Sentencing Council

Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders

Response from the Sentencing Council

Introduction

The Sentencing Council for England and Wales welcomes the opportunity to respond to the Green Paper.

The Sentencing Council is an independent body. It is made up of 8 judicial members (comprising representatives of all ranks of the judiciary) and 6 non judicial members who are experts in different aspects of criminal justice. The Council has agreed that it will:

- promote a clear, fair and consistent approach to sentencing;
- produce analysis and research on sentencing; and
- work to improve public confidence in sentencing.

The Council was established by Part 4 of the Coroners and Justice Act 2009 and came into being in April 2010. The Council fulfils the following functions in line with the Act:

- prepares sentencing guidelines;
- publishes the resource implications in respect of the guidelines it drafts and issues;
- monitors the operation and effect of its sentencing guidelines;
- assesses the impact of policy and legislative proposals, where it is asked to do so by the Lord Chancellor;
- promotes awareness of sentencing and sentencing practice; and
- publishes an annual report that includes the effect of sentencing and non sentencing practices[1].

The Council is therefore responding to those questions and topics within the Green Paper that relate to its remit and functions, as set out above, namely sentencing and non sentencing practices that have a direct effect on sentencing.

When responding to individual questions in the Green Paper the Council has had regard to the following principles:

- that there should be a clear, fair and consistent approach to sentencing;
- that the impact of sentencing on victims of offences should be considered;
- that public confidence in sentencing and the broader criminal justice system should be promoted;
- that sentencing should support the delivery of an efficient and effective criminal justice system;
- that the role of legislation is to set the parameters for sentencing and that the role of guidelines is to provide a framework within which the court can approach sentencing in a consistent manner.

[1] Non sentencing practices include: breaches of orders, recall, patterns of re-offending, decisions by the Parole Board, early release, remanding of persons in custody. s.131 (4) Coroners and Justice Act 2009

Responses to specific questions

Q32. What are the best ways to simplify the sentencing framework?

The Council agrees with the assertion in the Green Paper that the current sentencing framework is overly complex and as a result commands insufficient public confidence and is difficult for the courts to interpret.

The Council believes it would be extremely valuable to consider the codification of sentencing law. There are currently a vast number of statutory provisions in different Acts that take effect on different categories of offenders in different ways. The Council believes that the codification of the framework would benefit all those in the criminal justice system by streamlining the process and promoting greater consistency in sentencing. Codification also has the potential to realise considerable efficiency savings due to the potential reduction in time and resources that are currently required to go through the existing legislation. If clarified, the Council also believes that public confidence in sentencing and in the wider criminal justice system is likely to be improved. The Council recognises that any work on codification would be likely to be initiated by the Law Commission and wrote to them on this topic in October 2010.The Council believes that there would be a significant benefit to all involved in the criminal justice system, and the wider public, if priority were given to the harmonisation of the variety of early release frameworks and schemes that currently apply in different ways dependent on offence date and sentence length. An example of the complexities that flow from the current legislative framework is evident from a consideration of the consequences of administrative recall decisions highlighted in *Costello* [2010] EWCA Crim 371.

The Council believes that the appropriate balance is generally struck when legislation sets the parameters of sentencing and guidelines provide a framework within which the court can approach sentencing in a consistent manner and fully reflect the individual circumstances of a case. If a review of Schedule 21 to the Criminal Justice Act 2003 were to be taken forward by the Government, the Council would be keen to see that this principle informed the review and that account is taken of the way in which the Court of Appeal (Criminal Division) has interpreted the existing scheme of the legislation and underlined the discretion available to judges in applying it.

The Council is interested in the proposal to create a simpler way to calculate the impact of time spent on remand on the time that should be served as part of a prison sentence and remove the burden of this calculation from courts. The Council would be keen to see further detail of how this might be done in practice. In line with the comments the Council makes below about the importance of sentences being clear and transparent and explained in court the Council is cautious to see that the implementation of this proposal does not detract from the clarity of the explanation that might be given. The Council believes that a simplification of the operation of the existing regimes relating to remand would be beneficial. Such a simplification might draw from the schemes under the 1967 and 1991 Criminal Justice Acts and include a presumption that the time spent in custody or on electronic curfew count towards sentence unless the court sets out a reason why they should not apply, whether in total or in part. The Council recognises that previous schemes resulted in challenges to the calculations in the form of judicial reviews and also civil claims against the prison authorities for unlawful detention and would be keen to see that any revised scheme avoided these risks as far as was possible.

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The proposal to replace the current list of groups which attract the statutory aggravating factor in sentencing for hate crime with a general aggravating factor is welcomed. The Council believes that courts already seek to recognise any form of hatred or hostility demonstrated by an offender within the sentence that is passed and that this proposal enables this practice to be reinforced. The Council recognises that many interest groups will wish to respond on this matter and that their responses will inform how this work is taken forward and the drafting of any proposal for a statutory factor should this go ahead. The Council would also be keen that any general factor was well defined, avoiding the risk of multiple interpretations.

The Council also wishes to draw attention to the fact that many of the responses to the Council's recent consultation on the draft assault guideline highlighted concerns as to the difference that the legislation creates between some of those offences which have been racially or religiously aggravated[2] and other offences. Those offences charged under s. 29 (racially or religiously aggravated) have a higher statutory maximum than the non-aggravated form of the offence. This suggests an apparent inequality between offences aggravated in this way and those aggravated by other forms of hate crime such as offences motivated by hostility towards the victim on the basis of their sexual orientation or disability. Many respondents felt that all aspects of hate crime should be considered in the same way and the Council recommends that alongside considering a single aggravating factor for hate crime the Government reviews the potential for change in this area.

[2] s. 29 Crime and Disorder Act 1998

Q33. What should be the requirements on the courts to explain the sentence?

The Council agrees with the principle that the court should explain why it has passed a particular sentence and what that sentence will mean for the offender, so that all in the court room are given a clear explanation. The current position is that sentencers do make all reasonable efforts to explain the sentence but that they are significantly hampered in their efforts by the current legislative framework.

The Green Paper rightly identifies that the number of complicated and detailed requirements set out in legislation for the court to explain why they have, or have not, passed a particular sentence do not help aid the overall clarity of the explanation. The Council therefore welcomes the general thrust of the proposal which would result in the requirement to explain the sentence being set out in a single statutory provision (and therefore in one place).

However, the problem is that even if there were to be one simple statutory requirement to explain the sentence this does not overcome the difficulty that, in relation to custodial sentences in particular, the current legislative position means it is very difficult for the court to set out what the sentence will mean for the offender. This is because of the complexity of the existing statutory framework (see response to question 32 above). It is also because decision-making about release does not rest with the courts so the court may not know at the point of sentence when and whether the defendant will be released and on what terms. This confusion is likely to be compounded by the understandable, but potentially contradictory, proposal to remove the need for the court to calculate the impact of remand time and therefore state this in court. Whilst recognising the importance of the explanation of the sentence, the Council is keen to avoid the risk of overly lengthy sentencing remarks that do little to aid clarity and take up significant court time.

The Council is also fully aware that not everyone who is interested in the sentence is in court when the sentence is passed. Unless the case is of a very serious nature victims and witnesses will rarely be present when the sentence is passed. There is a need for ongoing work to consider how sentences are communicated and explained to victims and witnesses as well as the broader public. The Council is actively engaged in considering this and details its approach within its response to question 34. It should also be noted that however simple the explanation, those listening may hear and understand the sentence in different ways – for example when an indeterminate sentence is passed an offender may be most concerned by the indeterminate nature of the sentence, the victim may hear the minimum term and be concerned that it appears low. There is also a risk (demonstrated in a number of highly publicised cases) of the sentence being misunderstood by the press and thus the public: this may be an inevitable consequence of oral communication and re-enforces the need both for greater public understanding of the effect of a sentence and for support for victims, even when they are in court, to provide them with an appropriate explanation.

Q34. How can we better explain sentencing to the public?

The Council agrees with the Government's ambition to improve communication on sentencing and welcomes the Government's invitation to the Council to work with them, and other groups, on this.

Evidence from a range of research suggests the public do not understand either the current sentencing framework (what sentences mean) or have a realistic understanding of the sentences that are likely to be passed for different offences, frequently underestimating the severity of the actual sentence. Research also shows that this lack of information and understanding is often a key element that drives a lack of public confidence in sentencing and the broader criminal justice system[3].

The public is seeking more information[4] and a greater understanding of sentencing and the Council believes this is an area where Government and other organisations, including the Council, can act to make a difference. The Council is aware that many sentence types, in particular community sentences, are not well understood and that greater information can be of use. It is important that activity in this area is not confined to publishing statistics but also extends to giving the public an opportunity to consider the sentencing process for themselves. The Council is of the view that a range of mechanisms could be further employed to explain sentences, many of which are already in place, and include:

- the provision of explanatory material via new media (particularly the internet);
- a proactive approach to working with the media from bodies, such as the Sentencing Council, who communicate on sentencing;
- targeted material and explanations for those directly experiencing the system (particularly victims and witnesses);
- locally delivered activities (for example – 'You Be the Judge' events, Magistrates in the Community, Local Crime Community Sentencing, Police community engagement);
- communications to those working within the criminal justice system to improve their understanding of sentencing and the system overall.

These activities are relatively low cost but have the potential, over time, to significantly increase public understanding of sentencing if continued investment is made.

Since its launch in April 2010 the Council has sought to increase public understanding of sentencing. It has undertaken a wide range of successful activities which have included:

- a wide ranging public consultation on the draft assault guideline which resulted in more responses from members of the public than any previous guideline

[3] Research on the topic that has informed the Council's view includes:
Duffy, B., Wake, R., Burrows, T. and Bremner, P. (2008) *Closing the gaps: Crime and Public Perceptions* London: Ipsos MORI;
Hedderman, C. (2008) *Building on sand: Why expanding the prison estate is not the way to 'secure the future*', London: Centre for Crime and Justice Studies;
ICPR and GfK NOP (2009) *Public Attitudes to the Principles of Sentencing* London: Sentencing Advisory Panel;
Singer, L. and Cooper, S. (2008) *Inform, persuade and remind* London: Ministry of Justice.

[4] '58 per cent of people say they want more information about the CJS' (Ipsos Mori, 2008)

consultation (just under half of the consultation responses were from the public). The consultation process included the production of an accessible public consultation document alongside the professional consultation, a simple online questionnaire, producing easy read and large print versions to increase accessibility and running a number of consultation events. A proactive media campaign to support the consultation launch also resulted in various media coverage of sentencing, in particular a lead story on the BBC UK news website including a link to further sentencing information on the Council's website;

- the use of new media to widen the reach of information that is available on sentencing in user-friendly formats. The Council's website includes a variety of information available on sentencing; a visitor to the site can enter as a member of the public and receive specifically tailored information on sentencing and the Sentencing Council's work. The Council has also launched a Twitter account which has widened our reach, with the numbers of followers steadily increasing;

- liaison with a range of organisations with an interest to increase awareness of sentencing. This has included: active promotion by the Council of the MOJ on-line *You Be the Judge* tool through a range of media and events; and, work with the Metropolitan Police, London Probation Trust and London Criminal Justice Partnership to produce training materials and a leaflet for the police on understanding the basics of community sentences and licences. Work has commenced with the Magistrates Association on the development of a sentencing leaflet for use at their community engagement events and is also planned with victims organisations to develop a range of materials for victims and witnesses.

However the Council would also wish to highlight its view, as set out in previous answers, that alongside better explanations of sentencing for the public a simplification of the overall framework is also essential to aid public comprehension and build confidence. Unless the framework is simplified, sentencing will remain challenging to explain.

Q35. How best can we increase understanding of prison sentences?

In answering questions 33 and 34 above the Council has set out its views on the importance of explaining sentences and these responses apply equally to the need to explain prison sentences. Prison sentences, both in their purposes and implementation (for example, what being on licence means), do not appear to be well understood by the majority of the public and the Council believes that simplification and greater explanation would increase understanding.

The Council notes the proposal to remove the option of remand in custody for defendants who would be unlikely to receive a custodial sentence. The Council recognises that the proposal is for legislative change but is not clear what could be done to amend the Bail Act 1976 in a way that would be either principled or practicable. There is a significant challenge in anticipating a sentence before the full details of a case have been heard; in some cases it will not be clear until the conclusion of the trial/the preparation of the pre-sentence report whether the offence in fact merits a custodial sentence. The Council is also of the view that simply because an offence does not, at an early stage, appear to merit custody does not necessarily mean that a remand in custody is not warranted. The primary reason for remanding a defendant in custody is that he or she will fail to attend court which is not necessarily related to the gravity of alleged offence. The risk of further offending is equally potentially unrelated to the gravity but may be necessary to prevent re-offending of a type which may or may not cause injury but will nonetheless be damaging. Further, there may be a good reason to believe that the defendant will interfere with witnesses. Finally, if the remand is post conviction, for a report to be prepared, the report may not be secured other than by a remand in custody.

The Council agrees there is a case for restricting sentences of Imprisonment for Public Protection (IPPs) to exceptionally serious cases. Currently those offenders serving IPPs are often serving disproportionately long sentences, unable to demonstrate they are suitable for release, and this results in an imbalance within the system that the Council would be keen to see adjusted. The Council also welcomes the continuation of the Extended Sentence for Public Protection which it believes can be particularly valuable in certain cases. In parallel with any changes to IPPs there may be value in considering the reintroduction of Section 85 PCC(S)A 2000 to allow extended sentences to be used for all violent and sexual offences where the sentence is over 4 years (although it notes that the increase in the length of the recall period could well have resource implications).

Q36. Should we provide the courts with more flexibility in how they use suspended sentences, including by extending them to periods of longer than 12 months, and providing a choice about whether to use requirements?

The Council notes the proposal to provide more flexibility in the use of suspended sentence orders. The Council believes there is an opportunity to review both the length of sentence that can be suspended, perhaps considering the former construction in the Criminal Justice Act 1991 which allowed any sentence of up to two years to be suspended, and also the length of time for which a sentence can be suspended.

Cases where a suspended sentence is used for a sentence of over 12 months are likely to be exceptional. However the Council acknowledges that exceptional circumstances do occur, as well as the often parallel need to ensure that the length of the suspension aligns with the length of any rehabilitative requirement that is being imposed. Any extension of the use of suspended sentences would need to be approached with caution as it risks the potential for disproportionate use of SSOs and a substantially increased number of breaches. For example if the period available in a magistrates' court were extended back to the former 12 months for two or more either way offences, without constraining sentencers with the former 1991 requirement of exceptional circumstances, then the number of such orders might significantly increase with all the attendant risks on breach. There is also a risk of 'displacement' from community orders in cases where they may be a more appropriate option.

The Council recognises that there can be occasions when it may not be appropriate to impose requirements alongside a suspended sentence order. However it notes that requirements can often be an important part of both the rehabilitative and punitive elements of sentence and understands the public were keen to see these elements included when suspended sentence orders were introduced in their current form. Therefore, whilst welcoming the greater flexibility proposed, the Council is keen to see that the suspended sentence order continues to be regarded as a meaningful sentence.

Q42. How should we increase the use of fines and of compensation orders so as to pay back to victims for the harm done to them?

The Council recognises the importance of compensation orders in appropriate cases in order that victims can receive direct reparation from offenders. The Council is of the view that compensation orders should continue to be encouraged and that what remains crucial to enable this is that the relevant information is put before the Court by the prosecution to ensure that the matter can be properly considered. The Council will make reference to considering compensation orders in the assault guideline (step seven) that will be published shortly and will consider how future guidelines might play a role in further supporting their application.

However, the suggestion of creating a positive duty for courts to consider imposing a compensation order unless the victim does not wish one to be made (p.20 paragraph 72) seems unnecessary given the existing duty on the court to consider compensation orders in all cases[5] and the detailed guidance that is provided within the Magistrates' Court Sentencing Guidelines on this topic.

Compensation orders are already used in many cases where a victim can be identified, for example 40% of criminal damage cases result in a compensation order being made[6]. The use of these orders will necessarily be limited by the requirement to consider the means of the offender. Without such a requirement meaningless compensation orders would be likely to be made; this risks significantly mismanaging victim expectations while, at the same time, using resources in an effort to recover money that the offender simply cannot pay. The mismanagement of victim expectations in relation to compensation is already an issue within the current system and results in further detriment to the victim which is neither appropriate nor a desired consequence. Even where a victim wants compensation, the method of drawn out payment prolongs the relationship with the offender and the crime - which can cause further harm.

As with compensation orders, the use of other financial penalties is necessarily restricted by the requirement to consider the means of the offender. The Council is not opposed in principle to the use of financial penalties as an element of a community order. However, caution may need to be exercised in the implementation of any such change. It is an oversimplification (and a common misunderstanding) to consider that community orders must contain a distinct 'punitive' element in order to avoid the perception that the offender has been 'let off'; many of the requirements of such orders which may be considered 'rehabilitative' also involve significant restrictions of liberty.

[5] s.130 Powers of Criminal Courts (sentencing) Act 2000
[6] Sentencing Statistics 2009, MOJ

Q43. Are there particular types of offender for whom seizing assets would be an effective punishment?

The Council recognises the attraction of asset seizure being used as a penalty in its own right; however it has significant concerns about the practical implications of such a measure. It is therefore cautious about asset seizure being extended as a penalty for offences which have not resulted in a benefit to the offender and where the asset has not been used in the commission of the offence. The processes of establishing the ownership of assets; assessing the value of the assets; then calculating the value of the order; then collecting and selling on the asset would build further complexity into the system in a way that the Council feels is very unlikely to be a valuable use of court time or be cost effective.

The Council notes that the Court already has powers to seize assets which have been used in the course of committing a crime[7]. This is in addition to the extensive powers to seize the assets of offenders, irrespective of the offence of which they have been convicted, if they have benefited from the offence concerned or if they have a "criminal lifestyle". The Council would welcome any simplification of the existing confiscation provisions[8] in order to avoid the need for lengthy confiscation proceedings taking up significant court time. There have been increasing difficulties surrounding the definition of benefit, particularly in multi-handed cases. In addition, the inherent complexity of the determination by the court of what is available, can involve trust, matrimonial and company law, resulting in lengthy, costly cases.

The Council would welcome any measures that can be taken to simplify and potentially speed up the process of executing distress warrants to support fine enforcement and reduce the number of persistent fine defaulters within the system.

[7] s.143 Powers of Criminal Court (Sentencing) Act
[8] Proceeds of Crime Act 2002 and s. 143 Powers of Criminal Courts Act

Q44. How can we better incentivise people who are guilty to enter that plea at the earliest opportunity?

The Council has a statutory duty to prepare sentencing guidelines about the reduction in sentences for guilty pleas[9]. The Council had therefore commenced work in 2010 to consider what revisions might be made to the existing guilty plea guideline[10] and had commissioned research on the topic. In light of the references in the Green Paper to the guilty plea discount the Council has put its own work on hold until the outcome of the consultation is known. The Council believes that the Government should be informed by the findings of its research which will be published in or about April 2011[11].The early findings from the research have informed the Council's response to this consultation question.

Increasing the level of the reduction

In all common law jurisdictions an early guilty plea is recognised as a legitimate reason for imposing a more lenient sentence. It is important to encourage offenders who are guilty to admit their guilt by entering a guilty plea as early as possible, thereby saving victims and witnesses from the continuing distress of anticipating the trial process and also from having to testify; it also reduces the costs of those preparing for trial and eliminates the costs of the trial itself. However, it is also important to recognise that if the reduction for a guilty plea becomes very high, principles of sentencing may be threatened.

The most important factors affecting sentence in this country are the harm inflicted by the offence and the offender's level of culpability for the offence. Pleading guilty is unrelated to these two considerations: a guilty plea does not make the offence less serious and does not lower the offender's culpability for the crime. The Council is of the view that the offender's decision to plead guilty should therefore not be allowed to reduce a sentence significantly below a level that reflects these concerns. In that regard, the Council notes that in other common law jurisdictions the largest discount on offer is around a third, with some offering up to 35%[12]. To date no jurisdictions have been identified where the discount is significantly higher than this[13] however it is acknowledged that different jurisdictions operate in different ways.

The Council's quantitative survey research suggests that the public think the key justification for the reduction principle should be the consideration of the victim experience. However the public are cautious about the use of discounts for guilty pleas and the research indicates there might be limited support for an increase beyond the levels set out within the current guideline. The Council has not identified any research to date that indicates that an increase in the level of the discount would be likely to increase the volume of early guilty pleas. Indicative findings from the Council's own qualitative research suggest that for offenders the level of the reduction is not the primary motivating factor when they decide to plead guilty. Matters such as legal advice and the strength of the disclosed evidence are also significant. In addition, qualitative research with victims and witnesses suggests that they have differing levels of support for the use of discounts, although those who are particularly concerned about giving evidence in court, for example victims of more serious offences, may believe they are of particular benefit, even if entered at the court door. It should be noted, however, that

[9] s. 120 (3) Coroners and Justice Act 2009
[10] *Reduction in Sentence for a Guilty Plea*, 2007
[11] Dawes, Harvey, McIntosh, Nunney and Phillips (2011, forthcoming): *Attitudes to Guilty Plea Sentence Reductions;* to be published April 2011.
[12] *Thomson and Houlton* [2000] NSWCCA 309 per Spigelman CJ at [162]
[13] It is noted that Malaysia are considering a 50% reduction of the statutory maximum though this is not understood to have been implemented.

sample sizes for the qualitative research in this study were small and in some cases may not be representative of wider populations of these groups.

Stages

The Council believes an approach to the discount based on stages (a sliding scale) continues to be appropriate. The Council believes there may be merit in considering creating a greater distinction than the current guideline provides between the discount available at the first stage and that available later through the process to encourage earlier pleas.

Need for flexibility

The Council believes that legislation should set out the principle of the reduction, as it does currently, and that it is the function of the guideline to set the framework about how that reduction should be approached. The early findings from the research suggest that the public and victims and witnesses feel that any approach to the guilty plea reduction should be variable to reflect the circumstances of the offence and the offender. A guideline is well placed to consider and reflect the sensitivities of such questions as:

- What should be done with the burglar caught red-handed climbing out of the window? Should he get the same discount as other offenders where the case against them may not be as strong yet they admit their guilt early?
- What about the company director who voluntarily comes forward and admits a fraud saving months of lengthy investigations that might have involved distressing enquiries of a large number of other employees in the firm? How much should the discount be reduced if the director admits guilt (a) after a lengthy investigation but saving the preparation for a lengthy trial; or (b) on the first day of the trial but saving the costs of a four month trial?
- Should offences, even the most serious – for example those involving serious sexual offences and homicide - attract the same discount as lower level offences or should there be a cap?
- Should the first time offender get more credit than the repeat offender?

Q59. What more can we do to engage people in the justice system, enable and promote volunteering, and make it more transparent and accountable to the public?

The Council believes in the importance of transparency in sentencing and in the criminal justice system more broadly. The Council believes that its own work in producing guidelines, that are both straightforward to understand and accessible to all those who wish to review them, supports transparency. As set out above, the Council also takes a broader role in explaining the sentencing process. It believes that explanations and increased understanding of sentencing are crucial, alongside the publication of materials and data.

The Council's consideration of the views of victims and witnesses and the broader public in relation to sentencing has led it to develop the view that simplicity and clarity are essential in order to build understanding and confidence. The Council would therefore encourage the Government to consider how it ensures the clarity of any new or revised arrangements that it puts in place in response to what the Green Paper describes as 'low level crime and disorder'. The Council feels that the proposals risk public confusion regarding which types of cases get dealt with by whom and in what ways. Confusion would be likely to see a decrease in confidence rather than an increase. The Council would also wish the Government to consider very carefully the interaction between any disposals that occur out of court and those that occur in court, in particular in relation to breaches and records of previous offending.

Further matters raised within the Green Paper

Mode of trial/Allocation

The Council would like to re-enforce its view that, in line with the current statements in the Consolidated Criminal Practice Direction (CCPD)[14], there should remain a presumption in favour of summary trial. The Council recognises that there is limited evidence that jurisdiction is currently being declined inappropriately in either way cases, but that there is some evidence of inconsistency. Given the very real pressures on the Crown Court, it remains as important as ever that magistrates' courts have the confidence to retain jurisdiction in every case where it is appropriate to do so.

As the Government is aware, the Sentencing Council has the power to issue "allocation guidelines", which are defined as guidelines relating to the decision by a magistrates' court whether an either way offence is more suitable for summary trial or trial on indictment[15]. The Council will be considering developing allocation guidelines as part of its 2011/12 work programme. It is also considering the potential to revise the reference to mode of trial in the Introduction to the Magistrates' Court Sentencing Guidelines (MCSG). The Council has been in contact with the relevant bodies to alert them to its plans.

[14] paragraph V.51
[15] s. 122, Coroners and Justice Act 2009