be particularly attracted to a prison sentence promising not only punishment via the clang of the closing prison gate, but some help when it opens again. The Sentencing Council might therefore have been expected to produce guidelines on if, and if so how, courts should reflect this change in their decision-making.

**35.** There has also been some public opinion research – for example attitudes to the sentencing of drug offences, sexual offences<sup>48</sup> and on what the public think of sentence reductions for pleading guilty.<sup>49</sup> The Council won a 2012 Guardian Public Services Award<sup>50</sup> for its use of evidence in the development of the guideline on drugs, which included interviews in prison with 12 women drug “mules” (who had smuggled contraband into England and Wales) and a public attitude survey conducted by the Institute for Criminal Policy Research.<sup>51</sup>

**36.** When producing guidelines, the Council should interview sentenced offenders, as they did in relation to drug mules. This would help ensure that the human consequences of sentencing decisions are fully considered.

**37.** The current Council Chairman has written that “whilst every consultation sets out proposed sentencing levels, the level of specific response to sentencing levels is low. Whilst consultees frequently deal with other aspects of a guideline, the proposed sentencing levels do not appear to cause significant concern”.<sup>52</sup> But it should be the Council’s responsibility to seek out relevant views more proactively. And, in any event, it is the Council itself which should show concern about sentencing levels, because one of their jobs is to consider the cost of different sentences, and their relative effectiveness in preventing re-offending. A recent British Academy report has argued both that “the Sentencing Council should review the evidence and readjust its custody thresholds to incorporate more noncustodial sentences in the place of short prison sentences”, and that “a dispassionate overview of the whole range of sentence levels is sorely needed”.<sup>53</sup>

**38.** Cost and effectiveness are two of the factors which the Council must consider when preparing guidelines. Others include the current going rate for sentences, the impact of sentencing decisions on victims, and the

need to promote both consistency in sentencing, and public confidence in the criminal justice system. The impact on victims has assumed a growing significance.

**39.** It is the failure to tackle the question of effectiveness which is perhaps the Council’s biggest weakness. Its current consultation about knife offences claims that in developing an understanding of the cost and effectiveness of different sentences, the Council has considered the available information and evidence “and these are contained in the accompanying resource assessment”.<sup>54</sup> In fact, the resource assessments for adult and children have nothing at all to say about effectiveness of various sentences, for example on re-offending or on crime rates. They concentrate simply on their likely effects on demand for prison places. The Council does not predict an increase in custodial sentences, but has nothing to say about costs and benefits of different sentencing options for offenders who carry a knife.

**40.** The statutory requirement to consider the cost of different sentences and their relative effectiveness in preventing re-offending, could have led to a more critical stance towards short prison sentences, which are widely agreed to be ineffective. There has been a weighty academic critique of the Council’s draft guideline on the Imposition of Community and Custodial Sentences,<sup>55</sup> partly because it passed off as a largely technical exercise, a decision “which is, at the same time, the most basic and the most difficult for sentencers, ....whether to pass a custodial sentence or not”.<sup>56</sup> The six week consultation did not reflect the importance of the topic.<sup>57</sup> While the final guideline has taken on board some criticisms, there is still a refusal to expand on the custody threshold- what it is that makes a case so serious that only prison can be justified. The Council thinks that the “vast variation in offence types and factors which affect seriousness mean it is not possible to provide one general definition of the custody threshold”.<sup>58</sup>

**41.** In similar vein, the Council have declined to offer guidance on whether general deterrence – making an example of a particular offender in order to send a message to the wider public- can be a reason to increase sentence lengths. The Chairman argued that that this would represent a misunderstanding of the Council’s role.<sup>59</sup> Yet if longer sentences are more costly (which they are) and do not deter (which in most cases they do not), the council should say so. When it was formed, it was hoped that by collecting and analysing information and data “a better assessment should be made over time of the efficacy of sentences in terms of reoffending rates”.<sup>60</sup> This has not happened to any extent.

**42.** Lord Justice Leveson, the Council’s first Chairman, asked rhetorically in a 2013 lecture: “Should a habitual thief not be taken out of circulation if only for a short time, not to rehabilitate them, which although desirable is not very likely, but to provide some respite for the victims of their offending and therefore meet the objectives to reduce crime and to protect the public? Could it also be that custody in these circumstances proves enough of a deterrent to prevent further offending for some offenders?”<sup>61</sup> But the Council itself has not given answers based on evidence.

**43.** The Council has constructed guidelines in a conservative fashion without looking at some of the fundamental questions about the way in which sentences of varying types and lengths, both custodial and non-custodial, contribute to the purposes and effectiveness of sentencing either in theory and practice. It should adopt a broader perspective, making use of available data, and collecting its own in order to inform the sentencing ranges it recommends, with a view to bringing them into line with European practice.

## 5. The Impact of the Council's work

**44.** How then is the Council's work on guidelines to be assessed?<sup>62</sup> It has contributed to a more transparent system, both by the relatively open way in which it creates guidelines, and through the operation of the guidelines themselves. Defendants, victims and the public are now in a better position to know in broad terms the likely sentence for particular offences, and the factors which are likely to make it more or less severe. Research has suggested that if people know about its role, they are likely to find sentences acceptable.<sup>63</sup>

The requirements for courts to follow the wide overall offence guidelines, rather than the narrower category ranges within them, mean that the Council can report high rates of compliance. In 2014, for drug possession offences, 84 per cent of sentences imposed fell within the guideline offence range for Class A drugs, over 99% for class B and 89% for Class C. In domestic burglary cases, 96 per cent of sentences imposed fell within the guideline offence range, three per cent were above and one per cent were below the range.

**45.** With any sentence from a community order to six years prison making the grade as far as burglary is concerned, following the guideline is not demanding. The architects of the proposed New Zealand scheme take the view that, if courts comply with guidelines in more than 80% of cases, the range of possible sentences within the guidelines is probably too wide to be meaningful. A wide range of permissible sentences also makes it hard to predict the impact which a guideline will have on the need for prison and probation services.

**46.** Perhaps because of this, the Council has made relatively little of the opportunity to contribute to projecting the prison population. The 2008 Gage Working Group thought the Council should provide authoritative advice on the need for future prison

places but, apart from summarising the resource assessments of its own guidelines, the Council has done little other than point out the sources of data which could be used for analysis. Nor has it alerted the government to significant developments as it could do. Prison projections have remained a task for the Ministry of Justice, which it has carried out with limited success. The National Offender Management system reported that the prison population operated above published projections throughout 2014.<sup>64</sup>

**47.** On the other hand, the Lord Chancellor has only once asked the Council to make an assessment of resources required for a policy or legislative proposal (under S132 of the Coroners and Justice Act 2009). The effects of proposed changes to Suspended Sentence Orders were the only aspect of the Legal Aid, Sentencing and Punishment of Offenders Bill referred for the council's view. The view turned out to be that, since the range of estimates produced is so wide, the estimates themselves have limited value. This conclusion may be why the Council has not been called upon again, though equally it may be because the Ministry of Justice does not feel comfortable about outsourcing policy analysis, particularly if it were to come into the public domain at an early stage. The minutes of each Council meeting are published.

**48.** What about consistency? The council has always sought consistency of approach rather than outcome, on the basis that if courts apply the same series of steps, there is a greater chance of consistent outcomes than if they adopt their own approaches. There is however a fundamental problem in the fact that the law sets out five distinct, and potentially conflicting, purposes of sentencing – punishment, the reduction of crime, reparation, rehabilitation and public protection<sup>65</sup>. The Council has not produced guidelines on how courts should choose between these purposes, so sentences may be imposed with fundamentally different objectives in mind.<sup>66</sup>

**49.** Consistency is, in any event, a “slippery” concept.<sup>67</sup> Equity, proportionality and consistency can work against each other in reaching a decision about the level of a fine. They can do so higher up the tariff as well. There is a strong argument that guidelines should as much help courts to reach the most appropriate sentence in an individual case, as produce an aggregate level of consistency between cases. One early critique of guidelines was that they can prevent the judiciary from “taking a chance” on a particular defendant, resulting in imprisonment when a more imaginative disposal might have been better.<sup>68</sup> With current interest in the development of problem solving courts, this will need to be taken seriously.

**50.** There have been suggestions too, that the way the guidelines are written make it difficult for unrepresented defendants to make full use of them. Transform Justice found that “most advocates thought unrepresented defendants got tougher sentences – not because judges were tougher on them, but because unrepresented defendants had no idea how to mitigate”.<sup>69</sup> The study quotes a prosecutor saying that unrepresented defendants could confuse aggravating and mitigating features of an offence, and end up getting themselves a longer sentence: “most people for instance, think it’s mitigation to say they were drunk at the time. The sentencing guidelines say that’s an aggravating feature!” At the very least this means that guidelines should be drawn to the attention of unrepresented defendants in plain language, as part of a range of measures to provide better online and printed information on how they can prepare for and conduct their case.

**51.** As for the impact of the Council on imprisonment; controlling the size and cost of prison was the main purpose of the Council when it was first proposed in Lord Carter’s 2007 Review<sup>70</sup> but, after judges and MPs had their say, the aim diminished in importance. For one American expert the Council has “failed to achieve its animating purpose.”<sup>71</sup> Is that too harsh a view?

**52.** In the vast majority of guidelines, the Council has estimated that there would be no impact on prison places, or no significant impact. The exceptions have been the guidelines on assault offences which overall estimated a reduction of prison places of between 170 and 570 places; drugs offences which foresaw reductions of between 30 and 150 places; and sexual offences which calculated a need for up to 180 additional places. (see Appendix B).

**53.** The resource impact assessments produced by the Council have many caveats reflecting the risks of unanticipated consequences. Although guidelines on relatively few offences have intended to raise sentencing levels, some observers have feared that consequence. One lawyer has asked whether “longer sentences could be a result of sentencing guidelines? Less discretion and ratcheting up of prison terms”.<sup>72</sup> The Justice Committee has been worried that the “guidelines should not contribute to sentence inflation”.<sup>73</sup> One leading academic and former part time judge, Nicky Padfield has argued that the Council has talked up the prison population.<sup>74</sup>

**54.** As part of its role in monitoring the guidelines, the Council has assessed the impact of its guidelines on assault and on burglary. The first found that, in cases of causing grievous bodily harm with intent (GBH with intent), the average custodial sentence length (ACSL) rose by 17 per cent between the 12 months before and 12 months after the definitive guidelines came into force (from 5.9 years to 6.9 years). “This was substantially in excess of the small increase anticipated by the resource assessment (a rise of 2 per cent and a requirement for between 20 and 60 additional prison places). In addition, the proportion of sentences greater than seven years increased”.<sup>75</sup>

**55.** The increase in ACSLs occurred in June 2011, and coincided very closely with the guideline coming into force. One Crown Court Judge said that the level of

sentencing had gone up “immensely” because of the guidelines.<sup>76</sup> Another thought that “The starting point in category 1 is quite high at 12 years.”<sup>77</sup> Some judges admitted that they will often go outside the category range to reduce a sentence for GBH with intent.<sup>78</sup>

**56.** The assessment also found more punitive sentencing in cases of assault occasioning actual bodily harm, an increase in the use of custodial sentences (immediate and suspended), and a corresponding decrease in the use of community orders. The distribution of sentence lengths for immediate custody also changed, with relatively fewer shorter sentences (six months or less), and an increase in the proportion in the range of six months to two years. “These findings are in contrast to the prediction in the resource assessment which envisaged a drop in the severity of sentencing, due to the decrease in the sentencing range in the Sentencing Council guideline when compared to the previous guideline.”<sup>79</sup>

**57.** The burglary guideline was supposed to increase consistency and “regularise practice”, rather than “substantially altering it”.<sup>80</sup> The assessment of the guideline found instead that there has been a shift towards more severe sentences for all kinds of burglary, and for non-domestic cases “a steep increase”, with average custodial sentence lengths going up 13% between 2011 and 2014. Much of the Council’s assessment attributes the changes to factors other than the guidelines, such as pre-existing upward trends, or the effect of the 2011 riots in London and other cities.

**58.** After both post implementation assessments (on assault and burglary), the Council declared its intention to conduct further research to find out why its original resource estimates proved incorrect. This has not yet been published.

**59.** The Council has also used a Crown Court sentencing survey to monitor the impact of guidelines. The 2015 study published found that, in 97% of cases, judges sentenced within the (generously wide) prescribed range for the various burglary offences; but for sentences of “domestic burglary” and “non-domestic burglary” virtually all departures from the guidelines were above the offence range. It looks as if judges have been more prepared to raise sentences, both within and outside of guideline ranges, than they have been to lower them. In the assault study, one judge commented: “I will probably go outside the guidelines between 20 per cent and 25 per cent of the time because the ranges aren’t appropriate in my opinion; they are too low”.<sup>81</sup>

**60.** Requirements on courts to follow the upper limits of guidelines (or preferably categories within guidelines) should be tightened, while permitting courts to sentence below the range, if it is in the interests of problem solving or rehabilitation.

**61.** 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.

## 6. The way forward

**62.** A recent study has concluded that the attitude of successive governments, “coupled with the restricted mandate and conservative approach of the Sentencing Council to modifying sentencing practices” means that the custody rate is unlikely to change in the near future.<sup>82</sup> But what if the Council were to adopt a less conservative approach and seek to expand its mandate?

**63.** This report has argued that, within its existing remit, the Council could adopt a much less restricted approach in its assessment of appropriate sentencing levels. The Council is able to issue guidelines on any matter, and the former Chairman Lord Justice Leveson said that “we welcome suggestions and requests for guidelines from outside organisations”.<sup>83</sup>

**64.** One suggestion is that the Council focus on sentencing disposals as well as on offences and, in particular, look at ways of strengthening the way the custody threshold is applied by the courts.

**65.** It could provide guidance on how courts should “have regard to” the statutory purposes of sentencing in the 2003 Criminal Justice Act.<sup>84</sup> The Council might also provide more guidance on the weight to be attached to varying numbers of previous convictions, or the approach to dealing with persistent offenders. The Council could usefully look at developing a set of principles to guide sentencers in dealing with offending by groups of people, and how sentences should reflect varying degrees of involvement by participants in a crime.

**66.** It could also perhaps provide generic guidance on the principles by which courts should decide and apply personal mitigation (individual factors relating to the circumstances of the offender), which some observers believe receives less consideration by the Courts than it did in the pre-guideline era.<sup>85</sup>

One magistrate responded to the Council’s Consultation on the Imposition of Custodial and Community Sentences by pointing out “a gaping hole here. One of the main drivers of custodial sentencing is escalation and totality of offending (the depth of the offenders previous record for like offences), but the individual offence taken in isolation would not cross the custody threshold. The typical example is theft (shoplifting in particular) where individual instances of theft may be under £100, but the offender is prolific. In such cases, although somewhat subjective, the bench is often given little choice but to opt for immediate custody.”

**67.** The Council should produce guidelines on more overarching topics that apply to all offences; for example on choosing the objectives of sentencing; deciding when offences are so serious that only prison can be justified; the extent to which previous convictions make offences more serious; and what factors relating to a person’s circumstances make offences less serious, and sentences capable of being suspended.

**68.** With its existing remit, there are other thematic areas of work which could benefit from the Council’s attention. These include a guideline on women offenders – something that former Lord Chief Justice Phillips regretted failing to produce when chairing the SGC.<sup>87</sup> The approach to be taken to offences committed many years ago, particularly historic abuse cases, looks in need of clearer guidance. So too is the question of setting the tariff in murder cases, a guideline on which could conceivably replace the current statutory provisions.

**69.** There is also a case for looking at how courts deal with offenders with mental health and personality disorder problems; and offenders in particular age categories such as young adults, and older offenders whose remaining period of life is limited.

**70. The Council should look to produce guidelines on the need for a distinctive approach to the sentencing of women, young adults, and older offenders, as well as offenders with mental health problems.**

**71.** Looking beyond its existing remit, there is scope for the Council to apply its expertise to a wider range of matters relating to sentencing policy and practice. This would not be a question of making guidelines, but of producing well evidenced policy proposals. The Justice Committee has for example suggested that the Council could promote “a more sustainable sentencing framework”<sup>88</sup> by reviewing the maximum sentences for various common offences, the mandatory minimum sentences which apply to particular crimes, and whether prison should continue to be an option for minor theft or criminal damage.

**72.** Given that the Council has a responsibility for preparing guidelines on the allocation of cases between the magistrates’ and Crown Courts, it should consult on the desirability of implementing extensions to magistrates’ and district judges’ sentencing powers, the impact of which is currently contested.<sup>89</sup>

**73.** More ambitiously still, the Council might look at the role of restorative justice, which the government wishes to see made available to victims at every stage of the criminal justice system, sentencing included. Provisions in the Crime and Courts Act 2013 make it explicit that the courts can use their existing power to defer sentence post-conviction, to allow for a restorative justice activity to take place.<sup>90</sup> This is a practice the Council should encourage in appropriate cases.

**74.** The Council could undertake some at least of this work, feeding it into the Law Commission’s current consolidation of sentencing law. This will otherwise be a technical tidying up exercise – valuable of course because of the complexity of sentencing law and dangers of illegal sentencing – but less so than a genuine review of the sentencing framework, taking account of research on effectiveness, cost and sustainability.

**75. The Council should be given a clearer role in advising government and parliament about a wider variety of sentencing matters, such as changes to maximum sentences for offences, whether offences should cease to be punishable by prison, and whether offences should be dealt with only in the magistrates’ court.**

**76.** The Council may say that it simply does not have the resources to undertake these tasks, certainly before 2020 by when they expect to have produced guidelines on the major offences. But after then, the plan is simply to revisit and, where necessary, revise. There may be a case for that, particularly where guidelines have not had the desired effect. Periodic adjustments should arguably be made in response to prison capacity, and other resource constraints. But if the Council continues to adopt its conservative approach of endorsing current practice, it will simply enshrine higher levels of punishment as the norm.

**77.** Given that the Council has achieved a high, albeit reluctant, degree of judicial buy-in, there is perhaps scope for it to take a bolder approach. It has recently been suggested that it is possible to use guidelines in a more dynamic way to ensure that spending on punishment falls within specified limits, although this would require shifts both in political will and technical capacity.<sup>91</sup> It is perhaps time therefore to reopen the question of the relationship between sentencing and

resources. Lord Carter's review<sup>92</sup>, which proposed the Council, originally envisaged that, while the first version of guidelines would be drawn from current sentencing practice, subsequent versions would be modified to take account of the total impact on prison places and other penal services to ensure that they would come within a published financial envelope set out by government to parliament.

**78. The Justice Committee, which has previously argued for a much reduced prison population, and reinvestment of resources into prevention and rehabilitation, should establish an inquiry into the role of the Council, and revisit the desirability of linking guidelines to resources.**

# 7. Recommendations

**1. Review who should be on the Council.** There is a case for reviewing the criteria for membership, including whether the judicial members should form the majority. 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 the National Offender Management Service.

**2. Issue more generic rather than offence specific guidelines.** The Council should produce guidelines on more overarching topics that apply to all offences; for example on choosing the objectives of sentencing; deciding when offences are so serious that only prison can be justified; the extent to which previous convictions make offences more serious; and what factors relating to a person's circumstances make offences less serious, and sentences capable of being suspended.

**3. Evaluate the Council's effectiveness.** The government should prioritise carrying out an overdue evaluation of the Council, looking at whether it has made the most of its remit - to consider the cost and effectiveness of sentencing, publish information about local variations between courts in how much they impose prison sentences, and make comprehensive predictions about the impact of sentencing on the need for prison, probation and youth justice services.

**4. Interview offenders when drafting guidelines.** When producing guidelines, the Council should interview sentenced offenders as they did in relation to drug mules. This would help ensure that the human consequences of sentencing decisions are fully considered.

**5. Look more at costs and effectiveness of prison sentences.** The Council should adopt a broader perspective when producing guidelines, analysing at the way in which sentences of varying types and lengths, both custodial and non-custodial, contribute

to the purposes and effectiveness of sentencing. It should make greater use of available data, collecting its own where necessary, in order to inform the sentencing ranges it recommends, with a view to bringing them into line with European practice.

**6. Allow courts to sentence creatively.** Requirements on courts to follow the upper limits of guidelines (or preferably categories within guidelines) should be tightened, while permitting courts to sentence below the range if it is in the interests of problem solving or rehabilitation.

**7. Draft guidelines on offenders with particular needs.** The Council should look to produce guidelines on the distinctive approach to the sentencing of women, young adults, older offenders, and offenders with mental health problems; and write a plain English version of their guidelines for the use of unrepresented defendants.

**8. Assess impact on prison of all new policy.** 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, and the accuracy of predictions kept under review after proposals are implemented.

**9. Give advice on all sentencing issues.** The Council should be given a clearer role in advising government and parliament about a wider variety of sentencing matters, such as changes to maximum sentences for offences, whether offences should be punishable by prison, and whether offences should be dealt with only in the magistrates' court.

**10. Link guidelines to resources?** The Justice Committee, which has previously argued for a much reduced prison population, and reinvestment of resources into prevention and rehabilitation, should establish an inquiry into the role of the Council and revisit the desirability of linking guidelines to resources.

# End notes

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- 19** Recent research has found that people hold two contrasting ideas about fairness. One is a uniform model of fairness in which everyone is treated in the same way, regardless of gender, situation, experience or any other differences. The second is the contextual model of fairness, or the idea that a fair system is one that considers the unique factors, circumstances and contexts of a particular offence. Frameworks Institute 2016 New Narratives Changing the Frame on Crime and Justice [http://www.transformjustice.org.uk/wp-content/uploads/2016/08/UKCJ\\_MM\\_July\\_2016\\_Final-1-2.pdf](http://www.transformjustice.org.uk/wp-content/uploads/2016/08/UKCJ_MM_July_2016_Final-1-2.pdf)
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- 81** Sentencing Council 2015 Assessing the impact and implementation of the Sentencing Council's Assault Definitive Guideline <http://www.sentencingcouncil.org.uk/wp-content/uploads/Assault-assessment-synthesis-report.pdf>
- 82** The Evolution of Sentencing Policy and Practice in England and Wales, 2003–2015
- 83** Leveson LJ 2013 Achieving consistency in sentencing <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/leveson-parmoor-lecture-20131031.pdf>
- 84** One leading barrister has complained that although “the courts must also take into account crime reduction, reparation, protection of the public and reformation or rehabilitation of the defendant... in seeking consistency, judicial interpretation of the guidelines is, more likely than not, prone to result in punishment, and that tends to lead to prison Cooper J 2008 The Sentencing Guidelines Council - a practical perspective Criminal Law Review
- 85** See Jacobsen J (Forthcoming) in Sentencing News
- 86** Cooper J Nothing Personal in ed Roberts and Ashworth Sentencing Guidelines Exploring the English Model
- 87** <http://reformingprisons.blogspot.co.uk/2014/11/women-in-prison-is-penal-system-fit-for.html>
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- 89** See Justice Committee 2016 The Role of the Magistracy Paras 100–105 [http://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/165/16509.htm#\\_idTextAnchor030](http://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/165/16509.htm#_idTextAnchor030)
- 90** [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/375581/restorative-justice-action-plan-2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375581/restorative-justice-action-plan-2014.pdf)
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# Appendix A: A short history of guidelines in England and Wales

Curbing unjustifiable disparities was one of the reasons for establishing the Court of Appeal in 1907<sup>93</sup> and, although it initially had a limited impact, the development of guideline judgements, which explain how lower courts should approach the sentencing of particular types of offence proved more promising. In 1997, Labour's manifesto pledged to give the Court of Appeal a duty to lay down sentencing guidelines for all the main offences.

Since 1998, there have been a series of efforts to make sentencing more consistent and predictable so that individual decisions are proportionate and legitimate in the eyes of offenders, victims and the public, and the government can better plan the allocation of resources.

The Sentencing Advisory Panel was created in 1998 to assist the Court of Appeal in creating or revising guidelines by providing information about existing sentencing practice, and "the cost of different sentences and their relative effectiveness in preventing re-offending".<sup>94</sup>

The 2001 Review of the Sentencing Framework conducted by Home Office official John Halliday, recommended a more comprehensive set of guidelines for the use of judicial discretion, with "entry points" for considering severity of sentence, alongside graded definitions of seriousness of offences, and indications of the range of effects that previous convictions should have. The review made clear that "The proposed new sentencing guidelines should not assume that existing norms for sentence length would be equally punitive in the new framework, or that the existing custody rate would be equally appropriate".<sup>95</sup>

A Sentencing Guidelines Council was duly established in 2003 amidst a debate about how far guidelines should take account of existing capacity when determining the "going rate" for particular offences. With prison numbers continuing to rise sharply, the government

faced problems in providing sufficient space. From 2007 to 2010, 80,000 prisoners were released 14 days early in order to free up space, something which was seen to damage public confidence.<sup>96</sup> Making available sufficient places was rendered more problematic by the inability accurately to predict how many were needed.

To address these problems, Lord Carter's 2007 review identified a need for "a more effective, integrated and transparent planning mechanism that reconciles prison capacity with criminal justice policy". Without this, it found "there is too little predictability in the effect of sentencing decisions and the other drivers on the prison population and penal resources"<sup>97</sup>.

A judicially led working group cautiously recommended a new Sentencing Council to combine the functions of the panel and the Guidelines Council.<sup>98</sup> While Lord Justice Gage's group believed an increase in the prison population to be "undesirable", it saw practical problems with using guidelines to control the prison population "and bring it within a capacity envelope". A majority of the group rejected the idea that guidelines should be produced having regard to capacity. A majority too rejected the notion that the Guidelines should be approved by parliament. Following the Coroners and Justice Act 2009, which by and large enshrined Gage's recommendations in law, the Sentencing Council started work in April 2010.

During the passage of the Coroners and Justice Bill through Parliament, the conservative opposition argued that the intention of setting up the Council was "to fetter the ability of judges to exercise their discretion ... by considerations relating to the Government's number of prison places", which would be "a profound change" that "will come as a shock to the public, because it has been an established principle for a long time that judges should pass sentences that reflect the period that a person should serve in prison".<sup>99</sup> In fact, the Council's duty to consider,

inter alia, the cost and effectiveness of sentencing , was little different to that of the Panel and the SGC it replaced.

Notwithstanding the working group's hostility to linking guidelines to resources, an "impact assessment" for the new council drawn up by the Ministry of Justice reportedly argued that a "closer adherence to sentencing ranges could arrest historical trends in upward sentencing drift".<sup>100</sup> This could mean "avoiding the need to build some 1,000 additional prison places," For many, including the Justice Committee, this seemed too limited an ambition.

**93** Thomas D The Sentencing Process in ed McConville M and Wilson G The Criminal Justice Process

**94** Crime and Disorder Act 80 (3) c

**95** Review of Sentencing Framework page

**96** The End of Custody Licence <http://news.bbc.co.uk/1/hi/uk/8528868.stm>

**97** Lord Carter 2007 Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales

**98** Sentencing Commission Working Group Sentencing Guidelines in England and Wales An Evolutionary approach July 2008

**99** <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090126/debtext/90126-0007.htm>

**100** Thousands of criminals to serve less time in prison under Government plans Daily Telegraph 24 January 2010 <http://www.telegraph.co.uk/news/uknews/law-and-order/7067620/Thousands-of-criminals-to-serve-less-time-in-prison-under-G>

# Appendix B: Guidelines and resource assessments (prison places)

Guideline	Resource Impact assessment on prison
<b>Assault</b>	<p>GBH with intent +20 to+60 additional prison places</p> <p>s20 GBH +10 to+ 20 additional prison places</p> <p>ABH -80 to -200 fewer prison places</p> <p>Assault with intent to resist arrest -0 to -10 fewer prison places</p> <p>Assault on police officer -20 to -40 fewer prison places</p> <p>Common Assault -150 to -350 prison places</p> <p>Aggregate expected range -170 to -570 prison places</p>
<b>Drug Offences</b>	<p>Exportation, Permitting Premises, Supply, Possession with Intent to Supply, and Possession: Negligible effect</p> <p>Importation -30 to -150 fewer prison places</p>
<b>Burglary</b>	No resource impact
<b>Allocation, Offences Taken into Consideration and Totality</b>	No resource impact
<b>Dangerous dog offences</b>	Overall these changes are expected to cause an increase in cost to the Prison Service of between £80,000 and £160,000 a year
<b>Sexual offences</b>	0 to 180 additional prison places
<b>Environmental Offences</b>	Unlikely to be significant impacts on prison
<b>Fraud Bribery and Money Laundering</b>	No resource impact
<b>Theft</b>	No significant impact
<b>Robbery</b>	No significant impact

<b>Health and safety offences, corporate manslaughter and food safety and hygiene</b>	Health and safety and food safety and hygiene: No impact on prison Corporate manslaughter: no estimate possible
<b>Dangerous Dog offences</b>	As a result of the changes in legislation it is likely there will be an increase in the volume of offenders sentenced for dangerous dog offences. This is due to the extension of the offences to private property and the introduction of a new offence. We also anticipate there will be an increase in the average custodial sentence lengths, particularly for the most serious offences, as a result of the increases in the maximum statutory penalties
<b>Allocation</b>	No resource impact
<b>Imposition of Community and Custodial sentences</b>	No overall resource impact
<b>Reduction in Sentence for Guilty plea</b>	Extra 1000-4000 prison places
<b>Sentencing of Youths</b>	No significant impact
<b>Magistrates Court Sentencing Guidelines</b>	Less than 5 prison places

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