

## Sentencing Seminar

### Current issues in sentencing policy and research: a summary

Friday 13 January 2023

These notes of the seminar are not a verbatim record of the day, nor do they cover every point raised and may (despite our best efforts) contain inaccuracies.

#### **Welcome: Professor Peter Hungerford-Welch, The City Law School**

Professor Peter Hungerford-Welch opened the seminar, welcomed attendees, and outlined the role and work of the City Law School.

#### **Opening remarks: Rt Hon Lord Justice William Davis, Chair of the Sentencing Council for England and Wales**

As well as thanking the organisations co-hosting the event, Lord Justice William Davis set the scene by outlining the purpose of the Council and its [five strategic objectives](#) that were published in November 2021. He also outlined the Council's achievements since it was set up in 2010 and the challenges it still faces.

#### **Presentation on the work of the Sentencing Council and current and future priorities**

##### **Ollie Simpson, Office of the Sentencing Council**

Ollie Simpson, from the Sentencing Council's policy team outlined in more detail the role of the Council and the way in which it operates, covering the developmental cycle for guidelines ([see slides 2 to 12](#)).

The Council's five strategic objectives for 2021 to 2026 are:

- To promote transparency and consistency in sentencing. To date, 184 offence-specific guidelines and nine overarching guidelines have now been produced, covering the vast majority of offences. New guidelines underway are at varying stages of development and include motoring and aggravated vehicle taking, underage sale of knives, perverting the course of justice and witness intimidation, blackmail, kidnap and false imprisonment, and immigration offences. The Council is also working on revisions to the overarching guidelines on totality and on the imposition of community and custodial sentences.



Ollie Simpson

- To ensure all work is evidence-based. This entails ensuring all aspects of the Council's work is underpinned by evidence and covers statistical evidence, social research that is fed into guideline development and evaluations of impact and implementation.
- To consider and collate evidence on effectiveness of sentencing. The Council has a statutory duty to have regard to the cost of different sentences and their relative effectiveness in reducing reoffending. A literature review on the effectiveness of sentencing was published in September 2022. There is a commitment to update the evidence every two years.
- To work to strengthen confidence in sentencing. The Council has a duty to have regard to the need to promote public confidence in the criminal justice system when developing guidelines and monitoring their impact. The Council is engaged in a range of public awareness and partnership activity designed to make sentencing more accessible, promote confidence in guideline development, and measure success in increasing public confidence. An example is the inclusion of drink drive and fines calculators. In 2022, the Council surveyed 2,000 adults and found that 67 per cent of the sample said awareness of the existence of guidelines had a positive impact on their confidence in the fairness of sentencing.
- To explore and consider issues of equality and diversity relevant to its work and within its remit. This includes ensuring guidelines link to the Equal Treatment Bench Book, explicitly mentioning in guidelines where disparity may exist (e.g. in the Firearms offences guideline in 2021) and commissioning research in this area (this review was published earlier in the week and is discussed in the next presentation by the research team).

## Research Presentation: Equality and diversity in the work of the Sentencing Council

Dr Qi Chen, Diana Kirsch, and Dr Mateja Vuk, University of Hertfordshire

A presentation on [research on Equality and Diversity in the work of the Sentencing Council](#), published on 10 January 2023, was given. Key points covered were as follows ([see slides 13 to 28](#)) with more detail covered in the full report from the research.



Dr Mateja Vuk

- The research was commissioned to examine equality and diversity in the work of the Sentencing Council and to identify and analyse any potential for its work to cause disparity in sentencing outcomes across demographic groups.
- The research examined three groups of offence specific guidelines currently in operation in England and Wales - robbery, theft (theft from the person, theft from a shop or stall, theft in breach of trust and handling stolen goods), and harassment and stalking (fear of violence) - as well as the Sentencing children and young people guideline.
- Three methods were employed: (1) analysis of text in guidelines; (2) co-production (engagement with civil society organisations, defence lawyers and sentencers); and (3) Crown Court Sentencing Survey (CCSS) data analysis.
- Limitations of the study were noted, in particular: (1) the CCSS data are now quite old; (2) the data only captures the principal offence; (3) the CCSS data only covers the Crown Court; (4) the number of co-production partners is relatively small and constitutes a self-selected sample; (5) consideration is only given to sentencing in the study, with no exploration of the impact of earlier stages in the process.

- Participants had mixed views about whether sentencing guidelines take a balanced approach to 'upward' factors (those that increase sentences) and 'downward' factors (those that decrease sentences). Text analysis found that more words were used to describe upward factors and far fewer for downward factors. CCSS analysis also showed that downward factors were associated with the lowest change in sentences compared to the seriousness of the offence and upward factors.
- The research also explored the impact of specific guideline factors on sentencing. These included upward factors related to group offending, previous convictions, compliance with court orders and offences committed while on bail or licence. The research also examined the impact of downward factors, including determination to address addiction or offending behaviour, and mental disorders and/or learning disabilities.
- Participants expressed mixed views about gender and whether there is disparity in sentencing. It was also noted that the current expanded explanation on 'sole or primary carer' does not say that the carer is necessarily a woman and/or a mother. CCSS data analysis showed that men were more likely than women to receive immediate custody for offences of robbery and all types of theft. The association between gender and the length of sentence was, however, less consistent across the different offences. Regardless of gender, analysis also showed that the downward factor of 'main carer' was associated with lower odds of immediate custody for robbery and theft.
- Some co-production partners suggested that some offenders from ethnic minority groups were disadvantaged when it came to sentencing. Sentencers argued that although offenders from ethnic minority groups are less likely to plead guilty (through mistrust of the system), they are treated equally in plea reduction.
- CCSS analysis found no strong evidence of sentencing disparities for different ethnic groups. Black offenders were less likely to receive custodial sentences for robbery than White offenders, and Asian offenders were more likely to receive shorter custodial sentences than White offenders. However, the sample of guidelines examined was small and the analysis had limitations. It should also be noted that this finding is not consistent with other studies which have found a discrepancy.
- Some of the co-production partners indicated that young offenders are sometimes treated as adults because of their physical appearance. However, sentencers reported that they use their discretion even if the offender is no longer covered by the overarching guideline for sentencing children and young people.
- Analysis found that age has minimum and inconsistent effects on the likelihood of a custodial sentence but a much stronger effect on the length of custodial sentences.
- The research used factors such as 'difficult/deprived background' as proxies of socio-economic background (this enabled some analysis to be undertaken but the match is not a perfect one). 'Difficult/deprived' background did not seem significant in the sentencing of robbery or theft offences.
- Issues arose with regards to the way in which sentencers assess 'good character and/or exemplary conduct' and the accessibility of mental health treatment, addiction treatment and similar services.

Some of the key recommendations from the research included:

- Add an additional step to the existing approach in adult guidelines that requires sentencers to carry out a final review of the sentence, with downward factors and the offender's personal circumstances in mind. Co-production partners and sentencers generally agreed with this approach.

- Conduct further research and data collection. In particular, this research did not find any specific disparities based on race but this does not correspond with other research and the views of some of the co-production partners.
- Provide or amend the expanded explanations that accompany some of the guideline factors. An example is expanding the definition of remorse to take account of learning and communication difficulties and cultural differences.

**A number of issues were covered in the audience discussion. These included:**

- Whether there was any room to also look at the impact of Pre-Sentence Report (PSRs) that cover some of the upward and downward factors mentioned in the research. It was mentioned that sentencers find PSRs more useful in the Youth Court than adult courts as more detail and personal circumstances are provided which allows for an individualised approach. Analysis of PSRs is, however, not possible as the CCSS dataset does not contain this information.
- Whether prosecutors were included as part of the co-production meetings. The research team confirmed that they were not formally included, although some of the barristers they spoke to had prosecuted cases, as well defended.
- Whether there is likely to be any differential reporting of downward factors depending on an individual's ethnicity. In relation to CCSS data, the downward factors were taken from the relevant form filled out by sentencers which explained what factors they had deemed relevant to sentencing. This data was then linked to Ministry of Justice ethnicity data.
- The difficulties with obtaining data on ethnicity. It was mentioned that there are also difficulties with obtaining data in the area of prisons and probation because it is not always self-disclosed by offenders. Classifications are also based on interpretation if the data is not self-identified ethnicity data.
- How the guidelines for the research were chosen. It included guidelines for higher volumes offences and those where many of the upward and downward factors within them were common to other guidelines. The Sentencing children and young people guideline was also included to ensure that both types of Sentencing Council guidelines were explored (offence specific and overarching).
- Why the CCSS dataset was used when it is now quite old. The CCSS is the most comprehensive dataset available and given that primary data collection was not possible, it was deemed to contain the most useful data to draw on.



## Panel discussion on equality and diversity

**Dr Shona Minson from Oxford University and Jacqui MacDonald-Davis, Chair of the Magistrates' Association Black, Asian and Minority Ethnic network**

**Chaired by Professor Peter Hungerford-Welch from City Law School**

### Dr Shona Minson

Dr Shona Minson opened by welcoming [the report published by the Council and its response](#) to the recommendations. She then outlined some facts and figures relating to women in prison:

- In 1960, there were only 901 women in prison. The figure rose to 2,675 by 1997. As of the beginning of January 2023, the figure was 3,136: this represents a 248 per cent increase over 25 years.



Dr Shona Minson

- Almost three-quarters (72 per cent) of female prisoners have committed a non-violent offence. In 2020, most were sentenced to terms of less than six months.
- Many female prisoners have suffered abuse at the hands of a man close to them. Rates of self-harm and/or attempted suicide are very high. 53 per cent of women have suffered abuse – a figure thought to be an underrepresentation - and 71 per cent have a mental health problem.
- Women suffer very basic deprivations in prison. An inspection of HMP Peterborough found that women were not able to get hold of sanitary pads or toiletries.
- Coming out of prison, offenders can be deemed intentionally homeless. This means they don't have priority for accommodation and can make it impossible to have their children returned to their care. This in turn can also cause issues with the custody of children. It is thought that around 17,000 children per year have their mothers sent to prison but there are no statistics recorded. The effects for children are not just short-term.
- Only one mitigating factor in the sentencing guidelines makes reference to primary carers, but it is generic for all dependents and does not use the words mother, child or woman, so does not draw attention to the necessity of considering children when their mother is being sentenced.
- Deprived background is not often thought about because women are 'all' seen in this way.
- Although factors in guidelines have 'expanded explanations' covering matters that should be considered in sentencing, these are several clicks away in terms of accessing them in the electronic guidelines. There is no duty to read them even though there are explanations to say, for instance, that sentencers should defer sentence if they do not yet know who can take care of children. However, the separate work the Council is undertaking on the use of expanded explanations is welcomed.
- In a study of 18,000 sentenced women, caring mitigation was applied in 22 per cent of cases. However, Prison Inspectorate data from 2019-2020 estimate that between 50 to 60 per cent of women in prison had dependents under the age of 18. This suggests a lack of consistency of approach.
- A lot of middle class assumptions apply in sentencing. There are potential good/bad mothering assumptions that apply. The child cruelty guideline has a separate step five

where the court is told to think about parental responsibility in relationship to the sentence being imposed. This should be in all guidelines.

- It is vital that there should be a separate guideline for pregnant women who are being sentenced. In prison pregnant women miss one in four of their hospital appointments, they are more likely to suffer from toxic stress, and one in 10 give birth on their way to prison or in their cell. No doctors or nurses are present in prisons at night.

### **Jacqui MacDonald-Davis**

Jacqui MacDonald-Davis welcomed the research. She recognised that further data collection is required to fully address issues such as intersectionality and racial, age and gender disparity. It was also noted that the data analysis aspect of the research primarily focused on the Crown Court. However, many of the report's findings and recommendations, particularly the following, are relevant to magistrates' courts.



Jacqui MacDonald-Davis

- The importance of courts addressing mitigating factors that are relevant to a case, and reminding sentencers to ask themselves whether the information that has been presented is sufficient to make a decision or whether further questioning would be beneficial.
- The need to expand on the explanation of the term 'remorse', which could disadvantage individuals from certain cultural backgrounds or who live with a learning disability or communication difficulties.
- The importance of judges/benches understanding the lived experience of offenders and their difficult personal circumstances or background so that they can address the multiple needs of offenders when sentencing. A diverse bench and detailed probation reports are integral to this.
- The need for the Sentencing Council's case examples to better challenge magistrates' (un)conscious biases.
- The importance of judges/magistrates' to consider the full range of factors when sentencing young adults.
- The need to identify a more efficient way of directing magistrates to the Equal Treatment Bench Book.
- The importance of ensuring that sentencers provide clearer explanations to offenders and those present in the courtroom at sentencing.

Further discussion around the research's reference to "perception of blameworthiness, gender roles and of the paternalistic role of the court influence when sentencing women" and how disparity is "not always caused by the demographic characteristics of offenders, but [also] by the characteristics of victims" would be welcome.

### **Points raised in the audience discussion**

- Confidence that sentencers have all the information they need to apply aggravating and mitigating factors: responses included the fact that if magistrates are thinking about imposing a custodial sentence, they will always ask for a PSR, but that it also relies on defence lawyers suggesting one is produced, and that the number of PSRs has declined significantly in recent years with there instead often being expedited reports on the day. These may not give the most reliable details about the individuals' lives. If someone is a solo primary carer then there is guidance that they should ask for a PSR. It was also

pointed out that the Court of Appeal regularly states that if you are in the Crown Court sentencing a woman with caring responsibilities then you must get a PSR, the Council is also looking into the issue of PSRs as part of their work to revise the Imposition of community and custodial sentences guideline, and that the Probation Service is also currently undertaking a lot of work on PSRs

- Legal representation: it was felt that there was not enough guidance for defendants without legal representation.
- Mitigation for primary/sole carer: the research conducted by the University of Hertfordshire did explore this issue and the Council will be exploring the guideline factor on this in future research. It was felt (Shona Minson) that there should be a separate guideline for sentencing women. If that happens, the sole/primary carer factor should be included, but it should be clear that it is applicable to anyone who is a primary/sole carer, regardless of sex.
- Issues of disclosure: there are many reasons why someone might not disclose they are a primary or sole carer and this needs to be looked at. People might be concerned how sensitive information will be used and how it might be stored.

## **Panel discussion on sentencing young adults**

**Lady Dorrian, Lord Justice Clerk and Chair of the Scottish Sentencing Council, Professor Nathan Hughes, University of Sheffield and Dr Laura Janes, GT Stewart Solicitors**

**Chaired by Professor Julian Roberts, K. C. (Hon.) Sentencing Academy**

### **Dr Laura Janes**

Dr Laura Janes opened by outlining the fact that a growing body of evidence has emerged about why young adults need to be treated differently in sentencing. There is a lot of work that has come out since 2008 from the Transition to Adult Alliance. There are also two Justice Committee reports on this issue that were published in 2016 and 2018. Neuroscientific, psychological and sociological evidence shows that maturation is not complete in the majority of young people until the age of 25 and young adults have higher levels of need in the criminal justice system.

Dr Janes also referred to the 'age-crime curve' and the figures on young people in prison (in September 2019, there were 15,564 18-25 year olds in prison, around a third of which came from ethnic minority groups). Almost half of under 21s have been in care, 40 per cent have been in solitary confinement in prison and incidents of self-harm have increased by 3,500 between 2008 and 2018 ([see also slides 39 to 50](#)).

In case law, it has been established that offence seriousness does not outweigh a consideration of maturity and sentences have been reduced on appeal because courts have failed to take maturity into account. There is an expanded explanation to accompany the sentencing factor on 'age and/or lack of maturity' which states that this can affect responsibility for the offence and the effect of the sentence on the offender.

### **Professor Nathan Hughes**

Professor Nathan Hughes presented figures from analysis on young adults in court in England and Wales ([see slides 29 to 38](#)). This shows a peak in custody rates in 2011-12 and then a decline. Similarly, there has been a consistent and steep decline in the same timeframe for the imposition of community sentences. The reductions apply more to males

than females. The reduction has also varied geographically; for example, the reduction is less marked in the Metropolitan Police area than in forces like Cleveland and Lancashire.

### **Lady Dorrian, Lord Justice Clerk and Chair of the Scottish Sentencing Council**

Lady Dorrian, Lord Justice Clerk and Chair of the Scottish Sentencing Council spoke about the Scottish sentencing guideline for young people which applies to anyone under the age of 25 and some of the principles contained within this. These include recognition that young people generally have lower levels of maturity, that there is a greater possibility of rehabilitation and change, and that they are also less likely to have a stable job and housing situation. The guideline states that rehabilitation should be a primary consideration when sentencing a young person and requires sentencers to consider the best interests of the person being sentenced.



Lady Dorrian, Professor Nathan Hughes, Dr Laura Janes, Professor Julian Roberts, K. C. (Hon.)

The guideline also states that the court should not rely solely on chronological age and must obtain full information about maturity and other experiences such as addiction and trauma.

Under this guideline, a custodial sentence can only be applied to someone under 25 years when the court is satisfied that no other sentence is appropriate and if it then is, it should be shorter than it would have been if that person was an older person.

### **Points raised in the audience discussion**

- Whether there has been any work undertaken on the reasons for the geographical variation in custody rates for young people: as yet, this has not been possible, but it is an area that needs to be explored.
- Whether there has been any evaluation of the Scottish Sentencing Council's guideline on young people: there is currently no quantitative data to support a formal evaluation and the approach to evaluation is still being considered.
- If the concept of 'maturity' implies there is a point of full maturity. Research suggests this can continue to age 30, but it is contextual (some people present as mature in many ways but may have problems with addiction or have had a difficult upbringing). There is also the issue of disclosure of problems: young people do not tend to like to be labelled as immature.
- How immaturity is assessed. There is more work needed on training and detailed psychological reports are often needed. The Transition to Adulthood Alliance has a framework on this and how to make sense of the maturity journey.



## Gaps in knowledge

**Professor Nicola Padfield, K.C. (Hon.) Emeritus Professor Cambridge University; Peter Dawson, Prison Reform Trust; Professor Jessica Jacobson, Institute for Criminal and Justice Policy Research**

**Chaired by Steve Wade, Head of the Office of the Sentencing Council**

### **Professor Nicola Padfield**

Professor Padfield focused on effectiveness of sentencing, reducing reoffending, desistance, the need to individualise treatment, and understanding support and pro-social relationships ([see slides 51 to 60](#)). She stated that sentencing aims are incompatible and no priority on these is provided in statute.



Professor Jessica Jacobson, Peter Dawson,  
Professor Nicola Padfield

There should be greater recognition of the lack of statistical evidence in research on effectiveness of sentencing and more information about the limited effect of sentencing. Sentencers should individualise 'treatment' to be effective.

Questions to consider in future work include the following: who are guidelines written for (judges and magistrates or members of the press and public)? to what extent are guidelines used in busy

courts (it is doubtful that guidelines are fully consulted when judges and magistrates are busy with other things in the courtroom)?; what is the real impact of sentences (lived experience is important and qualitative research is important); what is the role of the PSR?; what are the implications of virtual courts?

### **Peter Dawson**

Peter Dawson from the Prison Reform Trust spoke about sentences of Imprisonment for Public Protection (IPP) and that recalls are rising and there are almost as many recalled IPP prisoners as those still serving IPPs ([see slides 61 to 74](#)). The number of people being sent to prison has dropped dramatically over the last 20 years but the length of sentences have increased. Extended sentences are increasing as IPPs decrease.



Peter Dawson

The size of the prison population is very dependent on decisions taken by the Parole Board rather than sentencing courts. Nearly a quarter of people currently in prison on a life sentence have already served their minimum term. On average they have spent a further nine years in prison. In 2019-20 more than seven in ten Parole Board decisions for 'lifers' and IPPs were positive and less than one of every 200 prisoners released by the Parole Board go on to be convicted of a serious offence within three years of their release.

In 2021-2022, 515 out of 549 recommendations by the Parole Board for a transfer to an open prison were accepted by the Secretary of State for Justice. In June 2022 the criteria was changed. Between April-August 2022, 11 out of 83 recommendations by the Parole Board were accepted and since June the rate is 12 per cent (9 out of 74 applications approved).

## **Professor Jessica Jacobson**

Professor Jacobson spoke about the location of the custody threshold and how the test for this is circular and ambiguous ([see slides 75 to 82](#)). It is important and necessary to map how this is applied in practice. This means understanding sentencers' views and experiences with 'cusp of custody' cases – those near the borderline of custody and community sentences. It is also necessary to examine public perceptions of what does and does not justify the use of custody.

On victim engagement with sentencing, surveys consistently show that most victims who report crimes do not remember having the opportunity to make a Victim Personal Statement (VPS) and gaps in knowledge include what impedes the delivery of these. There are also questions around whether victims understand the distinction between explaining the impact of the crime and expressing wishes on sentences and how sentencers exercise their discretion regarding whether and what parts of a VPS should be read aloud in court, by whom, and how they take it into account. It is unclear how sentencers perceive the evidential status of VPSs and whether they are confident in their ability to determine the facts and ensure integrity and fairness is protected.

### **Points raised in the audience discussion included:**

- The Imposition of community and custodial sentences guideline is helpful regarding the custody threshold. Sentencers ensure there is a proper and thorough discussion over this and guidelines assist with this. The research undertaken by the University of Hertfordshire supports the point that seriousness is the most influential factor considered in sentencing.
- There are examples of mismatches between public perceptions of sentencing and what happens in practice. It is important to undertake work in schools, organise seminars, and listen to those with lived experience. The role of social media also has to be acknowledged as this can polarise views.
- The live streaming of sentencing hearings was generally regarded to be a positive thing, but that it would be helpful if more of the public were aware that it is possible observe cases in court.

## **Closing: Sarah McManus, Sentencing Academy**

Sarah McManus closed by summarising the key points from the day and acknowledging that the seminar enabled knowledge exchange across a wide variety of stakeholders illustrating the breadth of sentencing as a discipline. Some of the recurring themes included 'rushed justice', how vital good quality PSRs are, the importance of recognising intersectionality and individualisation as an approach, the need to grow the evidence base including involvement from those with lived experience, and to increase understanding around 'what works' to reduce re-offending.