

The Sentencing Council and criminal justice: leading role or bit part player?

By Rob Allen
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Introduction

1. In August 2019, three weeks after becoming Prime Minister, Boris Johnson launched a sentencing review focussing “on violent and sexual offenders and whether they are serving sentences that truly reflect the severity of their crimes”.¹ Earlier in the summer, Johnson had made plain his views on how poorly the “cock-eyed crook-coddling criminal justice system” deals with such prisoners.² In September 2020 “sweeping reforms” to sentencing were announced in a White Paper – “A Smarter Approach to Sentencing”.³ These reforms give effect to Johnson’s manifesto guarantee of “tougher sentencing for criminals”, though they are offset by some more constructive proposals for responding to lower level crime.⁴

2. What is surprising is the lack of an evidence base behind many of these reforms, and the very limited role played by expert bodies and organisations in the development of perhaps the most significant sentencing reforms for 20 years. The 2019 sentencing review did involve a very modest “consultation” with 13 organisations but, as its results were not published, it is not clear what, if any, contribution this made to the outcome.⁵ The Smarter Sentencing White Paper has not invited any representations at all, simply promising that legislation will follow in a sentencing bill early in 2021. While the parliamentary process will offer some opportunity for scrutiny and amendment, the large government majority in the House of Commons (and lack of much Labour opposition to the proposals) means the proposals seem likely to become law. When the Justice Select Committee reported in 2019 on planning for the future prison population, it concluded that the most significant explanation for the rise in the prison numbers in recent decades “has been legislative factors created by a series of political and policy choices by successive governments and parliaments”.⁶ The White Paper acknowledges “despite that legislative hyperactivity, few big strides have been made towards a sentencing regime that really works”.⁷

3. What the Justice Committee ignored was the role that inflation of custodial sentence lengths has played in increasing the prison population. Much of the sentence inflation in recent years has happened in the absence of any major change in primary legislation. A progressive and sustainable approach to sentencing reform requires measures both to constrain inflationary policy making, and to prevent inflationary practice by the judiciary.

4. In many areas of public policy, independent institutions have been established to inform government action, and to prevent or moderate undue political influence on legal or practice developments. The pandemic has focussed attention on the work of the Scientific Advisory Group for Emergencies (SAGE). In fiscal policy, interest rates are set not by the Treasury but by an independent body of experts in the Bank of England, while decisions about the funding of NHS treatments are made by the National Institute for Care Excellence – NICE.

5. By contrast, the role of evidence and expert views in criminal justice in general, and sentencing in particular, has all but been squeezed out in recent years and political, often party political, considerations have driven up levels of punishment without any obvious rationale other than perceived electoral appeal.

6. One body that could play a much needed moderating role in criminal justice is the Sentencing Council for England and Wales – the independent organisation set up in 2010 to promote greater transparency and consistency in sentencing. Under its existing remit, the Sentencing Council's main role is developing sentencing guidelines for courts and monitoring their use, but it also has responsibility for promoting awareness among the public about the realities of sentencing and publishing information about sentencing practice. When it draws up guidelines, the Council must have regard to current

sentencing practice, the need to promote consistency in sentencing, the impact of sentencing decisions on victims of crime, the need to promote public confidence in the criminal justice system, the cost of different sentences and their effectiveness in reducing reoffending, and the Council's monitoring of the application of its guidelines. But its remit is arguably too narrow.

7. The Council was set up in response to the recommendations made by a working group in 2008. This group suggested the Justice Secretary should consult the Council when introducing a bill into Parliament and when proposing "a significant policy initiative which affects correctional resources".⁸ The statute setting up the Council enabled such consultation to take place, but only when requested to do so by the government. The Justice Committee has pointed out that the Sentencing Council "should play a role in evaluating government policy and bills".⁹ No such consultation or evaluation has taken place in ten years.

8. The Council was not among the organisations asked for its views in the 2019 Sentencing Review and is hardly mentioned in the 2020 White Paper. For its part, the Council did not even note the launch of the White Paper in the minutes of the meeting it held nine days after its launch.¹⁰ This seems odd given the impact the government's proposals will have on the prison population, and the need they will create for the Council to revisit existing sentencing guidelines. But it is less surprising given the limitations imposed by the Council's statutory remit, and the narrow way it has chosen to interpret it in its first ten years.

9. Ironically, the Council has been considering the future role it should play at the same time that civil servants have been working on sentencing reform without their input. The Council has consulted openly on "What next for the Sentencing Council?"¹¹ The

consultation has been limited to ways of fulfilling the Council's current statutory remit. But there is a strong case for revisiting its basic mandate so that it can play a much fuller role in influencing both policy and practice, and help to reduce the prison population in England and Wales. England and Wales has the highest rate of imprisonment in Western Europe at 133 per 100,000, more than twice as high as in the Netherlands. And the last ten years has seen a sharp decline in the use of community sentences.

10. The prison population has fallen slightly over the last decade and more sharply during the COVID-19 crisis. The trend is due to fewer people being sentenced in the courts rather than any reduction in the severity of the sentences they have received. The total number of those convicted fell from more than 1.4 million in 2009/2010 to less than 1.2 million in 2019/20, a reduction of 17%. For more serious offences, the decline has been almost 40%.¹² One would have expected such a large fall in convictions to reduce demand for prison places; but the fall in the prison population has been comparatively small – the prison population was 79,378 at the end of September 2020, only 7% lower than ten years earlier.

11. On the Council's watch, there has been significant prison sentence inflation – the average custodial sentence for all offences has increased 40% in the last ten years to nineteen and a half months (see Figures 1 and 2 for details). There has been a particularly sharp increase in the custodial sentencing rate for theft offences (including burglary), the commonest offences for which a prison sentence is imposed.

12. 20,000 new police officers are on course to be recruited, so the number of people prosecuted and convicted is likely to start rising, particularly when the COVID crisis recedes. Unless steps are taken to lower the custodial sentencing rate and reverse

sentence inflation, the prison and probation system could find itself under considerable pressure.

13. The government has projected that the prison population will increase to 98,700 by September 2026.¹³ Of the c. 20,000 additional prisoners, almost all will be serving sentences, with the rest on remand. The government has announced plans to deliver 18,000 new prison places by the mid-2020s but there is considerable doubt about whether this is achievable. Former Chief Inspector of Prisons Nick Hardwick said “there is no way the extra capacity can be built in time to accommodate the projected numbers. There is going to be a crash”.¹⁴

14. Professor Nicky Padfield has argued that “Judges should not be required to sentence people to be locked up in often failing, under-resourced and violent prisons, and to be supervised by a probation system which is also often ill-equipped to help them function as ‘good citizens’”.¹⁵ Unless action is taken, more and more judges and magistrates will end up doing just that.

Figure 1 Custody rate (%) at all courts 2010–2020 for indictable and either way offences¹⁶

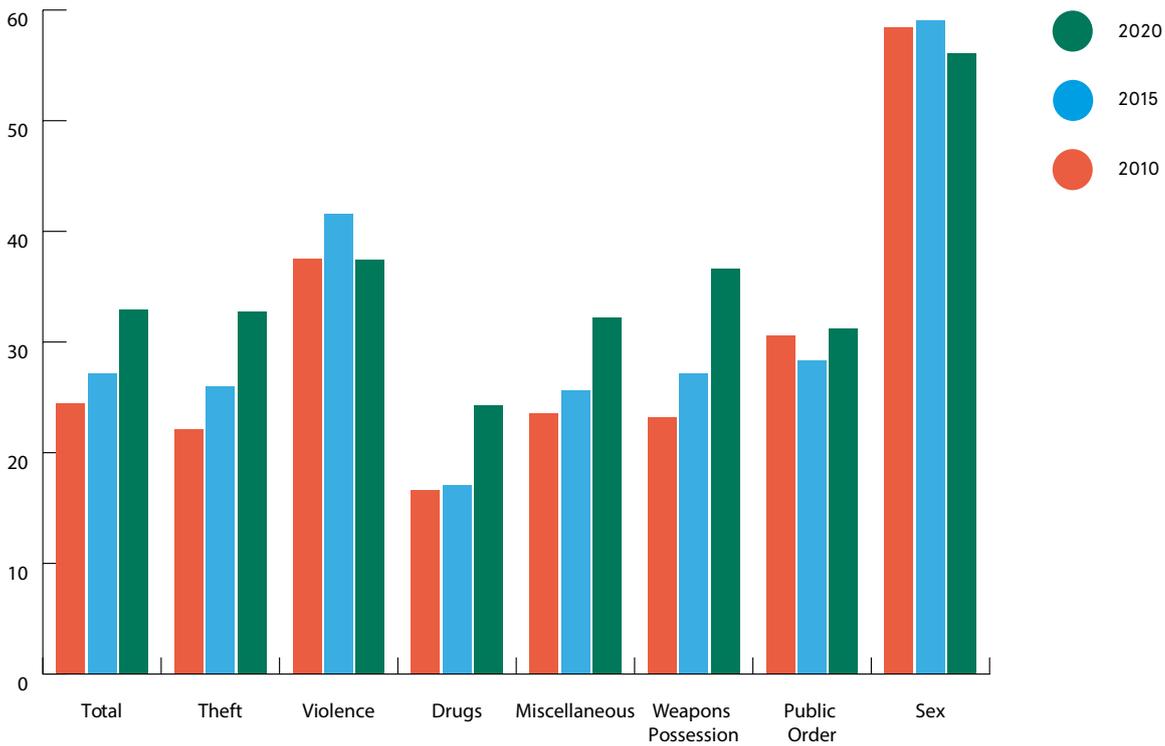
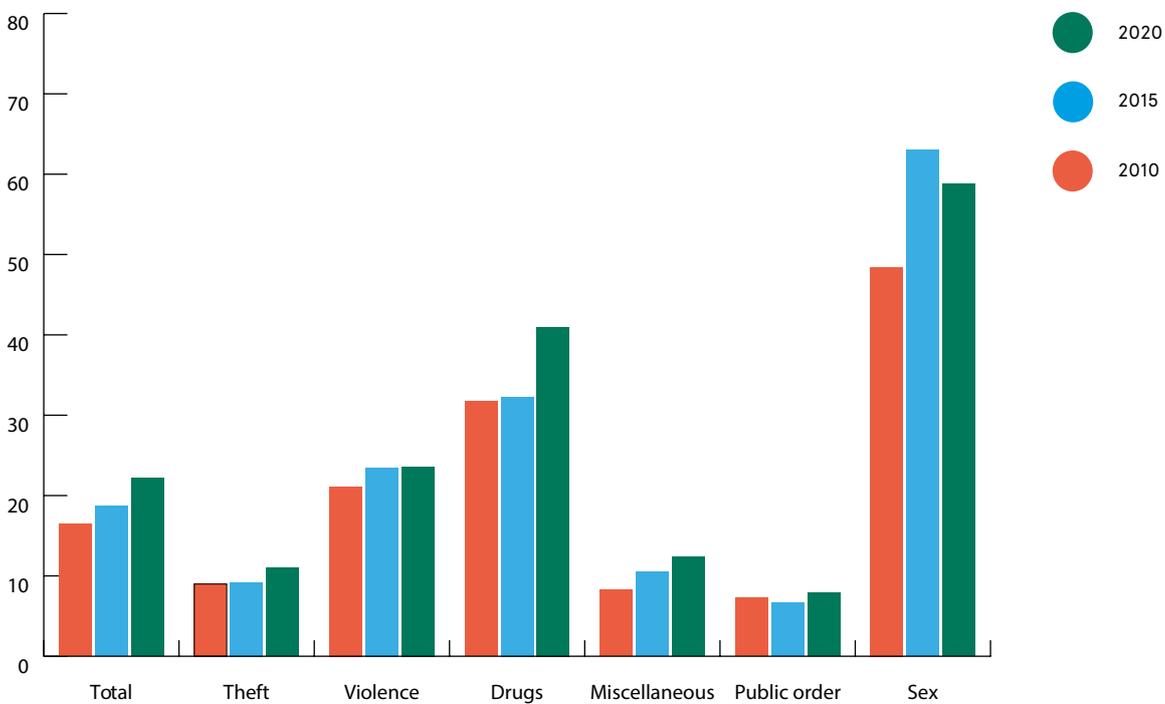


Figure 2 Average custodial sentence length (months) for indictable and either way offences 2010–2020¹⁷



The origins of the Sentencing Council

15. The origins of the Council lie in the unpredicted and unmanageable surge in prison numbers in the mid-2000s – the prison population in England and Wales leapt from 64,000 to 82,000 in the first eight years of the millennium. The inability of the prison system to cope with the swelling numbers prompted Jack Straw as Home Secretary to introduce emergency early release measures.¹⁸ A variety of proposals were put forward for improving the balance between the supply of prison places and the demand for them. A Sentencing Guidelines Council had been established in 2003, and a panel to advise the Court of Appeal about guideline judgments five years before that. But the prison population crisis demonstrated the need for a “more effective, integrated and transparent planning mechanism that reconciles prison capacity with criminal justice policy”.¹⁹

16. Lord Carter’s 2007 Report for the Labour government proposed separating sentencing policy from the political process. A working group chaired by Lord Justice Gage developed Lord Carter’s idea for a structured sentencing framework and permanent sentencing commission to lead and inform debate about the issues. The working group thought increases in the prison population “undesirable” but saw practical problems with using guidelines to control the prison population “and bring it within ‘a capacity envelope’”.²⁰ Gage’s recommendations for an enhanced Sentencing Guidelines Council were accepted and the rebranded Sentencing Council was born in April 2010.

17. Lord Chancellor Jack Straw told Parliament in 2009 that “ensuring the effectiveness of sentencing will be an important role of the Sentencing Council”.²¹ The Council does have a statutory duty to consider the cost of different sentences and their relative effectiveness in preventing reoffending when preparing or revising sentencing guidelines, and may also promote awareness of such matters. But it has done almost nothing to research and promote the effectiveness of sentences.

Impact of the Sentencing Council

18. In its first annual report, the first chairman Lord Justice Leveson wrote that the Council “has a significant opportunity to contribute both to the law and practice of sentencing and also to the wider public understanding of issues of sentencing”.²² What use has it made of that opportunity?

Impact on sentencing

19. Since its inception, the Council has published 27 sets of definitive guidelines, covering well over 200 offences, and eight sets of overarching principles, as well as making revisions to a number of guidelines in response to changes in the nature of crime or in legal provisions. Crown Court Judges and magistrates must follow the guidelines, unless it would be “contrary to the interests of justice”.²³ Most do so, sometimes slavishly. It has been said that “no other jurisdiction provides sentencers with as much guidance at sentencing”.²⁴

20. What the Council has not done is conduct the dispassionate overview of the whole range of sentence levels which a 2014 British Academy Report described as “sorely needed”.²⁵ Nor has it done enough to encourage greater use of non-custodial sentences in place of ineffective short prison terms.

21. More troubling still, the Council’s own impact assessments have shown that some of its guidelines have made a direct contribution to the sentence inflation it was set up to curb. Sentences for ABH, GBH, burglary, sexual offences, theft and robbery have become harsher following new guidelines. In every case, the Council did not estimate that this sentence inflation would occur (or for GBH, underestimated the level of inflation). In the case of ABH, the Council estimated that sentences would become less harsh when, in fact, they became more so. It’s not clear in every case that the guidelines caused sentences to rise, but they definitely did not prevent sentences from increasing.

How reliable are Sentencing Council predictions of guideline impacts?²⁶

SENTENCING GUIDELINE AND OFFENCE	EXPECTATION IN RESOURCE ASSESSMENT	IMPACT FOUND IN EVALUATION
Assault: common assault	Reduction in severity	Reduction in severity
Assault on Police Officer	Reduction in severity	Reduction in severity
Assault: GBH with intent	Small increase in average sentence length	Increased severity
Assault: GBH	Fewer custodial sentences but lengths will rise	Increased severity (slight)
Assault: ABH	Reduction in severity	Increased severity
Burglary: domestic	No change	Increased severity (slight)
Burglary: non-domestic	No change	Increased severity (may be attributable to guideline)
Burglary: aggravated	No change	Increased severity (may be attributable to guideline)
Drugs: possession Class A with Intent to Supply, and Possession	No change	Reduction in severity
Drugs: possession Class B	No change	No change
Production of Class B	Possible increase in severity	No change
Supply and possession with intent to supply for both class A and class B	No change	Increased severity
Importation	Reduction in severity	Reduction in severity
Permitting premises to be used	No change	Reduction in severity
Fraud, bribery and money laundering	No change	No change
Sexual offences: rape	May cause increase	Severity continued to increase (no strong statistical evidence that guideline caused it)
Sexual offences: sexual assault	No change	Increased severity (at upper limits of expectations)
Sexual offences: other	No change	No change
Theft	No change	Increased severity (slight)
Robbery	No change	Increased severity

 Unanticipated reduction in severity compared to resource assessment

 Impact as anticipated in resource assessment

 Impact involved unanticipated increase in severity compared to resource assessment

22. The Council thinks much of the recent sentence inflation should be attributed to ongoing trends rather than their guidelines.²⁷ Although some academic commentators agree, an Independent Review of the Council (2017) pointed out that a guideline has not done its job if it recommends that existing sentencing levels should be maintained, and those levels continue to go up.²⁸

23. More severe sentencing cannot all be laid at the Council's door of course. Harsher sentencing reflects a cocktail of factors – Court of Appeal judgments, a judicial culture which worries more about undue leniency than severity, and some increases in maximum penalties. Some also suggest that the mix of cases before the courts has changed. Is that the case? Those convicted may on average have more previous convictions than in the past, but have the offences themselves become more serious? It is disappointing that, 10 years after the Council was established, we simply don't know the answer to this key question.

24. This lack of important information reflects the low priority given by the Council to building up a knowledge base about sentencing. Indeed, it 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 its arson and criminal damage guideline, for example, the Council could not predict what impact its new guidelines would have because of a lack of available data. On breach of a suspended sentence order, they could not assess previous sentencing practice or make any realistic estimate of the impact of the guideline on prison or probation services. The guideline on reductions for guilty pleas estimated anything from a minimal impact to the need for 1,500 additional prison places, which would require the construction of a large prison.

25. It was originally intended that the Council should “devise, commission and take ownership of an expert system of data collection to provide Government and the public with reliable assessments of the likely impact of its guidelines”.²⁹ Between 2010 and 2015 it conducted a Crown Court Sentencing Survey which collected information on the factors taken into account by judges in working out the appropriate sentence, and the final sentence given. When the Council discussed the Survey in September 2011, it agreed that there was “no alternative to collecting the necessary data to discharge the Council's statutory duties”.³⁰ Yet, for budgetary reasons, the survey was halted in 2015. Since then the Council has collected data in both the Crown Court and magistrates' courts to inform the development of specific guidelines, but the evidence base for the Council's work, and for knowledge about sentencing more generally, has been weakened. An improved digital version of the Crown Court Sentencing Survey is long overdue. So too is data on local sentencing trends, which the Council has failed to collect or publish despite having a statutory duty to do so.

26. One small but significant piece of research the Council has done showed disparities in sentencing outcomes depending on the ethnicity and gender of those convicted, but the Council has “no clear evidence as to reasons for these disparities”.³¹ The Council should obtain such evidence so it can help remedy any possible discrimination. The current chairman has said that “our guidelines are drafted in a way which is intended to be neutral as to the sex and ethnicity of an offender”.³² This seems at odds with the position taken by the Council in 2010 when it considered its equalities obligations and agreed that cultural factors need to be considered in the development of guidelines. It is however encouraging that the latest guidelines on firearm offences say that sentencers should be aware of racial disparities,

given that a higher proportion of black and Asian people convicted of this offence receive prison sentences.³³

Impact on public confidence

27. In its first annual report, the then chairman of the Council wrote that “we want to demystify sentencing and get the public to understand what we are doing in their name and why”.³⁴ But relatively little has been done on this front. A 2019 survey (commissioned by the Council) found that most people were confident they understood terms like ‘life sentence’ and ‘statutory maximum sentence’, although under half felt confident they understood the term ‘on licence’. However, qualitative discussions showed that actual understanding lagged behind perceived understanding of all these terms.³⁵

28. The Council has developed resources for teachers and online “You Be the Judge” sentencing exercises, but should be doing more to challenge and correct common misunderstandings. They could learn from sentencing bodies in other countries. The Scottish Sentencing Council has produced a jargon buster³⁶ and the Sentencing Advisory Council in the Australian state of Victoria offers free interactive sessions about sentencing for legal service and advocacy organisations, those working with people affected by crime and university students.³⁷

29. While around 70% of the public think sentencing in general is too lenient – particularly for serious crimes, like rape and death by dangerous driving – this perception tends to lessen in the case of most offences when the public are presented with actual scenarios and sentences based on real cases. So far, the limited efforts made by the Council to inform the public about the realities of sentencing have had little

impact. So there is “constant pressure from the public, victims, and parliamentarians to increase sentences resulting in an upward drift in sentencing, including for example, introducing minimum sentences, increasing maximum sentences and creating new crimes”.³⁸ The Council has an important role to play in insulating sentencing from these populist pressures which look set to grow in coming years. Prisons Minister Rory Stewart told MPs in 2019 that “as we give more voice to citizens and to victims, almost inevitably we are going to face pressure between now and 2030 for longer and more brutal sentences”.³⁹

30. In carrying out its educational role, the Council needs to go beyond simply explaining how the current system works. The Justice Committee sees “considerable merit in the independent and expert Sentencing Council proactively publishing information or analysis on sentencing that is topical and relevant to public debates on sentencing”.⁴⁰ It has also backed calls for a ‘national conversation’ about the use of prison which “cannot continue to be hidden behind either prison gates or within the Ministry of Justice”.⁴¹ The Council is well placed to lead such a conversation through disseminating information on the effectiveness of sentences.

The future of the Sentencing Council

31. As the Council digests the responses to its consultation about future priorities, there needs to be a much more fundamental debate about the role which it plays in the development of policy and practice. Even within its existing remit, the Council could reinvent itself as an expert body on sentencing which does not simply reflect existing norms but challenges them based on evidence of effectiveness. In practice this would mean taking a range of measures to reduce the sentence inflation which has taken place since 2010, and to encourage greater use of community-based sanctions and measures, including restorative justice. The evidence shows that community sentences are in most cases more effective than custody at reducing reoffending.⁴²

32. Of the 65,000 people sentenced to prison for the more serious offences last year, 17,000 were sentenced for theft, 9,000 for drug offences and 7,000 for miscellaneous crimes against society. 27,000 were sentenced to six months or less. In March 2018, almost a thousand people were in prison for shoplifting, 25 for theft of a bicycle and 11 for possession of cannabis.⁴³ The law requires that a custodial sentence must not be imposed unless the offending crosses the so-called custody threshold – that it “was so serious that neither a fine alone nor a community sentence can be justified for the offence”. The Council currently takes the view 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”.⁴⁴ Given that the clear intention of the threshold test is to reserve prison as a punishment for the most serious offences, the Council must provide more detailed guidelines so that courts are discouraged from imposing unnecessary prison sentences.

33. Take people with mental health problems. It is a positive development that the Council’s recent guideline on sentencing people with mental

disorders, developmental disorders, or neurological impairments which says that an impairment or disorder should always be considered by the court. But the Council does not expect that there will be any impact on sentencing severity or on the imposition of community sentence requirements as a result of its guideline. This was a serious missed opportunity to encourage greater use of alternatives to prison which are likely to be more effective in reducing offending.

34. Ironically, in one of its more progressive proposals, the Smarter Sentencing White Paper suggests judges might explain in their sentencing remarks why a community-based treatment requirement has not been used in cases where a mental health, drug or alcohol issue has been flagged in a pre-sentence report. This is exactly the sort of requirement that the Council should already be imposing in its guidelines so that courts focus attention on diverting those convicted from custody wherever possible.

35. Indeed, the White Paper’s encouragement of problem-solving justice more broadly opens the door for the Council to take a more ambitious approach in its guidelines. In future these could permit and indeed encourage courts to sentence below the normal range if that would help reform and rehabilitate an individual, or allow them to make amends to their victims. Rehabilitation and reparation are after all two of the five statutory purposes of sentencing alongside punishment, the reduction of crime and the protection of the public. In the majority of cases the reduction of crime and protection of the public are best achieved through reform and rehabilitation rather than punishment.

36. The Council’s guideline on overarching principles rightly points out that courts need to consider which of the five statutory purposes they are seeking to achieve through the sentence that is imposed, but

offers no guidance about how courts should set about choosing the purpose in a particular case. Prioritising reform, rehabilitation and reparation will in most cases lead to a more effective sentence than simply choosing punishment. But these purposes have been neglected by the Council and the criminal justice system more broadly.

37. The Council needs to recognise that greater levels of punishment are far from the only way to satisfy victims. “We know that ‘the public’ are more likely to be impressed by sentences which ‘work’—overwhelmingly, victims of crime simply want their offender not to do it again”⁴⁵ (Professor Nicky Padfield). There is good evidence that problem solving and restorative justice (RJ) approaches can be effective for victims and those who commit crime. Victims’ satisfaction with the handling of their cases is consistently higher among those who attend restorative justice conferences, compared to those dealt with solely by standard criminal justice processes.

38. In December 2012, the Council agreed to include guidance about the appropriate use of RJ in individual guidelines, but they have not done so. The White Paper’s proposal for greater use of deferred sentences (which provide a window for RJ to take place) gives the Council the chance to put that right.

39. More broadly, if the Council were to give greater weight to effectiveness in the development of its guidelines, this would provide a sound basis for promoting public confidence. As the Justice Committee has proposed, the Council should rebalance its priorities “so it can devote more resources to evaluating the impact of guidelines, producing research and analysis on sentencing trends and promoting public confidence in sentencing”.⁴⁶

40. So, there is a good deal more that the Council could choose to do within its existing mandate. But it does not consider it has “an explicit role in ‘damping down’ any inflationary pressures”.⁴⁷ Should it be given such a role? The Council would certainly be more relevant and effective if its role was extended to become what the British Academy has referred to as a penal policy committee, which would “combine wide representation and expertise and distance sentencing decisions from day-to-day political and media pressures”.⁴⁸

41. At the very least 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, irrespective of whether Ministers request it and the accuracy of predictions kept under review after proposals are implemented. The Council should also make it clear to government, to the public and indeed to judges and magistrates that sentences only work with the right level of investment.⁴⁹

42. More ambitiously, 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. They could even be given decision-making powers on these matters.

43. The Council deserves to be funded much more generously whether the Council’s remit remains as it is or is expanded. After all, it is a key driver of spending for the Ministry of Justice, but its annual budget of £1.3 million is small compared to the £4.3 billion spent on prisons and probation each year.

44. There is a case too for reviewing the criteria for membership of the Council, including whether the judicial members should form the majority. The report of the Gage Working Group recommended that in the first instance the chair should be a member of the senior judiciary, in order to maintain the confidence of the judiciary as a whole in the guidelines. Ten years on, judges are accustomed to applying the guidelines and few judges would say they are not a good idea.⁵⁰ It is time to look outside the judiciary for a chair and, perhaps, to make lay members the majority. Currently over two thirds (nine) of the Council are members of the judiciary, one is the Director of Public Prosecution and less than a third are non-lawyers. The President is the Lord Chief Justice. No one on the council represents defence lawyers practicing in the magistrates' courts, where 90% of sentences are handed down.

45. The prison system should also be represented, for example by the head of HMPPS. Without the involvement of HMPPS, it is hard to see how the Council can properly understand the impact of sentences on the agencies which implement them. Developing such an understanding was one of the main reasons for the Council's creation and should remain a priority.

Conclusion and key recommendations

“A mechanism will need to be found to limit the growth in the prison population...The need to do so is simply unavoidable”.⁵¹ (Nick Hardwick, former Chief Inspector of Prisons)

Back in 2008, the Gage Working Group believed that “the increase in the prison population is undesirable for a number of reasons. Although prison protects the public from the possibility of further offending during the sentence, overcrowded prisons are less effective at rehabilitation, and other disposals such as community orders may be more cost effective”.⁵²

Twelve years on, we are faced with similar challenges. The prison population has reduced slightly recently, mainly due to court backlogs, but it is already over capacity and predicted to increase considerably. The government needs to respond to the challenge with boldness and imagination.

In their 2019 report, the House of Commons Justice Select Committee concluded that “any strategy for improving the sustainability of the prison population will require a review of sentencing legislation which should include the role of the Sentencing Council”.⁵³

The Committee has not done an inquiry on the Sentencing Council since it was set up. It should, not only to consider the role the Council should play within its existing statutory remit but whether it should take on a broader role as a penal policy committee.

Key recommendations:

- There needs to be a fundamental debate about how the Sentencing Council can play a greater role than it currently does - as an expert body in the development of more effective sentencing law, policy and practice in England and Wales.
- Within its existing remit, the Council should conduct a dispassionate overview of the whole range of sentence levels with a view to reducing the unnecessary and ineffective use of imprisonment and give greater priority to encouraging the use of effective non-custodial measures including restorative justice.
- The Council should build up the knowledge base about sentencing by collecting and publishing data about sentencing trends (including at a local level) and investigate racial and other disparities.
- The Council should do more to demystify sentencing and lead a ‘national conversation’ about the use of prison.
- Membership of the Council should be reviewed including whether it should continue to be chaired by a judge and continue to have a judicial majority.
- The budget of the Council should be significantly increased so it can undertake a wider set of activities.

End notes

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