UNIVERSITY OF CAMBRIDGE
Institute of Criminology

THE SENTENCING COUNCIL IN 2017

A Report on Research to Advise on how the Sentencing Council can best Exercise its Statutory Functions

Anthony Bottoms

assisted by A R (Jo) Parsons

Introductory Note

It was an honour to be asked by the Sentencing Council to conduct this Review.

The Review was commissioned by the Council in 2017 to assist with its internal decision-making, and it was in this context that the Council requested that the work be completed within a short timescale (see para. 11 of the report). Interviews for the Review were conducted in March 2017, a draft report was submitted in April, and - after discussion with Council staff and appropriate revision - the final text was delivered on 2 May.

It has now been decided by the Council that the report should be made public. I was consulted about this decision, and I fully support it. I hope, however, that those who now read the report for the first time will bear in mind the original context within which it was produced.

A number of things have changed since May 2017 – for example, there is a new Secretary of State for Justice, and a new Lord Chief Justice. In preparing the report for wider publication, it has seemed important to adhere closely to the original text, while at the same time drawing attention to relevant changes of personnel, and to relevant documents published since the initial completion of the report. In order to make plain where these 'updating' changes have been made, text of this kind has been placed in square brackets. Apart from this element of updating, alterations have been kept to a minimum.

As in the original report, I wish to place on record my warm thanks for the assistance of my colleague Dr Jo Parsons, without whom the conduct of the research, and completion of this report, would have been impossible.

Jo Parsons and I wish to thank all those members of the Council and its staff, plus some others, who willingly agreed to be interviewed, and so helped us to understand better the working of this very important body. We are also most grateful to the Council's staff for providing vital administrative support during the period of the research: special thanks to Steve Wade, the Council's Chief Executive; to Emma Marshall, the head of the Council's Analysis and Research Group, and our main contact person; and to Jessica Queenan, who helped us greatly when Emma was on annual leave.

Anthony Bottoms

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THE SENTENCING COUNCIL IN 2017

1. In February 2017, the Sentencing Council issued an invitation to selected individuals and bodies to submit proposals for research to advise the Council on how it could best exercise its statutory functions (described as a 'Review'). This document stated that the Review should focus on certain specific topics, namely:

   - The ways in which the Council can best exercise its aims, objectives and statutory duties in the future;
   - Whether there are any aims, objectives or statutory duties that could be more fully addressed in the future and how the Council might go about this;
   - The analytical data available to the Council and how it might use this in relation to its aims, objectives and statutory duties going forward;
   - Whether there are any non-policy or analytical functions that might be improved to help contribute to the Council exercising its duties in the future (e.g. governance or communications arrangements);
   - Areas in which the Council should consider conducting further research;
   - Areas where improvements may need to be made, and whether there are any further areas that the Council should be contributing to in the sentencing arena.

   In addition, the invitation document indicated that the successful contractor would be invited to suggest other potential areas for exploration.

2. The Council's aims, objectives and statutory duties are clearly central to these terms of reference. For convenience, these are therefore set out in Appendix I. In the case of the statutory duties, also provided is an annotation by staff of the Council (known collectively as 'Office of the Sentencing Council' or 'OSC') which indicates how far, in their judgement, the relevant duty has been met.

3. I was appointed to conduct this Review, which I have done with the assistance of Dr A.R. ('Jo') Parsons. As anticipated in the Council's invitation document, the Review has been conducted using two main methods, namely desk research and interviews with key respondents. Most of the interviews have been conducted with people suggested by Council staff: there were eighteen such interviews, with a range of respondents including current and two former members of the Council, members of OSC, and officials in the Ministry of Justice. In addition, one member of the Scottish Sentencing Council was interviewed.[1]

[1] All interviews were conducted jointly by Jo Parsons and myself. For this reason, in this report the first person plural is often used when reporting what was said in interviews.

4. In conducting the Review, a modified version of what is known in social science as 'grounded theory' methodology has been adopted. Research in the grounded theory tradition does not begin with specified hypotheses, but rather seeks to immerse itself in the field being researched, and then to build conclusions from this in-depth exposure.[2] Consistent with this methodological approach, interviews for the Review were conducted as soon as reasonably practicable after the beginning of the research contract, in order to understand the work of the Council from the point of view of people closely associated with it. For the same reason, the substantive part of this report begins with an analysis of the functioning of the Council, as it has been described by respondents in the interviews.[3]

5. This Report is structured as follows: Section A provides background information on the history of the Council and on some current challenges that it faces. Section B then summarises the evidence that has been received about the way in which the Council conducts its business. Section C develops a discussion of the ways in which the Council relates to various groups and agencies that have a legitimate interest in its work, including: courts; victims and their families; police and prosecutors; offenders and their families; academic commentators and pressure groups; Parliament and the Ministry of Justice; the media and the public. Section D deals with various aspects of the effectiveness of the Council. Section E returns to the terms of reference for this Review (above, paragraph 1) and provides responses to the specific topics mentioned in those terms of reference, in the light of the analyses in preceding sections. Section F brings together the main points for the Council to consider, arising from the Review; these points are also prefigured in the main text of the report by appearing in bold type.

A. Background: The Council and its Context, 2010-2017

6. The Sentencing Council was established by the Coroners and Justice Act 2009, and began work in 2010. [At the time of the research, it was] therefore seven years old. Constitutionally, it is an arms-length body, independent of the Ministry of Justice, although financed by that Ministry. The Lord Chief Justice is the President of the Council, and attends it occasionally, but for its regular work the Council is comprised of eight judicial and six non-judicial members, chaired by a senior judge. It has the power (and, in respect of two matters, the duty) to issue 'definitive guidelines' relating to sentencing, and sentencers are required by statute to follow those guidelines unless, in their judgement, the interests of justice indicate otherwise.[4] The Council is

[2] For a brief overview of grounded theory, and other approaches to social science research, see A E Bottoms 'The Relationship between Theory and Empirical Observations in Criminology' in R King and E Wincup *Doing Research on Crime and Justice,* second edition (Oxford University Press 2008), esp. at pp 94-101.

[3] [All interviews were undertaken in March 2017. As a result, all views reported reflect the situation as seen by interviewees at that time].

[4] Coroners and Justice Act 2009, ss. 120 and 125. The two topics on which the Council has a duty to issue guidelines are (i) reduction of sentences for guilty pleas, and (ii) the totality principle.

not the first non-court body to have been established in England and Wales to develop definitive sentencing guidelines; a similar role was fulfilled by the Sentencing Guidelines Council (SGC) from 2004 to 2010, and SGC guidelines that have not been replaced by Sentencing Council guidelines are still referred to by courts and listed as 'Definitive Guidelines' on the website of the Sentencing Council.

7. Among the main purposes of Parliament in legislating for the development of guidelines was to enhance the transparency of the sentencing system, and to promote greater consistency when judges and magistrates deal with similar cases. It is clear that the Council, in its work, fully subscribes to these objectives. A statutory provision requires the Council, when developing guidelines, to have regard to a range of factors, including existing sentence levels, the need to promote consistency in sentencing, the impact of sentence decisions on victims, the need to promote public confidence in the criminal justice system (CJS), and the cost of different sentences and their relative effectiveness in preventing reoffending.[5]

8. The definitive guidelines produced by the Council are of two main types: offence-specific guidelines, and what the Council calls 'overarching' guidelines, which cover issues that are relevant across many offence types (such as a guideline on when it is appropriate to impose a custodial sentence).[6] [At the time of the research, the Council had] issued guidelines relating to ten specific offences or groups of offences, and five overarching issues. In addition, in 2016 it issued the Magistrates' Courts Guideline (a revision of the 2008 SGC guideline of the same type), which contains guidelines for many offences that can be dealt with only in the magistrates' courts. These various guidelines, and the dates on which they were published, are set out fully in Appendix II. It will be apparent from this list that the Council has not yet issued guidelines for all of the principal kinds of offence which are regularly dealt with by courts (sometimes referred to as 'volume crimes'), but the hope has been expressed by the Chairman of the Council that full coverage of guidelines for such offences will have been achieved by 2020.[7]

9. When the Council began its work, many judges and recorders sitting in the Crown Court had significant reservations about the introduction of the guidelines system.[8] It is to the Council's credit that these reservations seem to have almost entirely disappeared. Inevitably, however, the Council still faces other challenges, of which two are perhaps of special importance. The first of these is a resource challenge, because,

[5] Coroners and Justice Act 2009, s.120(11).

[6] The founding statute states that 'a sentencing guideline may be general in nature or limited to a particular offence, particular category of offence or particular category of offender': Coroners and Justice Act 2009, s. 120(2). The term 'overarching' guideline covers the two statutory categories of 'general' guidelines and 'offender-specific' guidelines.

[7] Lord Justice Treacy, evidence before the House of Commons Justice Committee, 1st March 2016.

[8] Magistrates were apparently less doubtful about guidelines, because the Magistrates' Association had published its own (non-statutory) guidelines as early as 1989. These were frequently updated until they were replaced by the SGC's Magistrates' Court Sentencing Guidelines in 2008.

like many other public bodies, the Council's resources have been cut in recent years. Secondly, there have recently been challenges from some pressure groups and academics, who – in general – tend to press both for tighter guidelines and for the Council to adopt a wider vision in interpreting its role.[9] There is, of course, some tension between these two challenges, because a wider role is difficult to achieve on reduced resources. It is also the case that the need to develop offence-specific guidelines on the full range of 'volume' crimes necessarily reduces the time that the Council can devote to other activities. These conflicting pressures are a real feature of the Council's current situation.

10. Initial briefing from OSC staff concerning the scope and purposes of this Review has emphasised the need for the Review to be practical in its orientation. This report aims to fulfil that request, while also drawing attention, where appropriate, to empirical research and theoretical developments that are relevant to the Council's work.

11. As required by the Council, this Review was completed within a very short time span (six weeks). This timescale has limited the depth of the analyses of the contents of the interviews, and it has also limited the range of relevant published materials that could be consulted. These limitations should be borne in mind when considering the report.

B. How the Council Conducts its Business

12. All members of the Council hold other posts or responsibilities, so their work for the Council is part-time. The full Council meets on a monthly to five-weekly basis, but its business is also conducted through subcommittees. Three of these are standing subcommittees, dealing respectively with Analysis and Research; Confidence and Communications; and Governance. Other subcommittees are set up from time to time to discuss particular guidelines.

13. The Council is required by statute to publish an Annual Report,[10] and it also publishes an annual Business Plan (and, if necessary, a revised Business Plan to cover eventualities arising during the year). A draft of the Business Plan is prepared by OSC staff for consideration by the full Council, and the Governance Subcommittee is then responsible for monitoring the Plan during the year. Given that monitoring role, **the Council might wish to consider whether the Governance Subcommittee should discuss the draft Business Plan before it is presented to the Council.**

[9] A prominent example of this type of challenge is the 2016 report commissioned by the organisation 'Transform Justice' and authored by Rob Allen (R Allen *The Sentencing Council for England and Wales: Brake or Accelerator on the Use of Prison?,* Transform Justice 2016). The main arguments of this and other critical analyses will be considered in section C below.

[10] Coroners and Justice Act 2009, s.119.

14. The Council is supported by a team of full-time OSC staff, working under a Chief Executive. Formally speaking, OSC staff are divided into three groups: the Policy Group (including legal advisers), the Analysis and Research Group, and the Communications Group, all supported by a small team of administrative staff. However, the total staff complement is small, and there is much cross-fertilisation of ideas across the three groups, well exemplified in the creation of a 'Policy Initiation Document' (PID), involving staff from all groups, at the beginning of every formal piece of work undertaken.

15. The Council has developed a sophisticated methodology for the working up of guidelines, especially offence-specific guidelines. The stages of this include: (i) analysis of current sentencing practice for that offence (or group of offences), as well as case law and media reports; (ii) production of a scoping paper, presented to the Council at an early stage, with a listing of various options;[11] (iii) if it is decided to produce a guideline, preliminary work to develop a skeleton guideline, testing that skeleton against judges' transcripts, then 'road-testing' four or five cases with a research pool of magistrates and Crown Court judges; (iv) simultaneously with this preliminary work, development of a draft assessment of the resource implications of introducing such a guideline; (v) after agreement by the full Council, publication of a Draft Guideline, a Resource Assessment and a Statistical Bulletin relating to the group of offences, with a general invitation to comment; (vi) after the close of the consultation period (usually 12 weeks), careful analysis of the responses, and possibly some further analysis and road-testing, then discussion of proposed revisions; (vii) publication of the Definitive Guideline, together with revised versions of the Resource Assessment and the statistical tables, and a document that provides a response to consultation submissions and outlines the research evidence underpinning the guideline; and (viii) consistent with the Council's philosophy of 'continuous improvement', work to prepare for an eventual exercise to monitor and evaluate the guideline. Few outside commentators on the work of the Council are aware of the care and thoroughness entailed in this process.

16. Sentencing guidelines have been developed in a number of common law jurisdictions, but the offence-specific guidelines developed by the Council are of a type with no precise parallel elsewhere. These guidelines are more structured than those previously promulgated by the Sentencing Guidelines Council (SGC) in England and Wales, but less restrictive than the typical 'grid' guideline used in various jurisdictions in the United States.[12] Fairly detailed provisions on what Council guidelines should contain are given in s.121 of the Coroners and Justice Act 2009, although the precise structuring of guidelines has evolved over time. For the most part, they involve (i)

[11] The options may include an option to do nothing, but most of the options will involve the production of a guideline; they are differentiated in terms of what the guideline will cover.

[12] 'Grid' guidelines usually have two axes, respectively relating to the seriousness of the current offence and the extent of the defendant's prior record. The cell at the intersection of the two values gives a sentencing range which the judge is normally expected to follow.

assessment of the harm and culpability of the current offence, leading to placement in a table of categories of that offence type (Steps One and Two); (ii) identification of a 'starting point' and 'category range' of sentences within each of the categories (Step Two); (iii) consideration of further aggravating and mitigating factors (Step Two); (iv) possible reductions for assistance to the prosecution and for guilty pleas (Steps Three and Four); (v) possible use of statutory dangerousness provisions (Step Five); (vi) if sentencing for more than one offence, consideration of the possible use of the 'totality principle' (Step Six); and (vii) consideration of whether to make compensation and/or other available ancillary orders (Step Seven). Most English and Welsh sentencers appear to have fully accepted the 'stepwise' methodology of sentencing mandated by this type of guideline.[13] As we shall see, however, some critics believe that despite the apparently prescriptive character of these guidelines, there remains too much scope for unfettered discretion.

17. Some overarching guidelines (for example, the guideline on Reduction in Sentence for a Guilty Plea) are produced using a similar set of processes to those for offence-specific guidelines, but others (for example, the guideline on the Imposition of Community and Custodial Sentences) have required fewer empirical analyses, and so the focus has been primarily on the Consultation stage.

18. Much of the work in the preparation of guidelines is necessarily undertaken by members of the OSC Policy and Analysis and Research groups. A member or members of the Council is/are assigned as a 'policy lead' to work with OSC staff during this process, and there is also regular communication between OSC staff from all three OSC groups. The methods of working are therefore strongly collaborative. It is very clear that these processes have generated a high level of mutual respect and trust between Council members and OSC staff.

19. The timing of the Review meant that Jo Parsons and I were not able to observe a Council meeting. (The Council met just before the contract for the Review was signed, and this report had to be submitted before the next meeting). However, our interviews revealed considerable satisfaction with the way in which Council meetings are conducted - the Chairman keeps business moving and encourages contributions from all members, and all those attending (including OSC staff) are made to feel that they are valued participants.

20. One problem relating to the handling of Council business was however identified during the Review. Because the development of a guideline is, for good reasons, a relatively slow and complex process, if it is decided to change the priorities for guideline production, this can have significant consequences for the Business Plan, and on occasions this has led to an underspend on the Council's limited budget, especially as regards the Analysis and Research section of the budget. While, of

[13] The Scottish Sentencing Council, which was established in 2015, has not yet published information on what kind of framework it will adopt for offence-specific guidelines.

course, there are sometimes good reasons for changes in work priorities (including requests from the Ministry of Justice), **to maximise the efficiency of the Council's work it is desirable where possible to keep overall policy and the immediate needs of the Business Plan in close harmony.**

21. There have been a number of suggestions from outside commentators for alterations (usually additions) to the membership of the Council. However, among persons interviewed for this Review, there has been little enthusiasm for most of these suggestions. Given the statutory duties of the Council, the fact that courts are required by statute normally to follow the Council's guidelines, and the complex relationship between the Council and the Court of Appeal (Criminal Division) (discussed further at paragraph 36 below), there is a clear logic in having a Council with a judicial majority; and there was also universal support among interviewees concerning the value brought to the Council by the specific fields of expertise of the current non-judicial members (i.e. police, prosecution, probation, defence counsel, victim support and social scientific research). The *Transform Justice* report suggested that 'people with expertise in mental health or addiction, or the media and ex-offenders could make good candidates for membership [and] the prison system should also be represented'.[14] However, the only one of these suggestions that received any significant support from interviewees was that relating to expertise in mental health or addiction.[15] Even here, some felt that the best way forward was by the Council calling on specialist advice as necessary through the appointment of an expert adviser or panel of advisers, rather than by membership of the Council.[16] One other suggestion for strengthening the Council was spontaneously mentioned by some respondents in interviews; this concerned the possibility that some additional 'voice' from defence representatives familiar with issues relevant to magistrates' court proceedings would be helpful to the Council. After the interviews were completed, we learned that the Council is addressing this issue through the creation of a solicitors' panel. **It is recommended that both these sets of suggestions about membership or advice (i.e., relating to mental health/addictions, and to strengthening the defence 'voice') be taken forward by the Council as appropriate.**

22. The judicial membership of the Council comprises two Lord Justices, two High Court judges, two Circuit Judges, a District Judge and a magistrate. Some have commented on the apparent imbalance as between those normally sitting in the Crown Court or

[14] Allen, above n 9, para 18. Statutory provision for the membership of the Council is contained in Schedule 15 of the Coroners and Justice Act 2009, so any expansion of the Council would require legislative change.

[15] The other suggestions were cogently argued against: a senior prison manager would have little to offer to discussions of sentencing (but much to discussions of parole); and, while the Council should certainly be aware of the importance of desistance from crime and of accurate press reporting, it is not clear that these goals are best achieved by recruitments to Council membership. There was also little support for a further suggestion that the Council would benefit from the appointment of a non-judicial Deputy Chairman, perhaps a person prominent in public life but not now actively involved in politics. (Schedule 15 of the 2009 Act in any case provides that a judicial member shall be the Deputy Chairman, so the proposal would require legislative change).

[16] Earlier in its history, the Council appointed two advisers who attended its meetings but were not members. It also sometimes sets up consultative panels for a particular purpose.

above (six members) and those normally sitting in the magistrates' courts (two members), especially as, numerically speaking, there are far more magistrates' court cases than cases in the Crown Court. This issue was discussed in a number of interviews, but there was little significant support for change. Broadly, the argument was that more serious offences required more sustained attention, and this justifies the skew towards more senior judicial representation; also, the Council's review of the lengthy and complex Magistrates' Court Sentencing Guidelines had been well handled by the District Judge and the magistrate acting as Council leads, so the existing structure was viewed as working well.

23. The limited resources available to the Council significantly constrain its capacity to conduct analysis and research. The most obvious – and the most serious – example of this has been the 2015 decision to discontinue the Crown Court Sentencing Survey (CCSS) because of shortage of funds. This was a survey which had been recommended by the Sentencing Commission Working Group (the Gage Committee) in 2008, and which the Council had set up soon after it began work. It has also been described by a former Government Chief Social Scientist as having 'provided an important basis for the Council to make evidence-based decisions about its guidelines'.[17] Given the reduced resources available to the Council, the decision to discontinue was inevitable, but there is no doubt that the replacement strategy (so called 'bespoke' data collection on particular issues when required) is very much a second-best option, not least because it achieves substantially lower completion rates by judges.[18] It is true that the discontinuance of the CCSS has freed up some resources, and this has allowed the Analysis and Research group of the Council to conduct some analytical work that was previously not possible, for example the collection of data from magistrates' courts for particular purposes; and it is also true that the ending of the CCSS was informed by an independent review of how the Council could best fulfil its analytical functions within the available resources.[19] Nevertheless, it is worth noting that the Council has a statutory duty to monitor the factors which influence the sentences imposed by courts,[20] and the discontinuance of the CCSS has inevitably lessened the extent to which the Council is able to fulfil that duty. This matter will be considered again in Section E of this report.

24. The 'Communications' element of the Council's work has been described to us as 'mainly product-driven'; that is to say, the focus is on communicating well about guidelines that the Council is developing/has developed. To that end, there are always press briefings when a definitive guideline is published, and Council members

[17] Paul Wiles, 'Foreword', in J V Roberts (ed) *Exploring Sentencing Practice in England and Wales* (Palgrave Macmillan 2015), p. xii.

[18] Because the CCSS was intended as a census rather than a sample of Crown Court sentencing decisions, judges became habituated to completing the short form for each of their cases, and the overall completion rate was above 60%. For the more targeted 'bespoke' studies, judges have to be persuaded to complete their returns, and completion rates are reportedly much lower.

[19] This review was carried out by Natcen Social Research in 2014.

[20] Coroners and Justice Act 2009, s. 128 (2)(b).

are regularly invited on to television or radio programmes to answer questions about the guideline. To assist with this, the Communications team has developed media training for Council members, which is very much appreciated; and the feedback from media appearances by Council members is good.

25. A broader communication strategy operates through the Council's website. Considerable effort has been expended on the development of this website, and some parts of it have won praise (for example, the short video on sentencing). However, **comments have been made that the language of the website could in some respects be made less formal, and so more user-friendly for members of the general public. It is recommended that the Council should consider whether there is merit in this view.**

26. The remit of the Council in relation to a specific group of offences does not stop when a definitive guideline has been issued. Two questions arise at this stage, namely the issues of (i) how far has the guideline been complied with; and (ii) what the impact of the guideline has been on overall patterns of sentencing. It needs to be emphasised that these questions are distinct. For example, the Council might intend a particular guideline to formalise (and make more transparent and consistent) existing levels of sentence for a particular offence, and courts might fully comply with this guideline; yet the wording of the guideline might lead, as an unintended consequence, to an increase in the average sentence for a particular category within that offence grouping. 'Guideline impact' and 'guideline compliance' therefore require separate discussion.

27. To begin with *guideline impact,* the Council has a statutory duty to assess the impact of every guideline,[21] but given competing commitments, it has so far fulfilled this duty only to a limited extent. [At the time of the research, three impact assessments had been published,] relating respectively to impact of the guidelines on sentencing for assault, burglary and environmental offences.[22] Of these, the assault and burglary assessments have received the most attention from outside commentators, because these are volume crimes. The assault assessment showed impacts in line with the Council's expectation for several crimes (GBH s.20, common assault and assault on a police officer), but for two offences (GBH s.18 and ABH) there were unexpected increases in the severity of sentence. The burglary assessment also showed some unexpected increases, but the initial published report stated that further investigation would be necessary to assess whether these increases are attributable to the promulgation of the guideline or other factors.

[21] Coroners and Justice Act 2009, s.128 (1).

[22] *Assault Offences: Guideline Assessment* (October 2015); *Burglary Offences: Initial Guideline Assessment* (January 2016); *Environmental Offences: Guideline Assessment* (November 2016). All these assessments are available on the Council's website.

28. This further investigation in relation to burglary has now been completed [and published],[23] and it has found that the unexpected increases in sentence levels are attributable to the guideline. Accordingly, two major guidelines have now been shown to have resulted in some unexpected increases in sentencing. This is bound to create anxiety among civil liberties groups and some criminal justice organisations, and will quite possibly lead to pressure on the Council to speed up the publication of the impact assessments for other offence-specific guidelines.[24] **The Council may therefore need to consider carefully the work priorities for the Analysis and Research group in the near future – whether it is better to prioritise completion and publication of impact assessments or fresh analytical work on proposed new guidelines.**

29. A methodological point relating to impact assessment also needs to be made. In the impact assessment relating to domestic burglary, it is shown that in the period after the guideline was issued there was an increase in the proportion of offenders receiving custodial sentences, and an increase in the average sentence length of custodial sentences. However, there had also been an upward trend in the severity of sentences for this crime from about 2007. The impact assessment states that the Council's 'resource assessment anticipated no change in sentencing practice', and therefore the enhanced sentence levels experienced after the guideline remain 'in line with the anticipated result'.[25] This judgement is open to question. It can be argued, to the contrary, that the purpose of a guideline is to set sentencing levels, and if there is a pre-existing upward trend for the particular offence, and the guideline recommends (broadly) the existing sentencing levels, then the intention of the guideline is to stabilise the upward trend. Accordingly, **it is recommended that when conducting impact assessments, if there is a pre-existing upward trend and sentence severity continues to rise after the implementation of a guideline, the Council should in future treat this as an unanticipated, and not an anticipated, increase in the sentence level.**

30. Turning finally to *guideline compliance,* a measure of compliance that is sometimes quoted is the percentage of sentences for a particular crime that are within the 'offence range' for that crime. However, the 'offence range' in any guideline is necessarily very wide, because it comprises all possible sentences for all the categories of a particular offence; for example, for 'street and less sophisticated commercial robberies' the offence range is from 12 years' custody to a high-level community order. Given this breadth, most compliance rates measured on the offence range basis are very high (frequently over 90 per cent) and are for most purposes not very

[23] [*Burglary Offences: Further Guideline Assessment* (July 2017)]

[24] Impact assessments of five offence-specific guidelines – those relating to Drugs, Sexual Offences, Fraud, Theft and Robbery – are currently being conducted by external contractors, with some additional input from Council staff. [An internal evaluation of guidelines relating to three offence types (Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene) is also now under way, as is the collection of 'before' data relating to the guidelines for: bladed articles and offensive weapons; criminal damage; harassment without violence (including stalking); breach of a Community Order, Suspended Sentence Order and Protective Order.]

[25] *Burglary Offences: Initial Guideline Assessment,* p. 5.

meaningful.[26] Some critics have accordingly suggested that it might be appropriate to replace this measure with the alternative of 'sentencing within the category range'. However, this would be problematic for other reasons: the categories are established in the first part of Step Two of Council guidelines, after which courts are expected to consider aggravating and mitigating factors, assistance to the prosecution and guilty pleas, so there might easily be entirely principled reasons for the final sentence not to be within the category range set out at Step Two.

31. On the topic of consistency, the *Transform Justice* report states that 'the Council has always sought consistency of approach rather than outcome, on the basis that if the courts apply the same series of steps, there is a greater chance of consistent outcomes than if they adopt their own approaches'.[27] While the first part of this statement is correct, the second partly misapprehends the issues. The topic is conceptually important, and therefore worth careful attention. It is illuminated, I believe, by considering Ronald Dworkin's observation that 'treatment as an equal' does not necessarily lead to 'equal treatment'.[28] To take a simple non-legal example, the mother of a friend (let us call her 'Gim'), recalls that her father aimed to be scrupulously fair in the way that he treated his three much-loved daughters. Gim was the eldest of the three, and found herself required at age five still to wear a bib at mealtimes, because although she was no longer spilling food, her younger sisters were, and her father believed in equal treatment. It is striking that Gim, now in her ninth decade, still remembers this incident. This is because she felt unjustly treated, since a relevant difference between her and her sisters had not been taken into account. She had been treated equally with her sisters, but her different needs had not been considered, so she had not been accorded equal concern and respect. In the sentencing context, the implication is that, if individual differences are of any relevance to the final sentence (as the Council, surely rightly, believes that they sometimes are) then defendants who have committed identical offences should sometimes not receive equal sentences. Returning to the comment in the *Transform Justice* report, the implication of the Council's step-based guideline approach is therefore not that this will lead to 'consistent outcomes', but rather that, if the guidelines are followed, justifiable differences in outcome for those committing the same crime will remain, but unjustifiable differences will have been eliminated. The research problem that this leaves us with is, of course, that of measuring justifiable differences - a very difficult task. This issue is revisited in Section D, below.

[26] The only purpose for which such data are meaningful is that they measure the degree of compliance with the statutory requirement (Coroners and Justice Act 2009, s.125(1) and (3)) that a sentence must normally follow the sentencing guideline to the extent of sentencing within the offence range.
[27] Allen, above n 9, para 48.
[28] R Dworkin, *Taking Rights Seriously* (Duckworth 1977).

C. The Council's Relationships with Key People and Agencies

32. In conducting this Review, two matters have become very apparent. *First,* the sentencing decision is a key pivot in the criminal justice system, on which much else depends. The Council, as the creator of guidelines for sentencing, and with a statutory duty to promote confidence in sentencing, therefore holds a central role in the criminal justice system. *Secondly,* precisely because the Council now holds such a pivotal position, many individuals and organisations need to have confidence in it, and the Council always needs to be alert to its relationship with each of them. In view of these crucial facts, this section of the Review will consider the relationship between the Council and a range of other individuals and bodies, with special reference to ways in which these relationships might be improved.

(a) The Courts

33. As previously noted, the principles of a guidelines system appear now to be widely accepted by judges and magistrates in England and Wales. The Council can reasonably regard this as a major achievement, because the situation was very different when the Council came into operation in 2010.

34. It was reported to us that the recent change to the use of online-only guidelines in the magistrates' courts is causing anxiety among some magistrates. (A printed version of the magistrates' court sentencing guidelines used to exist, but the revised guidelines that came into force in 2016 are only available in an electronic form, so magistrates collect tablets containing the new guidelines as they arrive at court). Whilst it seems unlikely that, in the long run, this matter will constitute a major stumbling-block in the relationship between magistrates and the Council, the issue does raise a useful theoretical point, because there are, of course, understandable reasons for magistrates' anxiety. The theoretical point is that, **when thinking about its relationships with other relevant bodies and individuals, it is strategically important for the Council always to be aware of the particular pressures faced by the other party.**

35. An issue that was highlighted in interviews with judicial members concerns the contrast in the ways that judges typically use offence-specific and overarching guidelines. When they are sentencing an offender for an offence for which a guideline exists, even experienced judges will typically have the guideline in front of them, and follow through its 'steps'. By contrast, while they will of course read and absorb overarching guidelines when they are first promulgated, most will not regularly refer to them thereafter – as one judge put it to us, 'you know how the book ends', so there's no need to read it again. This is, of course, unproblematic if the contents of the guideline have been accurately assimilated, but the fallibility of human memory suggests that over time some sentencers might inadvertently misrecall or forget some aspect of a particular overarching guideline. In a 2017 article analysing all the Court of

Appeal sentencing cases reported in the *Criminal Appeal Reports (Sentencing)* for 2016, Professor Andrew Ashworth[29] shows that neither the SGC's guideline on Reduction in Sentence for a Guilty Plea, nor the Council's guideline on totality, was usually referred to explicitly in relevant cases in the Court of Appeal.[30] However, while in the former instance there was clear evidence in the judgments of awareness of the terms of the guideline, 'so that the frequent omission [of a reference to] the ...guideline is born of familiarity', in the latter instance it appeared that the specific terms of the guideline were 'prone to be overlooked' in judgments. The relevance of this issue is considered again at a later point in this report (paragraph 54).

36. A complex issue relating to courts concerns the relationship between the Council and the Court of Appeal (Criminal Division). In a 2014 case in the Court of Appeal, the role of the Court was stated to be that of 'amplification and explanation' of the Council's definitive guidelines, as well as 'issuing guidance in areas or circumstances not [yet] covered by a Definitive Guideline'.[31] That language suggests that the Court's role is ultimately subordinate to that of the Council, a view also supported in Ashworth's recent article (see above). However, in a 2016 letter in the *Criminal Law Review*, the Chairman of the Council, Lord Justice Treacy, wrote that the Council 'cannot issue guidelines which ignore either the will of Parliament or clear guidance issued by the [Court of Appeal Criminal Division]', a statement that appears to give strong weight to Court of Appeal guidance.[32] Given the judicial majority in the membership of the Council, major differences between the two bodies seem very unlikely to develop. Nevertheless, **at a theoretical level the structural relationship between the Council and the Court of Appeal seems not yet to have been fully clarified. If the Council agrees with this view, it would be helpful if it could find a way of ensuring that a clarifying statement is made, possibly through the good offices of the Lord Chief Justice, as the President of both bodies.**

(b) Victims and their Families

37. Understandably enough, the Council writes its guidelines explicitly for sentencers. However, in the interests of transparency, the Council quite rightly publishes all its definitive guidelines on its website, where they can be – and are – read by other interested parties, including victims and offenders. Evidence was received that victims do not always understand the complexity of the multi-step approach adopted in guidelines. In particular, they sometimes assume that the 'category table', typically included in Step Two of a guideline, gives the range for the *final sentence* for offences in the relevant category. (Of course, this is not necessarily the case, given other matters that are listed in every guideline after the category table). **The Council could**

[29] Andrew Ashworth 'The Evolution of English Sentencing Guidance in 2016' [2017] *Criminal Law Review* 507.
[30] The Guilty Plea guideline was referred to in one of the nine judgments where it was relevant; the Totality guideline in two of the 14 relevant judgments. It should be noted that the statutory requirement to follow a definitive guideline applies to the Court of Appeal as much as to other courts.
[31] *R v Dyer* [2014] 2 Cr. App. R. (S.) 61.
[32] Letter from Lord Justice Treacy [2016] *Criminal Law Review* 489.

usefully reflect on whether the wording of guidelines should take greater account of the fact that they will at times be read by victims and offenders, and in particular, consider whether some warning should be offered against reading the category table as a guide to the likely final sentence.

38. For similar reasons, **offence-specific guidelines might usefully include some reference to the 2003 legislative provision relating to the purposes of sentencing**.[33] It is of interest that the Chairman of the Council, writing in the *Criminal Law Review* in response to some criticisms of the Council, made significant reference to this section;[34] yet it is not referred to in most offence-specific guidelines. If guidelines are written solely for sentencers, it can of course be argued that there is no need to refer to this section, because sentencers are fully aware of it; but that argument will not apply if the Council deems it appropriate to use guidelines as a way of communicating with victims and offenders, to improve public awareness.

39. Victims might additionally be assisted if there were greater understanding of guidelines by police officers working in police custody suites: this is discussed further below (paragraph 41).

40. There is an assumption in some circles (including parts of the press) that victims will always want heavier sentences. The empirical research evidence does not support this view; instead, **studies show that victims' views are shaped by the way their case is handled, and that many victims express a strong interest in ensuring that, if possible, the offender does not commit further offences.**[35] **This strand of research could usefully be utilised by the Council if, and when, it faces criticism for its alleged leniency.**

(c) Police and Prosecutors

41. We received relatively little evidence concerning the Council's relationships with police and prosecutors. However, **three of our respondents very helpfully drew our attention to the fact that there seems to be a significant lack of awareness of sentencing guidelines by police officers working in at least some police custody suites**, **and that this could have damaging consequences for victims**. This is obviously a potentially important issue, and it was pleasing to learn that the Council's Confidence and Communications sub-committee [was, at the time of the research] attempting to address the matter. **It is strongly recommended that the Council develops its initial steps to address this matter.**

[33] Criminal Justice Act 2003, s. 142.

[34] Lord Justice Treacy, above n 32.

[35] See for example: H Strang *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press 2002); J M Shapland, G Robinson and A Sorsby *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders* (Willan 2010).

(d) Offenders and their Families

42. As a general principle, it is vital that offenders and their families, as well as victims and their families, retain confidence in the sentencing system.

43. An ethnographic research study of a Crown Court found that many defendants spoke approvingly of the judge's 'capacity to maintain a neutral [and fair] stance in court proceedings'. However, in court, defendants were often passive or fatalistic in their response to proceedings, and 'a recurring, but implicit, theme in defendants' comments…was their lack of "voice" within the court process…[sometimes] defendants gave the strong impression…that they…had spent their time in court as mere observers of their own fate'.[36] These comments were, of course, made despite the fact that, at the sentencing stage, the defendant has a standard 'slot' in the procedure, in the form of the 'plea in mitigation'.

44. Especially in light of recent research evidence on the theme of desistance from crime (see below, paragraph 48) it can be argued that it is important for offenders, where possible, to have at least some sense of engagement in the sentencing process. This is largely a matter for the Judicial College, but it also seems important for the Council to consider whether the structure of its guidelines can help to facilitate this aim, and the following paragraphs seek to address this question.

45. It is well known that pleas in mitigation combine both submissions relating strictly to the offence (e.g. that the offence was not planned) and submissions relating to the offender's wider situation, not strictly related to the offence (e.g. expressions of remorse, recent stress, efforts to desist – known as 'personal mitigation'). The Council's guidelines typically list both these under 'mitigation' at Step Two, with no differentiation between them. In the 'street and less sophisticated robbery' guideline, for example, nine mitigating factors are listed, of which two are offence-related ('no previous convictions' and 'little or no planning'), and these are respectively first and seventh in the list.

46. This structure seems open to criticism on two grounds. First, in the robbery guideline there are only two offence-related mitigating factors as against 20 aggravating factors. It is not controversial that aggravating factors outweigh offence-related mitigating factors, because research results in both England and Wales (in a sample of the general population) and Australia (in a sample of jurors) have confirmed this.[37] However, some of the listed aggravating factors have potentially mitigating counterparts that are not listed, which seems unfortunate (e.g. 'a leading role' is an aggravating factor in a group offence, but no mitigation is listed for playing 'a minor role'). **It is accordingly suggested that, when developing an offence-specific**

[36] J Jacobson, G Hunter and A Kirby, *Inside Crown Court* (Policy Press 2015), pp. 180-1, 191 and 195.
[37] J V Roberts and M Hough 'Exploring Public Attitudes to Sentencing Factors in England and Wales' in JV Roberts (ed) *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011); K Warner et al 'Measuring Jurors' Views on Sentencing: results from the second Australian jury sentencing study' (2017) 19 *Punishment and Society* 180.

guideline, the Council should make specific checks to ensure the inclusion of any appropriate mitigating counterparts to the listed aggravating factors.[38]

47. Secondly and more importantly, the placement of personal mitigation factors within the Council's guideline structure can be criticised. Step One of a typical Council guideline is headed 'Determining the offence category', and Step Two is described as comprising the 'Starting point and category range'. This is all offence-related language, whereas personal mitigation is about matters relating to the offender's situation and response.[39] From the point of view of a sentencer, this distinction perhaps does not matter – the relevant factors are listed, and will be taken into account. But **from the point of view of an offender reading the Council's guidelines, there would be merit in separating out personal mitigation factors as a separate Step in the guideline, so that offenders are more aware that their personal circumstances, and their steps towards desistance, are explicitly recognised by the Council as relevant to sentencing. This change is accordingly recommended.** Such a change might also be helpful to victims, by making clear to them that there are certain factors relating to the offender's situation that can properly modify what would otherwise be an appropriate sentence based on the factors of culpability and harm. (In Sweden, the language used is that of 'equitable factors' that modify the 'penal value' of the offence).[40]

48. The rapid recent development of desistance research, which has produced clear evidence that most offenders wish to desist, is also relevant to this discussion. Among the findings of this body of research are the following:[41]

- Most offenders, even most persistent offenders, eventually stop offending.
- Even those who do not stop often express a wish that they could stop.
- The age-range 20-25 is the time when there is the fastest deceleration of offending among persistent offenders.
- Much of the initiative for desistance comes from offenders themselves, or from those close to them; and for this reason, it has been suggested by one

[38] It is recognised that the lists of aggravating and mitigating factors in Council guidelines are non-exhaustive, and therefore judges and magistrates can, at their discretion, consider non-listed offence-related mitigating factors. But guidelines are read by offenders as well as sentencers, and omissions of relevant offence-related mitigating factors could give a misleading impression of bias.

[39] For example, in the 'street and less sophisticated robbery' guideline, personal mitigation factors include age or lack of maturity; serious medical condition; mental disorder or learning disability; sole or primary carer; remorse, especially if linked to voluntary reparation; and taking steps to address addiction or offending behaviour. For an empirical analysis of personal mitigation in the Crown Court, see J Jacobson and M Hough *Mitigation: The Role of Personal Factors in Sentencing* (Prison Reform Trust 2007).

[40] A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press 2005), Appendix I. An interesting list of the 'equity factors' contained in the Swedish Penal Code is given on p.166.

[41] For an overview of desistance research see J M Shapland and A E Bottoms (2017) 'Desistance from Offending and Implications for Offender Rehabilitation', in A Liebling, S Maruna and L McAra (eds) *The Oxford Handbook of Criminology* (sixth ed.) (Oxford University Press 2017).

prominent scholar in the field of offending behaviour programmes that we should reframe the concept of 'rehabilitation' as 'assisted desistance'.[42]

- For persistent offenders, desistance is usually a gradual, not a sudden, process, which means that people who are trying to desist will not infrequently appear before courts to be sentenced.

In the light of this background, **it is appropriate for those responsible for sentencing (including the Sentencing Council) to structure sentencing practices so that, where possible, they contribute to the desistance process – without, of course, compromising the other purposes of sentencing.** A useful way of conceptualising this is through the concept of 'responsive censure': that is, the court censures the offender according to the harm and culpability of the offence, but simultaneously seeks, in appropriate cases, to encourage him or her to respond positively to the censure by developing habits of desistance.[43]

(e) Academic Commentators and Pressure Groups

49. As the work of the Council has become better known, and its importance recognised, there has been an increasing amount of comment, sometimes critical, by academic commentators and by pressure groups with a remit to consider the work of the criminal justice system. Four documents of this kind are noted below, listed in chronological order; these can be regarded as broadly representative of the challenges presented to the Council by this group of commentators. It will be seen that each source listed raises a slightly different line of criticism. In this subsection, most of these lines of criticism will simply be described; they will then be evaluated, with appropriate recommendations, in Section D.

50. The first source is a British Academy policy document entitled 'A Presumption against Imprisonment' (2014). One of the formal recommendations in this booklet is that 'the Sentencing Council should take a fresh look at its statutory duties and powers in relation to the costs and the effectiveness of different forms of sentence'.[44] This refers to the Council's mandatory duty, when developing guidelines, to 'have regard to' a range of matters, including the 'cost of different sentences and their relative effectiveness in preventing re-offending'.[45] **It is a fair criticism to say that the Council has, to date, given little emphasis to this duty, and that this should be remedied in the future.** The British Academy document believes that 'reviewing sentencing practice in this way would surely lead the Sentencing

[42] F J Porporino, 'Bringing Sense and Sensitivity to Corrections: from Programmes to "Fix" Offenders to Services to Support Desistance' in J. Brayford, F. Cowe, and J. Deering (eds) *What Else Works?: Creative Work with Offenders* (Willan Publishing 2010).
[43] H Maslen*, Remorse, Penal Theory and Sentencing* (Hart Publishing 2015), ch. 5 on responsive censure.
[44] *A Presumption against Imprisonment: Social Order and Social Values* (British Academy, 2014), p. 106. The authors of the document are Rob Allen, Andrew Ashworth, Roger Cotterrell, Andrew Coyle, Antony Duff, Nicola Lacey, Alison Liebling and Rod Morgan.
[45] Coroners and Justice Act 2009, s.120(11)(e).

Council to reconsider the current use of imprisonment';[46] however, the greater importance of this document for the purposes of this Review is its highlighting of the Council's duty to consider evidence on the effectiveness of sentencing.

51. Andrew Ashworth, Emeritus Vinerian Professor of English Law at Oxford University, is an acknowledged expert on many aspects of criminal law, including sentencing; he was also a member of the Sentencing Advisory Panel for England and Wales from 1999 until its abolition in 2010, and Chairman of this Panel from 2007 to 2010.[47] He is the author of a leading textbook, *Sentencing and Criminal Justice,* first published in 1992 and now in its sixth edition (2015). In the concluding chapter of the most recent edition, Ashworth briefly reviews the work of the Sentencing Council, asking in particular why the English judiciary and magistracy has accepted a guidelines system, when their counterparts in some other common law jurisdictions have not. He offers four possible factors that might have contributed to this acceptance, of which the third is, for present purposes, the most important. Here, Ashworth argues that English judges 'recognise the flexibility' that remains a part of the Council's definitive guideline system, and says that this flexibility 'leaves ample room for the exercise of discretion and individualized justice, subject to appellate control'. By implication, he suggests that the Council does not wish to disturb this flexibility: 'it is no accident that there is little principled guidance on aggravation and mitigation, on previous convictions, and on totality of sentences'. Ashworth is critical of this degree of flexibility, which, he argues, means that the question 'do [the English guidelines] measure up to rule-of-law values?' must be answered in the negative.[48] Although the point is not spelt out, the thrust of the argument clearly is that the considerable degree of discretion remaining to sentencers allows for an unacceptable degree of inconsistency between the sentences awarded in different courts. Thus, the degree of flexibility in the guidelines is strongly challenged.

52. In May 2016, in an Editorial in the *Criminal Law Review*, Nicola Padfield, Master of Fitzwilliam College, Cambridge, and a former Recorder of the Crown Court, raised a number of questions about the work of the Council, two of which are of special interest in the present context.[49] First, responding to some comments in the Council's press release accompanying the definitive guideline on robbery offences, she asked: 'Is it not the job of the Sentencing Council…to put the case against deterrence as a reason to increase sentence lengths [since] it is well known that increasing the offender's belief in the likelihood of detection, arrest and conviction is much more likely to be effective?'. Secondly, at the end of the editorial, she wonders whether it is perhaps 'time to think again about the role of the Council – what is it

[46] *A Presumption against Imprisonment*, above n 44, at 106.
[47] The Sentencing Advisory Panel for England and Wales was a statutory body whose original remit was to advise the Court of Appeal (Criminal Division) on matters relating to sentencing; then, after the creation of the Sentencing Guidelines Council in 2004, it advised that Council.
[48] A Ashworth *Sentencing and Criminal Justice*, sixth edition (Cambridge University Press 2015), pp. 454-5.
[49] N Padfield 'Editorial: Guidelines Galore' [2016] *Criminal Law Review* 301.

really for?'; and then, partly answering her own question, she adds 'how about educating sentencers and the public about sentencing in practice as well as in law?'. Thus, Nicola Padfield's challenge is partly specific (about the Council and deterrence – a point that was not raised in the British Academy document) and partly general (looking to the Council to fulfil a broader educative role). Her challenge was, at the time, responded to by the Chairman of the Council,[50] but both aspects of it remain of relevance for the Council to consider.

53. The fourth, most recent, and best-known of these critical documents is a report devoted entirely to the work of the Council, sponsored by the think-tank *Transform Justice*, and authored by Rob Allen (2016).[51] The sub-title of this report asks whether the Council has been a 'brake or accelerator on the use of prison?', and this illustrates the document's particular preoccupation with the size of the prison population. (Thus, for example, the Summary of the report begins by stating that 'prisons in England and Wales are facing a major crisis…[and] ten years ago, the Sentencing Council was conceived as a way of helping to control the growth of prison numbers'). To an extent, this preoccupation with the prison population has blunted the impact of the *Transform Justice* report, because – whatever might or might not have been envisaged ten years ago – the current reality is that it would be politically very difficult for the Council, even if it wished to do so, to argue for a major step change in the use of prison.[52] That does not, however, mean that the kind of evidence-based assessment of the value of imprisonment sentences, proposed by the British Academy, should not be discussed by the Council.

54. The *Transform Justice* report also specifically recommends the production of more overarching guidelines rather than offence-specific guidelines.[53] This reflects the greater interest of academics and pressure groups in general principles rather than in specific offence types, and it contrasts interestingly with judges' comments, previously noted, that they look at overarching guidelines much less often than they look at offence-specific guidelines (paragraph 35 above). This raises an interesting issue - **if, as is sometimes suggested, the Council is considering developing more overarching guidelines after 2020, how can it ensure that they are regularly referred to? It is suggested that it would be appropriate for careful thought to be given to this question.**

55. In paragraph 9 of this report, it was suggested that criticisms offered by academic commentators and criminal justice pressure groups constituted one of the two most significant challenges currently facing the Council, the other being its lack of resources. It is hoped that the detailed discussion in this subsection has substantiated

[50] Lord Justice Treacy, above n 32.
[51] Allen, above n 9.
[52] See for example the 'no quick fix' speech on the prison population by the [then] Justice Secretary, Liz Truss, on 13 February 2017.
[53] Allen, above n 9, section 7.

that judgement. The comments raised by the four documents discussed above are both wide-ranging and searching, and the Council needs to be alert to their import. Of course, some of the points can be adequately responded to, but others might well require some adjustment of the Council's methodology or priorities. These matters will be revisited in section D below, on 'Effectiveness'.

(f) Parliament and the Ministry of Justice

56. We have not spoken to any Members of Parliament about the work of the Council, although we recognise that the House of Commons Justice Committee regularly responds to Council consultations, receives the Council's Annual Report, and has held evidence sessions with the Chairman of the Council (for example in March 2016). As far as we are aware, the relationship with the Justice Committee works well.

57. We have been told that the Council once held an 'awareness day' in Parliament, but that attendance by MPs, other than those on the Justice Committee, was poor. We were however informed by an official of the Ministry of Justice that Ministers receive approximately one Parliamentary Question per week on sentencing issues, and that the responses to these questions frequently mention the Sentencing Council. **Possibly, therefore, there is scope to target MPs who have tabled such questions for a further event which would raise awareness of the work of the Council beyond the members of the Justice Committee.**

58. We are grateful to two senior civil servants working for the Ministry of Justice (MoJ) for discussing with us the relationship between the MoJ and the Council. As an arms-length body, it is well established that the Council is independent of the MoJ. That independence is indeed vital given the principle of the separation of powers, the remit of the Council, and the fact that the Council has a judicial majority. Nevertheless, the relationship between the two bodies is very close, and this is reflected in particular in two ways: first, in that it is the MoJ's responsibility to set the Council's budget; and secondly, in that a senior civil servant from the MoJ regularly attends meetings of the Council as an observer. Some might question whether these features of the relationship compromise the Council's independence, but that was not the view of most Council members; indeed, they welcomed the presence of the MoJ official at Council meetings as a way of ensuring that there was good communication between the two bodies on substantive issues. We understand that there is a Memorandum of Understanding between the MoJ and the Council, but we have not seen this, so we are not able to comment on it.

59. An important area of collaboration between the Council and the MoJ is that relating to Analysis and Research issues. The MoJ is responsible for the collection and processing of data relating to sentencing in England and Wales, and these data are routinely made available to OSC staff for analytic purposes. This data-sharing seems to work well, and it is also reciprocal – that is, the Council makes available its own data (such

as the CCSS dataset) to the MOJ. More broadly, the MoJ also has a significant social research arm, and its priorities can sometimes coincide with those of the Council. For example, we were informed that the Justice Secretary [at the time of research was] 'absolutely focused' on the better development of policies to reduce reoffending, and that, within MoJ, significant research-related resources [were] being deployed in support of this objective, including some 'advanced analytics'. The Council is also (see Section D below) increasingly interested in the issue of effectiveness, which necessarily includes (but is not restricted to) the issue of the reduction of reoffending. **According to an MoJ respondent, there is scope for enhanced communication between the two bodies on effectiveness issues; we also understand from OSC sources that this has now started.**

60. A further analytic issue concerns the availability or otherwise of statistical material relating to sentencing. The founding statute provides that the Council 'may promote awareness of matters relating to sentencing by courts in England and Wales', including information about 'the sentences imposed by courts'.[54] In the past, data of this kind were routinely available in the annual *Criminal Statistics,* broken down by the essential categories of (i) indictable offences or summary offences; (ii) age (youth/young adult/adult); (iii) gender. Whilst these data are still available on MoJ online sources, they are extremely difficult to find, and even academics professionally interested in sentencing are unanimous in their view that the accessibility of such data has significantly deteriorated in recent years. Since the Council has a general duty to promote confidence in sentencing, it can hardly be happy about this situation; but, equally, it does not itself have the data to rectify matters. It is therefore recommended that **the Council should liaise with MoJ analytic staff to agree on a set of statistical tables that will allow easy understanding of time-trends in sentencing.**[55] **Members of the public accessing the Council's website to learn about trends in sentencing could then be provided with a simple link to access this information**.

61. Before leaving the question of the Council's relationship with the MoJ, it seems necessary to mention the situation that arose in the recent past where, as a result of what was described to us as a 'temporary emergency control' measure, the MoJ imposed a freeze on recruitment of staff not only within the Ministry itself, but also in the arms-length bodies for which it is responsible. In the case of the Council, this period, although short, had a major effect because two members of its small staff (respectively a statistician and the Head of Communications) left the Council during this period, and could not be replaced until the freeze was over. Inevitably, in a small unit such as the Council, the absence of two key staff members had a disproportionate effect, because the loss of a single member of staff is always more serious in small

[54] Coroners and Justice Act 2009, s. 129(2).

[55] As an illustration of problems with readily-available data, consider the page on sentencing (p.6) in the MoJ's Criminal *Justice Statistics Quarterly* published in February 2017. While there is certainly some valuable information in this source, the Figure on trends in sentencing outcomes for indictable offences since 2006 mixes all age-groups in an unhelpful way, and the high proportion of 'other disposals' is presumably particularly influenced by youth court sentences.

organisations. We were told by an MoJ official that this situation is unlikely to recur, because 'lessons have been learned'; it is to be hoped that this is indeed the case.

(g) The Media and the Public

62. As previously noted, there is always media interest when the Council publishes a new definitive guideline, and Council members' media appearances on these occasions are usually effective. Some sections of the media are, however, deliberately unhelpful. Thus, we were told that it is not uncommon for staff in a 'hostile' newspaper to publish information combining the most serious type of offence and the least serious penalty within an offence range, although they well know that such a combination is very unlikely to occur.[56] There is probably little that can be done to combat extreme tactics of this kind, although more generally the best approach to those pressing for more punitive sentences is likely to be to emphasise the clear evidence that this is not necessarily a view shared by victims (see paragraph 40 above).

63. Inevitably, most members of the general public know little or nothing about the work of the Council, and it is difficult to see how the Council, with its very limited resources, can communicate more effectively with this broad constituency. However, **one possibility would be for the Council to open itself up to a television documentary about its work, led by a respected director (along the lines of recent documentaries on each of the two Houses of Parliament).**

64. In this general area of communication, some commentators have naïve expectations about the Council 'leading' public opinion on sentencing. As a general strategy, this is not realistic either politically (because the Council is a quasi-judicial body, and it is not the role of quasi-judicial bodies to lead opinion in a general way) or practically (because the resources of the Council are too stretched).[57] This point does suggest, however, that the Council has something of a communications issue on its hands, which might be described as 'the management of expectations about the role of the Council and what it can achieve'. This point is developed in paragraph 66 below.

(h) Overview

65. The aim of this section has been to examine the Council's relations with the wide range of organisations, groups and individuals with whom its work inevitably interacts, and to make suggestions about how some of those relationships might be improved in

[56] For example, Category A1 in the 'street and less sophisticated robbery' guideline can include using a weapon (high culpability) with which serious physical injury is caused to the victim (high harm). The category sentencing range for this category is 7-12 years custody. Category C3 – the least serious category - has a category range of 'high level community order to 3 years' custody'. Using the broad concept of the 'offence range', a newspaper might report that 'The Sentencing Council says that thugs carrying weapons who rob people in the street and cause them serious harm can get off with a community sentence'.

[57] This is not to suggest that the Council cannot have a social effect through its regular work, just as the development of the concept of judicial review by the English courts in the period since 1950 has had a major effect on the work of many public bodies. Indeed, the fact that the stepwise guideline system is now widely accepted is itself clear evidence that the work of the Council can incrementally achieve change.

the future. The analysis has, it is hoped, re-emphasised the Council's pivotal position in the CJS, and the complexity of its role as a body that needs ideally to develop and retain high esteem among a very varied group of 'stakeholders'.

66. In paragraph 64 above, it was suggested that one of the problems facing the Council is that some members of the public have naïve expectations about its role, and what it can appropriately achieve. This point was also implicit in some of the discussion in subsection C (e) above, relating to pressure groups**. To combat unrealistic expectations of this kind, it is recommended that the Council should devote some serious discussion to how it wishes to present itself; and the role that it chooses needs to be one that can be convincingly defended in discussions with each of the various 'audiences' to which it must relate (e.g. victims, offenders, police, prosecutors, the media, pressure groups and the general public).** As a starting point for that discussion, one suggestion that the Council might wish to consider is to present itself as a quasi-judicial body.

67. One person who we interviewed said that it had been a significant achievement for the Council to establish full acceptance and legitimacy with its primary stakeholders (judges and magistrates), and it now needed to repeat the feat with its other stakeholders. That is a challenging agenda, which will probably never be fully achieved; but it is certainly an appropriate goal for the Council to bear in mind. To that end, **one appropriate strategy that the Council might consider would be to devote time, at one of its meetings each year, to consider its relationships with each of the individuals and groups discussed in this section.**

D. The Effectiveness of the Council

68. The issue of effectiveness is central to the Council's *raison d'etre,* and is clearly implied by the nature and scope of the terms of this Review, as detailed in paragraph 1. This topic can be considered in two ways: first, by assessing the effectiveness of the Council in carrying out its tasks; and secondly, by assessing whether the development of sentencing guidelines has achieved, or could achieve, various specified longer-term consequences (for example, a reduction in reoffending). These two matters will be considered separately.

(a) Effectiveness in Carrying Out Statutory Tasks

69. One aspect of the question whether the Council is effectively carrying out its statutory tasks, concerns issues of *guideline compliance* and *guideline impact.* These topics have been considered in paragraphs 26-30 above, and the remainder of this subsection builds on that discussion.

70. In light of the critique of the Council's work by Andrew Ashworth (above, paragraph 51), it is necessary to ask whether the approach to sentencing guidelines that the

Council has adopted still allows sentencers too much discretion and flexibility, and therefore whether excessive inconsistency remains in the system. In other words, is the guideline system ineffective, because it is failing to deliver the Council's aims of increased transparency and consistency in sentencing (paragraph 7 above)?

71. There have been some empirical studies of consistency, using data from the Crown Court Sentencing Survey. The most interesting for current purposes is a paper by Pina-Sanchez and Linacre, which examines whether inconsistency between comparable cases decreased as a consequence of the Council's 2011 assault guideline.[58] These authors studied sentencing for three assault offences (GBH s.18, GBH s.20 and ABH) before and after the introduction of this guideline; and, recognising the complexity of measuring consistency (see paragraph 31, above),[59] they deployed three different statistical methods, in each case controlling for a range of factors that might justifiably have influenced the sentence level. (These control variables included both offence-related and offender-related factors).[60] Each of the three methods showed that, *when controlled in this way*, there was a reduction in inconsistency between judges following the implementation of the guideline,[61] although it was not possible to say definitively that this reduction was caused by the guideline. These results therefore appear not to support Ashworth's claim that the introduction of guidelines has done little to reduce discretion, and therefore inconsistency, among sentencers.[62]

72. The authors of this paper do not disaggregate the data for the three types of assault that they studied. However, the separate research analysis by Sentencing Council staff, using the same dataset, has shown that for two of the three offences (GBH s.18 and ABH) there were unanticipated increases in the severity of sentences after the introduction of the guideline (see paragraph 27 above). This emphasises the complexity of research into sentencing: taking the two sets of results together, it seems probable (though not certain) that the assault guidelines simultaneously reduced inconsistency *and* resulted in unanticipated increases in severity for some offences.

73. It will be recalled from Ashworth's critique (paragraph 51 above) that he expressed anxiety about the fact that 'there is little principled guidance on aggravation and mitigation, on previous convictions, and on totality of sentences'. Hence, by

[58] J Pina-Sanchez and R Linacre 'Enhancing Consistency in Sentencing: Exploring the Effects of Guidelines in England and Wales' (2014) 30 *Journal of Quantitative Criminology* 731.

[59] As the authors state, 'overall variability in sentencing [is] composed of *legitimate* variability ...and variability due to [inappropriate] inconsistency', yet it is 'practically impossible to control for all relevant ...factors that [legitimately] explain differences between cases': ibid at pp. 734, 738 (emphasis added).

[60] Ibid at p.737. 'Offence' variables included whether the assault was prolonged, whether the victim was a vulnerable person, and whether the crime was committed under the influence of drugs; 'offender' variables included remorse and whether the offender was a main carer.

[61] The words in italics are emphasised because, using one of the methods, it was found that the *overall* variability between sentences increased following the implementation of the guideline; but after introducing the controls, 'variation in sentencing among cases with similar legal factors is decreasing': ibid at pp.740-41.

[62] It should be noted that this paper by Pina-Sanchez and Linacre was published after Ashworth's textbook had been sent to the printers.

implication, he is recommending that the Council should develop generic definitive guidelines on the first two of these topics, and an improved guideline on the third. The strength of the case for this recommendation will be examined by considering the topics of previous convictions and totality.

74. An important study on previous convictions, which helpfully combines both legal and statistical analyses, was developed by Julian Roberts and Jose Pina-Sanchez.[63] These authors draw attention to s. 143(2) of the Criminal Justice Act 2003, which altered the law by providing that, when considering 'the seriousness of an offence …committed by an offender who has one or more previous convictions, the court *must* treat each prior conviction as an aggravating factor if…the court considers that it can reasonably be so treated' (emphasis added). The statute then lists only two factors that may be considered in assessing whether previous convictions can 'reasonably' be treated as aggravating; these are paraphrased in recent Council guidelines as: '(a) the *nature* of the offence to which the conviction relates and its *relevance* to the current offence, and (b) the *time* that has elapsed since the conviction' (emphasis in original). As Roberts and Pina-Sanchez point out, at the time of the 2003 Act 'some scholars were apprehensive that [the enactment of s.143(2)] would greatly increase the aggravating effect of previous convictions, by encouraging courts to treat each prior conviction as aggravating' – an approach that would have conflicted with much prior sentencing practice in England. But the authors also note that, given the mention of the factors of 'recency' and 'relevance' in the second part of the statutory provision, 'there is no mandatory requirement to take all convictions into account'.[64] They therefore conducted an empirical analysis of Crown Court sentencing, using CCSS data for 2011, to test in particular whether these data supported either (i) a model whereby an accumulation of prior convictions continuously increases the severity of sentencing (the 'cumulative sentencing model'); or (ii) the more traditional English model of 'progressive loss of mitigation' (whereby a lack of previous convictions provides mitigation up to a certain point, after which additional convictions do not further influence the sentence level). The conclusion of their analysis was that 'for most offences courts continue to apply the principle of the progressive loss of mitigation… although some variation in the effect of previous convictions does emerge between offences'.[65]

75. Arising from this analysis, it can be argued – following the logic of Ashworth's argument that the Council's guidelines provide insufficient guidance - that the present practice whereby a paraphrase of the wording of s.143(2) CJA 2003 is printed in Step Two of offence-specific guidelines as a 'statutory aggravating factor,' is inadequate. Instead, it might be argued, given that there are competing interpretations of the

[63] J V Roberts and J Pina-Sanchez, 'Previous Convictions at Sentencing: Exploring Empirical Trends in the Crown Court' [2014] *Criminal Law Review* 575.
[64] Ibid at p. 578-9.
[65] Ibid at 575.

statutory provision, the Council should more explicitly address the question whether (for example) the 'progressive loss of mitigation' model should be enshrined in a definitive guideline. On the other hand, it is interesting to consider the brief comments of Pina-Sanchez and Linacre on previous convictions within their analysis of the effects of the Council's assault guideline. They note that the section on previous convictions in the former SGC guideline on assault had been 'heavily criticised', and that, statistically, the number of previous convictions 'had a more predictable effect on sentencing [i.e. inconsistency was reduced] after the new guideline came into force'.[66]

76. By contrast with previous convictions, there is a complete lack of empirical data on the courts' use of the totality principle: no research has ever been conducted on this topic in England and Wales, and it is impossible to study it using CCSS data because judges completing forms for that survey were asked to provide information only for the principal offence. There is even some uncertainty about the frequency with which 'multiple offence sentencing' (MOS) occurs: the Consultation document issued in preparation for the Council's 2012 totality guideline stated that about 24 per cent of cases (presumably including summary cases) came into this category, but an earlier statistical study of Crown Court sentencing found that 62 per cent of persons sentenced in that Court were convicted of two or more offences.[67] This older Crown Court figure is roughly comparable with the proportion of MOS cases in studies of higher criminal courts in other jurisdictions; if it also reflects the contemporary situation in the Crown Court in England and Wales, then the issues around totality are not a minor matter.

77. MOS has also been largely neglected as a topic by both sentencing theorists and empirical researchers worldwide. However, a very small number of empirical studies has been completed, in four different jurisdictions (Finland, Germany, Sweden and Victoria), and from these it has been possible to identify some principles that judges have used when sentencing cases of this kind.[68] Notably, these principles are more specific than the Council's guidance that 'when sentencing for more than a single offence, [courts] should pass a total sentence which reflects all the offending behaviour and is just and proportionate',[69] although the Council's explanatory

[66] Pina-Sanchez and Linacre, above n 58 at p.744.

[67] D Moxon *Sentencing Practice in the Crown Court* Home Office Research Study 103 (HMSO 1988), p.9.

[68] These principles, and the empirical evidence on which they are based, are discussed in A E Bottoms 'Exploring an Institutionalist and Post-Desert Theoretical Framework for Multiple Offense Sentencing' in J Ryberg, J V Roberts and J de Keijser (eds.) *Sentencing Multiple Crimes* (Oxford University Press 2017). In a nutshell, the principles suggest that judges consider it is fair to reduce the unadjusted aggregate sentence: (i) if the offences are closely connected; (ii) if the aggregate of the unadjusted sentences would be large (because a failure to reduce in such circumstances will be crushing to the offender's future prospects); (iii) if the aggregated sentences for many less serious offences would cumulate to a length of sentence normally passed for a much more serious single offence (because this sends the wrong message about proportionality).

[69] Sentencing Council, *Offences Taken into Consideration and Totality: Definitive Guideline* (2012), p.6.

document on totality alludes to similar principles.[70] Each of the principles makes normative sense, but they are significantly different from one another, and might therefore be differentially applied by different judges. If, as seems likely, similar (unarticulated) principles are applied by sentencers in the English Crown Court, then, in the absence of express guidance from the Council, there would certainly seem to be the potential for the inconsistency of practice that Ashworth fears. To make progress on this matter, it would however be necessary to research the main features of existing practice in England and Wales.[71]

78. **In the light of the evidence summarised in paragraphs 73-77 above, it is recommended that the Council should consider whether it wishes to follow Professor Ashworth's advice by developing an overarching guideline on previous convictions and/or revisiting the existing overarching guideline on totality.**

(b) Effectiveness in the Longer-Term Consequences of Sentencing

79. In textbooks on sentencing, it is standard practice to classify theories of punishment under two main headings: first, consequentialist theories, which focus on achieving various consequences, such as deterrence, rehabilitation or incapacitation; and secondly, broadly retributivist theories (now often described as 'censure theories'), which particularly emphasise the point that punishment is imposed in order to censure inappropriate behaviour. Looked at through this theoretical lens, the Council's guidelines seem to be mainly (though not exclusively) underpinned by a censure-based approach. Thus, Step One of the guidelines, following the steer in s.121 (2) and (3) of the Coroners and Justice Act 2009, explicitly adopts censure theorists' standard criteria for assessing the seriousness of misbehaviour, namely harm and culpability; and when one looks at the headings of the various 'Steps' of offence-specific guidelines, only one of them (Step Five on 'Dangerousness') is explicitly consequentialist, and that Step will (thankfully) be relevant in only a small proportion of cases. However, as described earlier in this report (paragraph 38), the Criminal Justice Act 2003 does contain a section (s. 142) which requires 'any court dealing with an offender' to 'have regard to the following purposes of sentencing', and these purposes include – in addition to the protection of the public – the consequentialist purposes of 'the reform and rehabilitation of offenders' and 'the reduction of crime (including its reduction by deterrence)'. Moreover, we have seen that one of the points pressed by critics of the Council is that it has paid insufficient attention to its duty to 'have regard to…the cost of different sentences *and their*

[70] Sentencing Council, *A Short Guide: Sentencing for Multiple Offences (Totality)* (2011).

[71] It is also worth noting that many jurisdictions (including all the four for which we have empirical research findings) differ from England and Wales in that they require sentencers to state, in open court, the unadjusted sentence for each offence. Since it could be argued that this practice would be helpful to victims, this is another matter that the Council might wish to consider.

relative effectiveness',[72] and it has been argued above (paragraph 50) that there is merit in this criticism.

80. Against this background, two separate issues arise. First, it is necessary to consider what (if any) guidance the Council should be offering to sentencers on the specific issues of rehabilitation and deterrence (both of which are explicitly mentioned in s.142 of the 2003 Act). Secondly, given that consequentialist issues have so far featured only to a limited extent in the deliberations of the Council, should it pay more attention to these matters in the future; and if so how might this best be achieved?

81. As regards *rehabilitation*, there is a very large literature on this topic, which cannot be fully discussed here. The issue of primary importance – certainly from the point of view of critics of the Council – is the comparative effectiveness of community penalties and short prison sentences in reducing reoffending. In the last decade, this topic has been the subject of several literature reviews, the most recent of which was conducted by the Swiss criminologists Villettaz, Gillerion and Killias at the request of the National Council for Crime Prevention in Sweden,[73] and subsequently also published as a (prestigious) Campbell Collaboration Systematic Review.[74] The Villettaz et al. review limited its coverage to studies with rigorous methodological controls – namely, randomised or natural experiments, or quasi-experimental studies using propensity score matching. The main conclusion of the review was stated very succinctly: 'although a majority of the selected studies ...show non-custodial sanctions to be more beneficial in terms of re-offending than custodial sanctions, no significant difference is found in the meta-analysis based on four [randomised] controlled and one natural experiments'.[75] Since experimental studies are, in principle, methodologically superior to quasi-experiments, these findings leave open the possibility that the controls used in the quasi-experiments were insufficient to counteract the likelihood that those sent to prison will have had a greater propensity to recidivism than those receiving non-custodial sanctions. Hence, the safest scientific conclusion is that we are unable at present to detect any aggregate difference in the effectiveness of non-custodial and short custodial sentences in the prevention of reoffending. In saying this, however, it is also important to note the complete absence of any evidence suggesting that short prison sentences might be better than non-custodial sentences in preventing re-offending.

82. Given neutral findings on the question of effectiveness in preventing reoffending, it is nevertheless reasonable to argue that there might be other appropriate criteria for choosing between custodial and non-custodial sentences, such as cost and the degree

[72] Coroners and Justice Act 2009, s.120(11)(e), emphasis added.
[73] P Villettaz, G Gillerion and M Killias *The Effects on Re-Offending of Custodial versus Non-custodial Sanctions* (National Council for Crime Prevention, 2014).
[74] *Campbell Systematic Reviews*, 2015:1
[75] Villettaz et al, above n 73 at p.12.

of impact on the offender's life. All of these criteria favour non-custodial sentences. Thus, there is clearly evidence to support the view of the [then] Lord Chief Justice that 'much more could be done to explore keeping some offenders out of jail'.[76]

83. But if this kind of policy is to be pursued, how might the custody/non-custody choice be best dealt with, within the guidelines system? A relevant matter in this respect is the statutory injunction that 'the court must not pass a custodial sentence unless it is of the opinion' that the offence(s) was/were 'so serious that neither a fine alone nor a community sentence can be justified for the offence'.[77] That section is, of course, quoted in the overarching guideline on the Imposition of Custodial Sentences, where the Council goes on to say that, in light of this provision, sentencing courts should explicitly ask themselves the question 'is it unavoidable that a sentence of imprisonment be imposed?' Indeed, the guideline goes on to say that 'custody should not be imposed where a community order could provide sufficient restriction on the offender's liberty…while addressing the rehabilitation of the offender to prevent future crime'.[78]

84. As noted, these requirements are stated in the overarching 'Imposition' guideline. By contrast, no offence-specific guideline contains a specific Step relating to the custody threshold. Given the possibility that sentencers might not remember to ask themselves the 'is custody unavoidable' question when going through an offence-specific guideline, **the Council should consider whether it would be helpful to add this question as a standard additional Step in guidelines for all imprisonable offences**.[79]

85. Possibly, also, the Council might wish to reinforce this point in cases which are, as the Imposition Guideline puts it, 'on the cusp of' a short custodial sentence.[80] In a thoughtful essay on personal mitigation, John Cooper QC states, from his regular practice in criminal courts, that in the last decade or so pre-sentence reports (PSRs) have significantly changed in character. It used to be the case, he suggests, that the PSR was 'a document which concentrated upon the defendant's rehabilitative prospects', and which aimed 'to positively consider probation or other non-custodial sentencing options'. By contrast, 'the present-day PSR generates schedules of risk assessments and dangerousness indices'.[81] There appears to be no recent research on PSRs, but conversations with experienced members of the probation service suggest that Cooper's description is broadly correct. Moreover, since his essay was published,

[76] Lord Thomas of Cwmgiedd, in evidence to the House of Commons Justice Committee: *The Times,* November 23rd, 2016.
[77] Criminal Justice Act 2003, s.152(2).
[78] *Imposition of Community and Custodial Sentences: Definitive Guideline* (Sentencing Council 2016), p.7.
[79] This would be analogous with the treatment of totality, for which there is a generic Totality guideline, but Step Six of offence-specific guidelines also reminds sentencers to consider this issue at this point in the decision-making process.
[80] *Imposition Guideline*, above n 78, p.7.
[81] J Cooper 'Nothing Personal: The Impact of Personal Mitigation at Sentencing since Creation of the Council 'in A Ashworth and J V Roberts (eds.) *Sentencing Guidelines: Exploring the English Model* (Oxford University Press 2013), at p.162.

there has been further pressure to ensure that PSRs are provided 'on the day' without adjournment,[82] as well as a declared management objective that 'the maximum number (likely to be up to 75%)' of PSRs will be prepared by Probation Service Officers (PSOs) rather than by (more fully trained) Probation Officers.[83] None of this sounds particularly helpful as a support for a court that might wish, in answer to the 'is custody unavoidable?' question, to understand more fully the social circumstances of the offender, and to assess whether a realistic rehabilitation plan can be developed for him (or her). To strengthen the hand of such a sentencer, if the Council is minded to support the suggestion in the previous paragraph, **the possible new 'Is Custody Unavoidable?' Step in offence-specific guidelines might usefully contain a reminder that the court can request an adjournment to ensure that a more considered and reliable PSR is obtained in the interests of better decision-making.**

86. This discussion of rehabilitation has focused on the custody threshold issue as the most important issue for the Council to consider, but it should be briefly noted that there are other strands of research evidence relating to rehabilitation that give grounds for cautious optimism about the reduction of recidivism. These other possibilities include restorative justice[84] and problem-solving courts[85], but within the time-frame of this report it has not been possible to develop these matters further.[86]

87. The second specific dimension of consequentialist effectiveness to be considered is that of *general deterrence*; that is to say, the possibility of reducing the offending levels of persons other than the defendant by imposing on him (or her) a relatively severe sentence. It will be recalled that this issue was raised by Nicola Padfield (paragraph 52 above); she suggested that it is 'the job of the Sentencing Council…to put the case against deterrence as a reason to increase sentence lengths [since] it is well known that increasing the offender's belief in the likelihood of detection, arrest and conviction is much more likely to be effective'. An initial question is, therefore: does the research evidence support Padfield's empirical claims?[87]

88. The short answer to this question is 'almost always yes, but with some limited exceptions'. To begin with the affirmative part of this answer, deterrence scholars are now unanimous that, as a recent authoritative review has put it, 'the evidence in support of the deterrent effect of the certainty of punishment is far more consistent

[82] National Offender Management Service *Determining Pre-Sentence Reports: Sentencing within the New Framework* (2016) PI 04/2016, updated March 2017.
[83] National Probation Service *E3 Blueprint* (2015), p. 15.
[84] See especially Shapland et al, above n 35.
[85] See especially O Mitchell, D B Wilson, A Eggers and D L Mackenzie 'Assessing the Effectiveness of Drug Courts on Recidivism' (2012) 40 *Journal of Criminal Justice* 60.
[86] Both of these possibilities are highly congruent with the recently-developed 'responsive censure' approach to penal theory, discussed at paragraph 48 above.
[87] As noted in paragraph 52 above, Nicola Padfield's critique was, at the time of its publication, responded to by the Chairman of the Council, Lord Justice Treacy. However, he did not discuss the relevant empirical evidence, which is the sole focus of the present discussion.

than that for the severity of punishment'.[88] Indeed, the bulk of the evidence suggests that increases in sentence severity have zero or very weak deterrent effects.[89] This consistent finding is sometimes regarded as counter-intuitive, but additional research evidence offers many reasons for it. For example: (i) potential offenders might not be aware of the increase in penalties; (ii) a sentence is a contingent future event which is often discounted by potential offenders, because they believe they will not be caught;[90] and (iii) a research review of the determinants of potential offenders' perceptions of risk shows that 'certain situational contingencies', such as drinking or drugtaking, emotional arousal and/or pressure from associates, 'have a demonstrated tendency to override [the] cognitive system'.[91]

89. Research has also, however, suggested some limited exceptions to the general pattern of results described in the previous paragraph. The best-attested of these exceptions concerns so-called 'focused deterrence strategies' developed by some police departments in the United States. In these programmes, police deliberately target a group of known offenders, and explicitly inform them and their loved ones that if further offences are committed they will press for the highest possible penalties.[92] Central to this success, it seems, is explicit communication to a limited audience who can be made subject to police surveillance. Perhaps unsurprisingly, less localised 'focused deterrence' sentencing strategies are not so consistently effective, but they can also be more effective than the simple (unfocused) raising of sentence levels. [For example, it is often suggested that the increasing sentences for offenders who carry a gun will deter others from arming themselves when committing crime, but a recent review of research evidence in the United States found 'mixed' evidence on this point, with a contrast between 'city-level studies suggesting reductions in gun homicides and possibly other types of gun crime…and nationwide studies suggesting no crime prevention effects at the state level'.[93]]

90. What are the implications of research on general deterrence for the Council? Perhaps the most important implication is an indirect one. As previously indicated (paragraph 15 above), when developing offence-specific guidelines the Council always begins by obtaining information on current sentencing levels; and frequently (but not always) the guideline is constructed with the aim of roughly stabilising those levels. On occasions, these preliminary analyses have uncovered evidence of an upward trend in sentencing severity in the immediate past. In such circumstances, it is important to

[88] D Nagin 'Deterrence in the Twenty-First Century' (2016) 42 *Crime and Justice: A Review of Research* 199.
[89] For a short summary see A E Bottoms and A von Hirsch 'The Crime Preventive Impact of Legal Sanctions' in P Cane and H M Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) at pp. 98-106.
[90] Indeed, research also suggests that, because detection rates are low, more experienced offenders have substantially lower expectations of being caught than do neophyte offenders.
[91] R Abel 'Sanctions, Perceptions and Crime' (2013) 29 *Journal of Quantitative Criminology* 67 at 93.
[92] A A Braga and D L Weisburd 'The Effects of "Pulling Levers" Focused Deterrence Strategies on Crime', *Campbell Systematic Review* 2012:6.
[93] A A Braga 'Guns and Crime' in F Parisi (ed) *The Oxford Handbook of Law and Economics, vol 3: Public Law and Legal Institutions* (Oxford University Press 2017) at 364 (see also detailed evidence at pp 353-357).

examine what has caused the upward trend. If it seems that judges have increased sentences in an attempt to achieve general deterrent effects, then the research evidence suggests that the Council should consider whether the upward trend is justifiable (given the evidence on 'focused' strategies) or whether – as the bulk of the evidence on sentence severity would suggest – there is little to justify the upward trend. In other words, **when considering existing sentencing levels and trends in the initial stages of guideline construction, the Council should appraise these levels and trends in the light of the research evidence on general deterrence.**

91. In paragraph 80 above, it was suggested that, beyond the specifics of rehabilitation and general deterrence, a more general question about effectiveness needs to be considered. That question is: should the Council in future pay greater attention to evidence on the longer-term effects of sentencing, and if so how might this best be achieved? As regards the first part of this question, it is recommended that, **since s. 142(1) of the Criminal Justice Act 2003 includes consequentialist aims among the purposes of sentencing, when constructing guidelines the Council should when appropriate consider research evidence on consequences.** As regards the second part of the question, this is perhaps something best considered in detail by the Council if it accepts the main recommendation above.

92. An additional comment does however need to be made. As the discussions of both rehabilitation and general deterrence have shown, it is not always easy to convey the results of complex research findings in the form of succinct messages. That raises questions about how the Council should inform itself about research findings, but also – and more particularly - how some of the main research results can best be communicated to sentencers?

93. There are no straightforward answers to this question, but the Council might wish to reflect on two possibilities. First, it is of interest that the new Scottish Sentencing Council has chosen, as one of its first tasks, to develop a guideline on the basic principles of sentencing,[94] as did the SGC in England and Wales when it was set up in 2004. The Council has so far chosen not to pursue such a strategy, nor to comment definitively on the purposes of sentencing. However, **the Council might wish to consider whether a guideline, or less formal guidance, on s.142(1) of the Criminal Justice Act 2003 should be developed, in the course of which comments would be made on relevant empirical research findings.** The second possibility would be to build on an example from an earlier era. From 1964 to 1990 the Home Office published successively five editions of a booklet entitled *The Sentence of the Court*,[95] the main text of which was designed to provide basic information to sentencers (especially magistrates) about the principal sentencing options available to them. At

[94] [The Scottish Sentencing Council published a draft guideline on 'The Principles and Purposes of Sentencing' on 1st August 2017. No definitive guideline on this topic has yet been issued].

[95] *The Sentence of the Court*, fifth ed. (Home Office 1990).

the end of the booklet, however, a short section attempted to summarise the main findings of empirical research as they related to sentencing choices. A possibility that **the Council might consider** would be to revive this communications strategy: this would involve **commissioning a summary of relevant research findings from an appropriately-qualified individual or group, which the Council could then make available as a background document for sentencers**.

E. Responding to the Terms of Reference for the Review

94. In this final substantive section, it is appropriate to return to the terms of reference for this Review. As stated in para.1 above, these are as follows:

- The ways in which the Council can best exercise its aims, objectives and statutory duties in the future;
- Whether there are any aims, objectives or statutory duties that could be more fully addressed in the future and how the Council might go about this;
- The analytical data available to the Council and how it might use this in relation to its aims, objectives and statutory duties going forward;
- Whether there are any non-policy or analytical functions that might be improved to help contribute to the Council exercising its duties in the future (e.g. governance or communications arrangements);
- Areas in which the Council should consider conducting further research;
- Areas where improvements may need to be made, and whether there are any further areas that the Council should be contributing to in the sentencing arena.

95. Of course, many comments, and some recommendations, on these matters have been made in the preceding sections of this report. Section F below collects together all the main recommendations and suggestions highlighted in previous sections, but this section has a broader purpose: namely, to highlight issues especially relevant to each of the terms of reference. This will be done using the headings provided by the Terms of Reference.

(a) The ways in which the Council can best exercise its aims, objectives and statutory duties in the future

96. It is the clear conclusion of this Review that the Council has achieved a great deal in the seven years of its existence. Its achievements include:

(i) The development of a unique style of 'Stepwise' sentencing guidelines which aim to avoid the contrasting vices of excessive sentencer discretion and excessive straitjacketing of sentencers by a guideline system;

(ii) The widespread acceptance of the guideline system by magistrates and judges, possibly (although this is speculation in the absence of research evidence) because a guideline system which allows some discretion allows sentencers both to be guided and to feel that confidence is being placed in their use of discretion;

(iii) The development of a sophisticated methodology for the production of guidelines, especially offence-specific guidelines;

(iv) Production of a large number of guidelines, both offence-specific and overarching, that have in significant ways transformed sentencing law in England and Wales;[96]

(v) The development of a unique sentencing research database, the Crown Court Sentencing Survey, that has allowed several key sentencing topics to be examined in more detail and depth than was previously possible in England and Wales;

(vi) Evidence (derived from the Crown Court Sentencing Survey) that at least one guideline (the assault guideline) resulted in more consistent decision-making by sentencers;

(vii) The development of excellent working relationships within the Council and OSC, with a strong sense of commitment to the work of the Council.

97. Of course, there are other dimensions of the work of the Council that are not so strong, but the above achievements give it a very solid platform from which to move forward.

98. The Council is perhaps now moving to a significant transition point. Up to now, the main focus of its work has been on the production of guidelines, in most instances where no previous guidelines existed. But the coverage by guidelines of all the main offences is expected to be completed by about 2020, so there is now an opportunity to look ahead to a different set of challenges. **Some evidence has been received that in the recent past the need to produce many guidelines has sometimes prevented the Council from developing an appropriately wide vision of its role and responsibilities, and the Council might wish to consider whether there is merit in this view.**

99. Section C of this report might perhaps assist the Council in thinking about the future. As set out in that section, it is clear that sentencing decisions are pivotal to the functioning and legitimacy of the criminal justice system, and the Council is now pivotal to the sentencing system. This gives the Council a key role that has not always been appreciated by commentators. But it also means that **the Council needs to develop its own legitimacy with many 'stakeholders', including victims, offenders,**

[96] We were told on a number of occasions by interviewees that courts now rely to a significantly lesser degree than in the past on the standard books on sentencing law, which have in certain respects been replaced by guidelines.

police and criminal justice pressure groups: and that, perhaps, is key to how it can 'best exercise its aims and objectives in the future'.

(b) Whether there are any aims, objectives or statutory duties that could be more fully addressed in the future and how the Council might go about this

100. This issue is best treated as a detailed supplementary question to the first issue. On this basis, three specific items perhaps stand out as matters that could usefully be more fully addressed. In each case, the specific statutory duty will be identified.

101. The Council has a duty (in s. 128 of the Act) to monitor the operation and effect of its guidelines. Because of other agenda pressures, and resource constraints, the Council has so far fulfilled this duty only to a limited extent, although significant efforts are currently in progress to accelerate the programme of impact assessments (see paragraphs 27-28 above). It is important that this set of assessments is published as soon as is reasonably practicable.

102. In carrying out its monitoring task under s.128, and assessing what conclusions can be drawn from the monitoring, the Council is *required* to consider 'factors which influence the sentences imposed by courts' (s.128(2)(b)). However, MoJ data collection in relation to courts does not extend to collecting information about these factors, so this is a responsibility that the Council must address on its own. The gathering of such data was a key reason for the establishment of the Crown Court Sentencing Study (CCSS); and both the Council's own monitoring research (paragraphs 26-28 above) and other research on consistency and on previous convictions (section D above), have demonstrated how immensely valuable that survey has been. As noted in paragraph 23 above, for resource reasons it has been found necessary to discontinue the CCSS, and to replace it by 'bespoke' data collection exercises. While this has had the advantage of, for the first time, allowing occasional 'bespoke' data collections in magistrates' courts, as regards the Crown Court it has significantly diminished the extent to which the Council has been able to fulfil its statutory duty under s. 128 (2)(b). Clearly, the ideal situation would have been to continue with the CCSS *and* to conduct bespoke data collections in magistrates' courts. From outside the system, it is difficult to make recommendations about this matter, but constitutionally it does not seem to be a very satisfactory situation when an official body is unable to fulfil its statutory duties adequately because of the lack of resources granted to it.

103. As outlined earlier in this report (paragraphs 50 ff), a number of commentators, including a British Academy policy group, have drawn attention to the Council's relative failure, when developing guidelines, to address the issue of the cost and effectiveness of different sentences, notwithstanding the statutory duty in

s.120(11)(e) of the Act. Section D of this report makes a number of suggestions about how the Council might deal with this issue in the future.

(c) The analytical data available to the Council and how it might use this in relation to its aims, objectives and statutory duties going forward

104. All members of the Council with whom we spoke were very impressed with the quality of the analytical work conducted by OSC in support of the development and monitoring of guidelines, and all the information available to me supports that assessment. The major difficulty here, already alluded to in previous paragraphs, is the lack of resources. I have not examined financial matters in detail, but – for example – I understand that the current annual research budget available to the Council, over and above the salaries of its staff, is less than £150,000, a figure that might reduce in future years. From a university perspective, such a sum would fund one relatively modest research grant, which gives little scope for creative analytical development by the Council.

105. Looking to the future, it might be possible to create a 'Sentencing Research Forum' with funding from sources other than the Council and the MoJ, and a membership of researchers (probably mostly from universities). If the Council were to participate in such a Forum, it could suggest topics for research that would be of value to the Council; it could perhaps also smooth the way for the achievement of research access. This suggestion is necessarily highly speculative, and would be contingent on securing funding, but it does seem to be worth brief mention in the overall context of this Review.

(d) Whether there are any non-policy or analytical functions that might be improved to help contribute to the Council exercising its duties in the future (e.g. governance or communications arrangements)

106. Certain suggestions on governance and communications have been made in earlier sections of this report (for example in paragraphs 13, 20, 21, 25 and 63). While, it is hoped, these points are all worth consideration by the Council, none of them could be described as major issues. Of greater significance is the presentational issue discussed in paragraph 64 concerning the need for the Council to manage the unrealistic expectations of some commentators, based on misunderstanding of the Council's role and/or a failure to appreciate its resource limitations. It was suggested in paragraphs 66-67 that there would be merit in responding to such comments by devoting specific attention to a discussion on how the Council can best present itself and its work to other groups and organisations, and perhaps to emphasising the Council's role as a quasi-judicial body.

107. However, the major 'non-policy or analytical function' requiring mention is the Council's shoestring budget. Enough has been said about this, but **to an outside observer the size of the budget does sit oddly alongside the pivotal role that the Council plays within the criminal justice system.**

(e) Areas in which the Council should consider conducting further research

108. As regards this issue, the substantive topic that stands out is multiple offence sentencing in general, and the totality principle in particular, because (i) there has never been any research on this topic in England and Wales; (ii) if the 1988 data are still valid (see paragraph 76 above) then this is a matter that affects more than half of the sentences in the Crown Court; and (iii) this is one of the two matters where the Council has a mandatory duty to prepare a guideline.[97]

109. Much more generally, **the Council should perhaps consider whether the Cabinet Office's Behavioural Insights Team (sometimes known as 'The Nudge Unit') would be able to provide some valuable insights that would assist in the development and impact of guidelines.** As the subtitle of a book about BIT states, some of its work has been able to demonstrate that 'small changes can make a big difference';[98] and among these changes have been changes of wording in tax reminder letters, leading to substantially faster payments. Given the reliance of the Council on written guidelines to communicate with its primary audience (magistrates and judges), there would seem to be merit (if the Council has not already done this) in holding exploratory discussions with BIT to assess whether a collaboration might prove fruitful.

(f) Whether there are any further areas that the Council should be contributing to in the sentencing arena

110. There remains one matter, not discussed earlier in this report, which in my judgement it would be valuable for the Council to watch closely in the next couple of years. It might be described as the 'elephant in the room' of the English sentencing system – a major malfunction that is universally acknowledged as such by sentencing scholars.[99] This malfunction is the rapid increase in the use of the suspended sentence since 2005, largely replacing community orders notwithstanding that the law has (since 1969) been clear that a suspended sentence should not be passed unless, in the absence of the power to suspend, the court would have sentenced the defendant to immediate imprisonment. This post-2005 trend has resulted in 'considerable net widening and no significant reduction in the use of immediate custody'.[100] The

[97] Coroners and Justice Act (2009) s120 (3)(b).
[98] D Halpern *Inside the Nudge Unit: How Small Changes Can Make a Big Difference* (Penguin 2015).
[99] See for example J V Roberts and A Ashworth 'The Evolution of Sentencing Policy and Practice in England and Wales 2003-2015' (2016) 45 *Crime and Justice: A Review of Research* 307.
[100] Ibid at 313.

malfunction in the use of the suspended sentence is not new – it can be traced back to the earliest days after this sentence was introduced in 1967.[101] However, in the period from 1991 to 2005 the issue largely disappeared, because a statutory provision then in force restricted the use of the suspended sentence to cases where there were 'exceptional circumstances'; and this greatly reduced courts' use of the measure. The malfunction then reappeared with the repeal of the 'exceptional circumstances' clause by the Criminal Justice Act 2003. In its 'Imposition' guideline of 2016, the Council has reiterated in strong terms the doctrine that the suspended sentence is a sentence of imprisonment, and therefore the 'is custody unavoidable' question (above, paragraph 83) must be answered in the affirmative before the question of suspension can even be considered. It is to be hoped that this fresh guidance will lead to a reduction in the use of the suspended sentence, but it has to be said that the historical evidence (excluding the 'exceptional circumstances' years) does not generate optimism that such a reduction will occur. **If the Imposition Guideline does not lead to a reduction in the use of the suspended sentence, then the Council should actively consider what further steps need to be taken to ensure that courts are using this sentence appropriately.**

F. Recommendations

111. This Section sets out the recommendations and points for the Council's consideration that have been developed in the course of this Review. Four 'overarching' recommendations are first outlined, encompassing topics that are relevant to all or many aspects of the Council's work. Brief additional text is supplied in respect of these recommendations. Then, secondly, each of the highlighted points made in Sections B, C, D and E is listed, so that they are conveniently available to the Council.[102]

(a) Overarching recommendations

112. The following four recommendations are seen as of special importance:

(i) Sentencing is one of two main 'distribution' points for cases processed within the criminal justice system (the other is the police custody suite). Given the rapid development of sentencing guidelines since 2004, the Council now has a key role in shaping sentencing practice in England and Wales. Recently, these two facts have caused a number of groups and organisations to focus considerable attention upon the work of the Council, sometimes critically. Some of these criticisms are based on unrealistic expectations about the role and characteristics of the Council. It is recommended that the Council should devote specific

[101] A E Bottoms 'The Suspended Sentence in England 1967-1978' (1981) 21 *British Journal of Criminology* 1.

[102] In the main, the language of the original highlighted text has been reproduced, but sometimes small changes have been made to reflect the different context.

attention to a careful delineation of its role, which can be used to answer such criticisms (see further, paragraph 66).

(ii) Because of its pivotal role in the criminal justice system, the Council needs to relate well to a range of different groups and organisations, who frequently have differing assumptions about and expectations of the sentencing process. A wise observation made in the course of one of our interviews was that it had been a significant achievement for the Council to establish full acceptance and legitimacy with its primary stakeholders (judges and magistrates), but that it now needed to repeat that feat with its other stakeholders (paragraph 67). To that end, it is recommended that the Council keeps in mind, and regularly reviews, its relationships with victims, police, prosecutors, offenders, academic commentators, pressure groups, Parliament, the media and the public (see further, Section C *passim*).

(iii) The Terms of Reference for this Review do not include financial aspects of the Council's work. Nevertheless, it is very clear that the Council is attempting to fulfil its pivotal role in the criminal justice system on a very limited budget which – like the budgets of most public sector bodies – has been cut in recent years. These financial constraints mean that the Council does not have the means to fulfil adequately all its statutory duties. It is hoped that the Council might be able to use this Review to argue for an increased budgetary allocation.

(iv) The great majority of contemporary theories of punishment conceptualise the sentencing process as concerned in part to censure the offender's behaviour proportionately to the harm and culpability of the offence (a backward-looking set of considerations), but also in part to achieve some desirable consequences (a forward-looking set of considerations). Both of these approaches are included within the statutory provision on the purposes of punishment (s.142(1)) of the Criminal Justice Act 2003). As mandated by s.121 (2) and (3) of the Coroners and Justice Act 2009, the Council's guidelines appropriately prioritise the first of these approaches (i.e. harm and culpability). However, the guidelines have paid little attention to the second approach, notwithstanding the provisions of s.120(11)(e) of the 2009 Act, and this is increasingly leading to criticism by external commentators. It is recommended that, while maintaining the primary focus on censure, appropriate attention is also given to consequentialist purposes of sentencing.

(b) Recommendations and Points for Consideration

- The Council might wish to consider whether the Governance Subcommittee should discuss the draft Business Plan before it is presented to the Council (paragraph 13).

- To maximise the efficiency of the Council's work it is desirable where possible to keep overall policy and the immediate needs of the Business Plan in close harmony (paragraph 20).

- It is recommended that both these sets of suggestions about membership or advice (i.e. relating to mental health/addictions, and to strengthening the defence 'voice') be taken forward by the Council as appropriate (paragraph 21).

- Comments have been made that that the language of the website could in some respects be made less formal, and so more user-friendly for members of the general public. It is recommended that the Council should consider whether there is merit in this view (paragraph 25).

- The Council may need to consider carefully the work priorities for the Analysis and Research group in the near future – whether it is better to prioritise completion and publication of impact assessments or fresh analytical work on proposed new guidelines (paragraph 28).

- It is recommended that when conducting impact assessments, if there is a pre-existing upward trend and sentence severity continues to rise after the implementation of a guideline, the Council should in future treat this as an unanticipated, and not an anticipated, increase in the sentence level (paragraph 29).

- When thinking about its relationships with other relevant bodies and individuals, it is strategically important for the Council always to be aware of the particular pressures faced by the other party (paragraph 34).

- At a theoretical level the structural relationship between the Council and the Court of Appeal seems not yet to have been fully clarified. If the Council agrees with this view, it would be helpful if it could find a way of ensuring that a clarifying statement is made, possibly through the good offices of the Lord Chief Justice, as the President of both bodies (paragraph 36).

- The Council could usefully reflect on whether the wording of guidelines should take greater account of the fact that they will at times be read by victims and offenders, and in particular, consider whether some warning should be offered against reading the category table as a guide to the likely final sentence (paragraph 37).

- Offence-specific guidelines might usefully include some reference to the 2003 legislative provision relating to the purposes of sentencing (paragraph 38).

- Studies show that victims' views are shaped by the way their case is handled, and that many victims express a strong interest in ensuring that, if possible, the offender does not commit further offences. This strand of research could usefully be utilised by the Council if, and when, it faces criticism for its alleged leniency (paragraph 40).

- Three of our respondents very helpfully drew our attention to the fact that there seems to be a significant lack of awareness of sentencing guidelines by police officers working in at least some police custody suites, and that this could have damaging consequences for victims. It is strongly recommended that the Council develops its initial steps to address this matter (paragraph 41).

- It is suggested that, when developing an offence-specific guideline, the Council should make specific checks to ensure the inclusion of any appropriate mitigating counterparts to the listed aggravating factors (paragraph 46).

- From the point of view of an offender reading the Council's guidelines, there would be merit in separating out personal mitigation factors as a separate Step in the guideline, so that offenders are more aware that their personal circumstances, and their steps towards desistance, are explicitly recognised by the Council as relevant to sentencing. This change is accordingly recommended (paragraph 47).

- It is appropriate for those responsible for sentencing (including the Sentencing Council) to structure sentencing practices so that, where possible, they contribute to the desistance process – without, of course, compromising the other purposes of sentencing (paragraph 48).

- It is a fair criticism to say that the Council has, to date, given little emphasis to its duty to have regard to the cost of different sentences and their relative effectiveness in preventing re-offending. This should be remedied in the future (paragraph 50).

- If, as is sometimes suggested, the Council is considering developing more overarching guidelines after 2020, it is suggested that it would be appropriate for careful thought to be given to the question: how can one ensure that such guidelines are regularly referred to? (paragraph 54).

- Possibly, there is scope to target MPs who have tabled Parliamentary Questions relevant to the work of the Sentencing Council, for an event which would raise awareness of the work of the Council beyond the members of the Justice Committee (paragraph 57).

- According to an MoJ respondent, there is scope for enhanced communication between the two bodies on effectiveness issues; we also understand from OSC sources that this has now started (paragraph 59).

- The Council should liaise with MoJ analytic staff to agree on a set of statistical tables that will allow easy understanding of time-trends in sentencing. Members of the public accessing the Council's website to learn about trends in sentencing could then be provided with a simple link to access this information (paragraph 60).

- One possibility would be for the Council to open itself up to a television documentary about its work, led by a respected director (along the lines of recent documentaries on each of the two Houses of Parliament) (paragraph 63).

- To combat unrealistic expectations, it is recommended that the Council should devote some serious discussion to how it wishes to present itself; and the role that it chooses needs to be one that can be convincingly defended in discussions with each of the various 'audiences' to which it must relate (e.g. victims, offenders, police, prosecutors, the media, pressure groups and the general public) (paragraph 66).

- One appropriate strategy that the Council might consider would be to devote time, at one of its meetings each year, to consider its relationships with each of the individuals and groups discussed in section C of this report (paragraph 67).

- In the light of the evidence summarised in paragraphs 73-77 of this report, it is recommended that the Council should consider whether it wishes to follow Professor Ashworth's advice by developing an overarching guideline on previous convictions and/or revisiting the existing overarching guideline on totality (paragraph 78).

- The Council should consider whether it would be helpful to add the question 'Is Custody Unavoidable?' as a standard additional Step in guidelines for all imprisonable offences (paragraph 84).

- The possible new 'Is Custody Unavoidable?' Step in offence-specific guidelines might usefully contain a reminder that the court can request an adjournment to ensure that a more considered and reliable pre-sentence report (PSR) is obtained in the interests of better decision-making (paragraph 85).

- When considering existing sentencing levels and trends in the initial stages of guideline construction, the Council should appraise these levels and trends in the light of the research evidence on general deterrence (paragraph 90).

- Since s. 142(1) of the Criminal Justice Act 2003 includes consequentialist aims among the purposes of sentencing, when constructing guidelines the Council should consider research evidence on consequences (paragraph 91).

- The Council might wish to consider whether a guideline, or less formal guidance, on s.142(1) of the Criminal Justice Act 2003 should be developed, in the course of which comments would be made on relevant empirical research findings (paragraph 93).

- A possibility that the Council might consider would be to commission a summary of relevant research findings from an appropriately-qualified individual or group, which

the Council could then make available as a background document for sentencers (paragraph 93).

- Some evidence has been received that in the recent past the need to produce many guidelines has sometimes prevented the Council from developing an appropriately wide vision of its role and responsibilities, and the Council might wish to consider whether there is merit in this view (paragraph 98).

- The Council needs to develop its own legitimacy with many 'stakeholders', including victims, offenders, police and criminal justice pressure groups: and that, perhaps, is key to how it can 'best exercise its aims and objectives in the future' (paragraph 99).

- To an outside observer the size of the Council's budget sits oddly alongside the pivotal role that the Council plays within the criminal justice system (paragraph 107).

- The Council should perhaps consider whether the Cabinet Office's Behavioural Insights Team (sometimes known as 'The Nudge Unit') would be able to provide some valuable insights that would assist in the development and impact of guidelines (paragraph 109).

- If the Imposition Guideline does not lead to a reduction in the use of the suspended sentence, then the Council should actively consider what further steps need to be taken to ensure that courts are using this sentence appropriately (paragraph 110).

APPENDIX I:

THE SENTENCING COUNCIL: AIMS, OBJECTIVES AND STATUTORY DUTIES

Aims

As stated in the last Annual Report published in October 2016, the aims of the Sentencing Council are to:

- Promote a clear, fair and consistent approach to sentencing;
- Produce analysis and research on sentencing; and
- Work to improve public confidence in sentencing.

Objectives

The Council's objectives, informed by its statutory duties under the Coroners and Justice Act, 2009, are specified in the 2016/17 Business Plan as:

- Objective 1: Prepare sentencing guidelines that meet their stated aims, with particular regard to the likely impact on prison, probation and youth justice services, the need to consider the impact on victims and to promote consistency and public confidence;
- Objective 2: Monitor and evaluate the operation and effect of guidelines and draw conclusions;
- Objective 3: Promote awareness of sentencing and sentencing practice
- Objective 4: Deliver efficiencies, while ensuring that the Council continues to be supported by high-performing and engaged staff.

Statutory Duties

See next page. The assessments in the final column have been made by OSC staff.

Sentencing Council statutory duties

Duty under Coroners' and Justice Act 2009	Description	Extent to which this has been discharged
s.119	Publish report on the exercise of the Council's functions during the year	Met
s.120(3)(a)	Prepare sentencing guidelines about guilty pleas	Met
S.120(3)(b)	Prepare guidelines about the rule of law as to the totality of sentences	Met
S.120(4)	(May) prepare other guidelines	Met
s.120(5),(6a-d), (7), (8)	Must publish draft guidelines and consult when preparing guidelines (including the Lord Chancellor and Justice Select Committee); must then publish definitive guidelines after making necessary amendments	Met
s.120(11a-f)	When exercising the function of preparing guidelines, the Council should have regard to: - The sentences imposed by courts - The need to promote consistency - The impact of sentencing on victims - The need to promote public confidence in the CJS - The cost of different sentences and their relative effectiveness in preventing re-offending - The results of monitoring	Partly met
S121 (2), (3a-c)	Guidelines should illustrate varying degrees of seriousness with which offences are committed with factors relating to culpability, harm, and other relevant factors	Met
s.121(4a,b), (5a,b), (6a-c)	Guidelines should provide an offence range, category range, starting point, aggravating and mitigating factors and criteria for determining the weight to be given to previous convictions.	Met
s.121(7a-c)	Additional to mitigating factors are factors relating to guilty plea reductions, discounts for assistance to the prosecution, totality and these should be reflected in guidelines	Met

s.121(10aii, bii)	Starting points should relate to sentences that assume an offender has pleaded not guilty	Met
s.122(2), (3), (4), (5), (6)	The Council must prepare allocation guidelines, issue them as draft, consult on them and then publish them as definitive guidelines; they may from time to time review the allocation guidelines; they should have regard to need to promote consistency and the results of monitoring.	Met
s.123	The Council may prepare or revise guidelines and if urgent may dispense with the need to publish in draft and to consult (other than with the Lord Chancellor)	N/A
s.124 (1), (3), (5)	The Council may be asked to prepare guidelines by the Lord Chancellor or the Court of Appeal and it should consider doing so	Met
s.127(1), (2)	The Council must prepare and publish resource assessments for both draft and definitive guidelines	Met
s.127(3a-c)	Resource assessments must assess the resources required for the provision of prison places, probation provision and youth justice services	Met
s.128(1), (2)	The Council must monitor the operation of its guidelines and consider what conclusions can be drawn, including: - The frequency with which, and extent to which, courts depart from sentencing guidelines - Factors which influence the sentences imposed by the courts - The effect of guidelines in promoting consistency - The effect of guidelines on the promotion of public confidence in the criminal justice system	Met Met Met Partly met Partly met
s.128(3)	The Council should include in its Annual Report a summary of monitoring work undertaken and any conclusions drawn from this	Met
s.129(1)	The Council must publish information regarding the sentencing practice of magistrates in relation to each local justice area; and information regarding the practice of the Crown Court in relation to each location at which the Crown Court sits	Not met
s.129(2)	The Council may also promote awareness of matters in	Partly met

	relation to the sentencing of offenders, in particular the sentences imposed, the costs of different sentences and their relative effectiveness in preventing reoffending, and the operation and effect of guidelines	
s.130(1), (2)	The Annual Report must contain a sentencing factors report which contains an assessment of the effect which any changes in sentencing practice is having on the resources required for: the provision of prison places; probation provisions; the provision of youth justice services	Met
s.131(1),(2), (3), (4)	The Annual Report must contain a non-sentencing factors report (and at other times the Council may publish this type of information having provided it to the Lord Chancellor). The report should cover which non-sentencing factors are having/likely to have a significant quantitative effect on resources. These factors include prison recall, breach of orders, patterns of re-offending, Parole Board release decisions, remand issues etc	Partly met
s.132(1)(3)	The Council has a duty to assess the effect, and prepare a report, where the Lord Chancellor refers any government policy or proposals likely to have a significant effect on resources for prison, probation or youth justice services	Met
Schedule 15	This outlines the constitution of the Council and the experience members need to have to be appointed	Met

APPENDIX II: LIST OF DEFINITIVE GUIDELINES

This list of definitive guidelines (as published on the Sentencing Council website) is presented in chronological order under the two categories of 'overarching' and 'offence-specific' guidelines (see paragraph 8 of the report for discussion). Guidelines issued before 2010 were developed by the Sentencing Guidelines Council [SGC].

PUBLICATION DATE	OVERARCHING GUIDELINES
16/12/2004	Overarching Principles: Seriousness [SGC]
07/12/2006	Overarching Principles: Domestic Violence [SGC]
20/12/2007	Reduction in Sentence for a Guilty Plea [SGC]
20/02/2008	Overarching Principles: Assault on Children and Cruelty to a Child [SGC]
20/11/2009	Overarching Principles: Sentencing Youths [SGC]
06/03/2012	Offences Taken Into Consideration and Totality
10/12/2015	Allocation Guideline (revised)
25/10/2016	Imposition of Community and Custodial Sentences
07/03/2017	Reduction in Sentence for a Guilty Plea
07/03/2017	Sentencing Children and Young People Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery
	OFFENCE SPECIFIC GUIDELINES
28/11/2005	Manslaughter by Reason of Provocation [SGC]
25/07/2006	Robbery Guideline – Young Offenders – Extract [SGC]
07/12/2006	Breach of a Protective Order [SGC]
30/04/2007	SGC Sexual Offences Guidelines Part 7-Sentencing young offenders – offences with a lower statutory maximum- Extract [SGC]
29/11/2007	Failure to Surrender to Bail [SGC]
12/05/2008	Magistrates' Court Sentencing Guidelines [SGC] – (updated by the Sentencing Council, 02/07/2016)
15/07/2008	Causing Death by Driving [SGC]
04/08/2008	Additional note to Magistrates' Court Sentencing Guidelines: Knife Crime [SGC]
09/12/2008	Breach of an Anti-Social Behaviour Order [SGC]
16/07/2009	Attempted Murder [SGC]
16/03/2011	Assault
13/10/2011	Burglary Offences

PUBLICATION DATE	**OFFENCE SPECIFIC GUIDELINES** (contd)
24/01/2012	Drug Offences
12/12/2013	Sexual Offences – Offenders under 18: Explanatory note
12/12/2013	Sexual Offences
26/02/2014	Environmental Offences
23/05/2014	Fraud, Bribery and Money Laundering Offences
06/10/2015	Theft Offences
03/11/2015	Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences
28/01/2016	Robbery
17/03/2016	Dangerous Dog Offences