

Investigating the Sentencing Council's impact in three key areas

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1. Summary

The Sentencing Council for England and Wales was set up in April 2010 to promote greater transparency and consistency in sentencing, while maintaining the independence of the judiciary.

As part of its tenth anniversary year, the Council undertook to investigate its impact in three key areas, and this involved conducting analytical projects on the following topics:

- Attitudes to sentencing guidelines: views from the judiciary;
- Estimating the changes in sentencing severity and requirements for prison places associated with the Sentencing Council's offence-specific guidelines;
- A review of consistency in sentencing, with additional analysis investigating the impact of three specific guidelines on consistency of approach to sentencing.

The Council felt it was particularly important to explore the views of the key users of the guidelines - sentencers - and to understand their experience of using guidelines, as well as their perceptions of the impact of guidelines on aspects such as fairness, transparency and consistency.

It also wished to undertake additional research and analysis to explore impacts on two key areas related to sentencing outcomes and which would feed into work to address some of the Council's statutory duties under the Coroners and Justice Act 2009. This includes the duty to have regard to the impact of its guidelines on prison, probation and youth justice services, and the duty, when preparing guidelines, to promote consistency in sentencing.

This document summarises the high-level findings from these pieces of analysis and some further work that the Council intends to undertake in the future. Reports detailing the full findings have been published on the Council's website and should be read in conjunction with this document in order to understand the context of the work and limitations on the data which have a bearing on interpretation of the findings.

The principal findings from these three key areas include the following.

Attitudes to sentencing guidelines: views from the judiciary¹

All members of the judiciary were invited to take part in a survey via a letter from the Chair of the Sentencing Council and a link to it circulated by email by Judicial Office. Of over 1,000 sentencers who took part:

- Over four-fifths of respondents who had begun sentencing before the introduction of sentencing guidelines in 2004 said they had supported the introduction of guidelines produced by the Council's predecessor body, the Sentencing Guidelines Council (SGC).
- Over half of respondents who had begun sentencing before 2004 agreed that sentencing had been fair before the introduction of guidelines; however, a smaller

¹ The full reports for each of the projects referenced in this document can be viewed here: <https://www.sentencingcouncil.org.uk/publications/item/investigating-the-sentencing-councils-impact-in-three-key-areas>

proportion agreed that sentencing had been transparent or consistent before the introduction of the SGC guidelines.

- Three quarters of sentencers agreed that the guidelines had improved since their introduction in 2004. In addition, of those sentencers who had begun sentencing before 2011, the vast majority thought transparency and consistency had improved and fewer, though still a majority, thought fairness had improved.
- The majority of respondents agreed that the Sentencing Council guidelines, which started to be introduced from 2011 are well-structured, helpful to the sentencing process and easy to use. There was greater agreement among sentencers who had begun sentencing more recently, and greater agreement among judges than magistrates.
- A greater proportion of magistrates and district and deputy district judges than Circuit and High Court judges said they were confident using the guidelines in a digital format.

Estimating the changes in sentencing severity and requirements for prison places associated with the Sentencing Council's guidelines¹

Key findings were:

- In analysis to estimate the cumulative impact of the Council's evaluated offence-specific guidelines in its first ten years (covering 76 offences in total), it was found that for around two-thirds (64%) of the offences studied (49 offences), sentencing outcomes following the introduction of the guidelines aligned with what was expected. However, for around 24 per cent (18 offences), sentencing outcomes did not align with what was expected; for the remaining 12 per cent (9 offences), the findings were less clear.²
- Looking only at the impact that the Council's guidelines may have had on sentencing severity, unrelated to whether any impact was expected or not, analysis showed that for 45 offences there were no observed changes in sentencing severity when the relevant guideline came into force, but for 31 offences, changes were observed. For 21 of the offences where changes were observed, there were increases in sentencing severity, while for the other 10, there were decreases. In total, there were 10 offences where changes in sentencing following the introduction of the relevant guideline were related in some way to immediate custody: seven increases in severity and three decreases.
- The potential associated change in the requirement for prison places was estimated for 9 of these 10 offences. Overall, it is estimated that these nine offences were associated with a need for a total of around 900 additional prison places per year, by 2018. However, it is not possible to be certain about the impact of guidelines on sentences, and due to this uncertainty, a range of values was estimated for each offence. When these were combined to form a total estimated change in the

² For details of the findings for each offence, see Annex E of the report 'Estimating the changes in sentencing severity and requirements for prison places associated with the Sentencing Council's guidelines', here: <https://www.sentencingcouncil.org.uk/publications/item/investigating-the-sentencing-councils-impact-in-three-key-areas>

requirement for prison places, this produced a very wide overall range. This means that although there is an estimate that the evaluated guidelines were associated with the need for around 900 additional prison places, the actual number could fall anywhere between 0 and 1,700.

- Around three quarters of these prison places are estimated to have arisen as a result of two offences/ guidelines: causing grievous bodily harm with intent and robbery. To put this into context, the total prison population in England and Wales since the Council was set up has fluctuated between approximately 80,000 and 86,000, and within that, the number of sentenced prisoners has fluctuated between around 67,000 and 75,000. However, these figures on the prison population are not directly comparable with the estimates of the prison places associated with guidelines and are only presented to provide a sense of magnitude.³
- Regarding the three overarching guidelines that have been evaluated - the Allocation, Reduction in sentence for a guilty plea and Sentencing children and young people guidelines - the review found that aside from a tentative finding of a decrease in sentences for children aged 15 to 17 sentenced for robbery, there was no evidence to suggest that any of these guidelines had led to a change in average sentencing severity.

Consistency in sentencing¹

The key issues covered in this work were that:

- There is no universally accepted definition of consistency in sentencing, though it is widely understood as the notion that offenders with similar characteristics, who commit similar offences, in similar circumstances would be expected to receive similar sentencing outcomes.
- The Sentencing Council promotes consistency in approach. This is because no two offenders or situations are the same and sentencers take into account a wide range of factors when sentencing. Guidelines encourage a consistent approach by guiding sentencers through structured, step by step decision making, while still allowing judicial discretion around the final sentence. This allows for a consistent approach to sentencing, but some variation in outcomes for offences that on the face of it appear to be very similar.
- Studies of consistency in sentencing since the Sentencing Council came into operation in 2010 have shown mixed results, with some showing increases in the levels of consistency when the relevant guidelines came into force, and others showing no change over time, and where improvements in consistency have been found, these have been small. This includes findings from a second study undertaken by the Council in this area in relation to guidelines for theft from a shop

³ The figures on the prison population are based on the actual number of people in prison at a point in time, whereas the figures on the number of prison places associated with guidelines are estimated based on analysis of sentencing data, and adjusted to account for changes in sentencing volumes over time. As these figures do not come from the same source and are calculated differently, they are not directly comparable. The figures on the prison population are based on the total prison population on 30 June each year, as taken from the Ministry of Justice Offender Management Statistics publication. See 'Annual Prison Population: 2020', Tables A1.1: <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2020--2>

or stall, domestic burglary and supply/possession with intent to supply a controlled drug. This was conducted by analysts in the Office of the Sentencing Council in conjunction with Leeds University (see Isaac, Pina-Sanchez and Varela Montane, 2021).¹

- Although some findings show only small improvements, this is in the context of the fact that where we have evidence, sentencing already seems to be relatively consistent. This means that there may only be narrow room for improvement, particularly for common offences and/ or ones where there is already a guideline. Guidelines are also intended to impose consistency of approach and encourage individualised sentencing decisions within the steps of the guidelines. For this reason, complete consistency would not be expected and it may be harder to detect changes in the level of consistency.
- It should also be noted that there are important limitations on the data available at present (either lack of data or a lack of sufficient variables within the data to control for all relevant factors or the inability to randomly allocate cases between judges) and so it not always possible to draw conclusions about consistency from studies.

Conclusion

Survey research with sentencers indicated that positive views of guidelines exist, both in relation to their introduction in 2004 and in terms of the later Sentencing Council guidelines that started to come into force from 2011. Overall, the research suggests there is broad judicial support for the guidelines, they are seen to have improved over time and to have had a positive impact on sentencing practice.

In terms of the impact of guidelines on sentencing severity, the Council is satisfied that for the majority of offences evaluated to date, the guidelines seem to have had their expected impact. However, it is the case that for some offences, sentencing outcomes differed from what was expected at the time the guideline was published. As a result, the Council has considered whether those guidelines require revision. Some such guidelines have already been revised and for others the Council has committed to revisiting the guidelines in due course and considering whether they may require revision or amendment. For others, particularly those where the evaluation findings were tentative, the Council will continue to monitor sentencing data before making any decision as to whether the guidelines need to be revisited. It also intends to undertake a review of its approach to evaluations to ensure that these encompass all the relevant types of impacts that guidelines may have and that where data permits, the impacts on different groups can be examined.

The research into consistency showed mixed results, with some positive findings relating to the possible impact of the Council's guidelines on consistency of approach. In some areas there seem to have been smaller gains, but this should be seen in the context of the fact that where we have evidence, sentencing already seems to be relatively consistent, meaning that there may only be narrow room for improvement. There are also considerable limitations on the evidence available to assess consistency at present meaning that it is not always possible to draw conclusions from the studies conducted. Nonetheless, the Council is committed to continuing to work on its statutory duty to promote consistency in sentencing. It does this through its research work, both while guidelines are in development and then after they have been implemented. This will include considering the ways in which consistency can be monitored and measured over time and any improvements to data sources that will help to facilitate further work in this

area. As part of this, the Council will consider both quantitative and qualitative methodologies that might facilitate further work in this area.

Future work in these specific areas will supplement other more recent analytical work undertaken by the Council as well as the responses to a consultation that the Council issued in 2020 – *What Next for the Sentencing Council?* – to help set its priorities for the next 5 years. A response to this consultation will be published by the Council in due course and will include consideration of issues that include the ways in which consistency can be monitored and measured over time and any improvements to data sources that may facilitate further work in these areas, including in the area of evaluating the impacts of guidelines.

In addition, the Council has started a programme of work on equalities and inclusion to be applied across the whole range of its guideline development and evaluation activities. This will include considering ways in which the Council can examine the impacts of its guidelines on people with protected characteristics under the Public Sector Equality Duty. The Council will also continue to capture the views of sentencers on its guidelines through its existing research work and as part of consultation activities when a draft guideline is issued.