

Dr David Green
CIVITAS
First Floor
55 Tufton Street
Westminster
London
SW1P 3QL

Michelle Crotty
**Head of the Office of the Sentencing
Council**
EB20 East Block
Royal Courts of Justice
Strand
London
WC2A 2LL

T 020 7071 5793

www.sentencingcouncil.org.uk

24 March 2014

Dear Dr Green,

We became aware of your report “Serious, Violent and Persistent Offenders” following media coverage in the national press on 11 March.

We are concerned about many aspects of the report, which we consider proceeds upon a false basis, but will focus here primarily on the statistical analysis and Sentencing Council’s accountability.

Statistical analysis

The report indicates that it is dealing with serious offenders, basing this on the premise that it covers indictable offences. As your references appear to acknowledge, indictable offences include both ‘indictable only’ cases, which are Crown Court only, and ‘triable either way cases’, which are heard in either the magistrates’ court or the Crown Court depending on their seriousness¹. Your report therefore uses statistics from both the magistrates’ courts and Crown Court, not those from just the Crown Court, and covers both youths and adults. In practice, over half of ‘indictable offences’ are sentenced at the magistrates’ courts because they are not deemed to be serious enough to be sentenced at the Crown Court. It is misleading therefore to purport to cover serious offenders and then use statistics

¹ See page 5

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/282982/criminal-justice-stats-sept-2013.pdf

which comprise such a significant proportion of cases heard in the magistrates' courts.

It also states that "just over one in every five criminals who are cautioned or convicted for an indictable crime are given immediate custody". Given the statistics for indictable crime that you have used, this would include cases such as a minor theft committed by a teenager and it is, therefore, not surprising that magistrates aren't jailing all such offenders as this would be disproportionate.

The mixing of statistics for those cautioned or convicted is also misleading. A caution is not a conviction but an administrative penalty given by the police who do not have the power to impose imprisonment in any circumstances. Judges and magistrates cannot sentence anyone who has not been convicted of an offence.

Analysis of data for specific offences

We are very concerned about the way statistics relating to specific offences have been analysed. The first offence described is burglary and it appears to mean by this domestic burglary. However, the statistics used relate to all types of burglary (such as burglary of commercial premises), which have different sentence levels set by law. It provides some analysis which concludes that the minimum sentences for those offenders convicted of a third burglary offence are not being applied properly. It is, however, not possible to conclude from the statistics that this is or is not the case since they only indicate that the offender has three or more previous convictions – this means for any offence, not just a relevant burglary offence. Relevant burglaries are tightly defined by legislation. The law regarding the minimum sentence to be imposed for a third domestic burglary requires three convictions for domestic burglary and also includes rules on how any reduction for a guilty plea should be applied. These statistics cannot therefore be used to conclude that judges are failing to apply the law. Again, the statistics used are not those from the Crown Court but include cases heard in the magistrates' courts (with a statutory upper limit of six months' imprisonment) and cover youths as well as adults; you will be aware that the statutory approach to sentencing youths is very different to adults which I set out in more detail below.

The other offences covered in the report - violence against the person and robbery, again both use statistics for adult and youth offenders, with the violence figures

covering both Crown and magistrates' courts thereby giving a misleading impression about sentence types and lengths for these offences.

Use of suspended sentences

The report looks at the increase in the use of suspended sentence orders since 2005, but does not state the legislative changes that occurred under the 2003 Criminal Justice Act and the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which increased sentencing powers in relation to these orders. Parliament has extended the scope of suspended sentences over the last ten years.

The Sentencing Council's accountability

The Sentencing Council was established by Parliament to be an independent body, but to be accountable to Parliament for its work which is scrutinised by the Justice Select Committee (JSC). Indeed, the Council has a legal obligation under the Act which established it, the Coroners and Justice Act 2009, to consult the Committee, which has responded to our consultations on guidelines for assault, drug, burglary, fraud, environmental and sex offences.

The Council has a legal obligation to consult the Lord Chancellor about the draft guidelines it produces – and he has responded to every consultation we have conducted. He also represents the views of other departments who may have an interest in a particular offence. Not only the Government but also the public are consulted about every sentencing guideline produced by the Council, which in addition to consultations, also conducts research with the public and victims to understand their views about sentencing. The consultations are widely publicised and receive high numbers of responses: for example, there were 394 responses to the assault guideline consultation, 460 to the burglary guideline consultation, 502 on dangerous dog offences and 685 on drug offences. The Council produces a consultation response document following each consultation which sets out which responses have been taken into account and those which have not, and why, when drafting the definitive guideline.

Sentencing guidelines are intended to cover the majority of cases that come before the courts but if a judge or magistrate thinks a different sentence should be given in an exceptional case, they can sentence outside the guideline sentencing ranges including up to the maximum sentence allowed by law. In these circumstances,

judges must give clear reasons. Maximum sentences are set for all statutory offences by Parliament.

If individual judges are felt to have sentenced too harshly, sentences can be appealed from the magistrates' court to the Crown Court and from the Crown Court to the Court of Appeal. The Attorney General can also ask the Court of Appeal to review sentences for many offences that he considers to be unduly lenient.

The Council's membership is constituted in such a way as to ensure a very wide range of criminal justice professionals who can bring their significant expertise in sentencing and other aspects of the criminal justice system. It includes not only members of the judiciary from the Court of Appeal, Crown Court and magistrates' courts, but others including a victims' representative, the Director of Public Prosecutions, a defence lawyer, a professor of criminology and a senior police representative. As your report states, Council members can only be appointed with the agreement of the Justice Secretary.

Ministers are also accountable to Parliament for the Sentencing Council's effectiveness and efficiency, for its use of public funds and for protecting its independence.

Independence

As stated, the Council was established by Parliament to consult Government, but not to be obliged to have its guidelines signed off by Government, according to the principle that Parliamentary control of guidelines could lead to their politicisation. Your report accepts the importance of keeping Parliament and judiciary separate, and this principle in relation to sentencing guidelines has been discussed by both Government and the JSC. It was highlighted by the Government in its response to the JSC's 2009 report on guidelines and Parliament, prior to the establishment of the Sentencing Council as a streamlining of its predecessor bodies, the Sentencing Guidelines Council and the Sentencing Advisory Panel. It stated:

"The Government agrees that it is for Parliament to set the sentencing framework by creating or amending criminal offences and setting maximum, and in some cases minimum, sentences. It is for sentencers to sentence within that legal framework, taking account of the circumstances of the case before them and having regard to the sentencing guidelines produced by the independent Sentencing Guidelines Council. And it is for Government to set out its sentencing policy.

“The role of Parliament in sentencing guidelines and in particular the question of whether Parliament should approve sentencing guidelines was considered by the Sentencing Commission Working Group chaired by Lord Justice Gage. The majority of the Gage Working Group did not favour the idea of Parliamentary approval of guidelines expressing concern that the involvement of Parliament in approving guidelines could lead to the politicisation of the guidelines in ways which the Select Committee’s report highlights.”

The JSC’s report outlined its role as “an appropriate balance between judicial independence and democratic scrutiny, in the sense that the Justice Select Committee comments on draft guidelines, but our views are not binding on the Sentencing Guidelines Council”

Jeremy Wright also stated in Parliament this year that: “Guidance to the judiciary is produced independently of Government, by the Sentencing Council. This is in line with the principle that, while the Government decides what maximum penalties should be, the courts are responsible for deciding what sentence to impose within those limits.”

Sentencing offenders: statutory issues

I would also like to highlight some aspects of the legislation relating to sentencing which the judiciary and sentencing guidelines must follow. It is important to be aware of this when citing statistics that cover both adults and youths.

In relation to adults, courts must have regard to the five purposes of sentencing contained in section 142(1) Criminal Justice Act 2003:

- (a) the punishment of offenders;
- (b) the reduction of crime (including its reduction by deterrence);
- (c) the reform and rehabilitation of offenders;
- (d) the protection of the public; and
- (e) the making of reparation by offenders to persons affected by their offence.

The Act does not indicate that any one purpose should be more important than any other and in practice they may all be relevant to a greater or lesser degree in any individual case.

When sentencing an offender aged under 18, the aims as set by statute are different with the emphasis being on preventing offending rather than stressing punishment. A court must have regard to:

- a) the principal aim of the youth justice system (to prevent offending by children and young persons) as per the Crime and Disorder Act 1998, s.37(1); and
- b) the welfare of the offender. (Children and Young Persons Act 1933, s.44(1)).

Since the statistics used in the report cover both adult and youth offenders, one would expect that the custody rate would be lower than if they covered just adult offenders, due to the difference in the approach to sentencing.

Conclusion

The Sentencing Council is a body established by Parliament with clear lines of accountability. It produces guidelines within the framework of the law, having regard to any requirements it lays down. Any analysis of sentencing practice must look at the statutory context within which it operates and whether it adheres to this, while accurately interpreting the available statistics, before arriving at any conclusions.

Yours sincerely,

Michelle Crotty

Head of the Office of the Sentencing Council