What next for the Sentencing Council?

Consultation
General matters: questions 1 to 6

10 March 2020 to 9 June 2020
About the consultation

To: This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.

Duration: From 10 March 2020 to 9 June 2020

Enquiries (including requests for the paper in an alternative format) to:
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How to respond: Please send your response by 9 June 2020 to:
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Additional ways to feed in your views: This consultation exercise is accompanied by a resource assessment, and an online questionnaire which can be found at:
www.sentencingcouncil.org.uk
A consultation event is taking place on 3 April 2020. For more information, please see www.sentencingcouncil.org.uk.

Response paper: Following the conclusion of this consultation exercise, a response will be published at: www.sentencingcouncil.org.uk

Freedom of information: We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents’ names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. Please note: we will disregard automatic confidentiality statements generated by an IT system.

In addition, responses may be shared with the Justice Committee of the House of Commons.

Our privacy notice sets out the standards that you can expect from the Sentencing Council when we request or hold personal information (personal data) about you; how you can get access to a copy of your personal data; and what you can do if you think the standards are not being met.
Introduction

1. This year marks the 10-year anniversary of the Sentencing Council for England and Wales. The Council was set up as an independent non-departmental public body by the Coroners and Justice Act 2009 (C&JA 2009).

History

2. Since the 1980s, the Court of Appeal has made increasing use of its power to issue guideline judgments that give guidance on sentencing. However, the Court was originally limited in its scope for giving such general guidance in the context of deciding a specific appeal. Guideline judgments therefore remained relatively rare, and covered few offences. As a result, the Sentencing Advisory Panel (SAP) was established by the Crime and Disorder Act 1998 to carry out research and make evidence-based recommendations for sentencing guidelines to the Court of Appeal. The Court of Appeal was not required to accept those recommendations, although it did in most cases, albeit with modifications.

3. In 2001, the Halliday report recommended that to move towards a system of more comprehensive guidelines, new structures would be needed. As a result, the Criminal Justice Act 2003 established the Sentencing Guidelines Council (SGC), which then became the body tasked with producing sentencing guidelines based on advice and recommendations from the SAP. This marked the first time that guidelines were produced by a body that was not solely comprised of judges. Courts were required to have regard to the SGC guidelines but not obliged to follow them.

4. Debate continued as to the best model for producing guidelines. Lord Carter was commissioned by the government to carry out a review of prisons, and his report, published in December 2007, recommended the establishment of a formal sentencing commission with an explicit role in managing the prison population similar to the approach taken in some US states. A working group chaired by Lord Justice Gage considered this proposal. It concluded that such an approach was too narrow and made its own recommendations.

5. The Gage recommendations were given effect by the C&JA 2009. The Act created the current Sentencing Council, which replaced the two previous bodies. Courts are now required to follow the guidelines (as opposed to 'have regard' to them) unless, in an individual case, to do so would be contrary to the interests of justice.
The Council today

6. The President of the Council is the Lord Chief Justice, and the Chairman is a Lord or Lady Justice of Appeal, currently Lord Justice Holroyde. The Council consists of 14 members: eight judicial members, drawn from the judiciary and lay magistracy, covering the full range of criminal courts; and six non-judicial members with experience in a range of criminal justice matters.

7. The Council is supported by an office whose budget is funded by the Ministry of Justice. Since the Council was created in April 2010, we have received a small budget and, along with many other public sector bodies, have seen this reduce over time. This has meant that the Council has had to make difficult choices about which areas of work to prioritise and how best to deliver our statutory responsibilities. At the time of writing, our budget for the financial year 2019/20 was in the region of £1.5 million, the majority of which (approximately £1.2 million) related to staff and Council member costs. The Council's full complement of staff is only 17 and comprises a multi-disciplinary team of lawyers, policy officials, analysts, communication specialists and administrative support.

8. The legislation sets out a number of duties that the Council must fulfil and a range of functions that we may carry out. It also places some constraints or requirements on how those functions are to be exercised. The Council’s various statutory duties, matters to which it must have regard and functions it may choose to carry out, are described and considered in detail throughout the main body of this consultation and at Annex B.

9. In addition, given the significant judicial membership, which includes two Court of Appeal judges and two High Court judges, it is difficult for the Council to take positions or give views on matters that might properly be considered as policy matters outside our statutory remit or matters of political sensitivity.

Aims and objectives

10. The Council’s main overarching objectives 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.

11. In 2015, as the pressures on our budget were becoming apparent, the Council took stock of our statutory duties and reiterated our commitment to focusing resources
primarily on sentencing guidelines. We gave ourselves a set of overarching objectives to achieve by 2020. These were to have produced sentencing guidelines covering all the most frequently sentenced offences, and to have replaced all of our predecessor body’s guidelines by the year of our 10th anniversary. The Council agreed that this overarching ambition should be our main focus until 2020. Each year we publish a rolling, three-year workplan outlining our progress towards that ambition and any other pressing additional matters that may arise.

Looking forward

12. As we reach our 10th year, the Council is satisfied that we have largely delivered what we initially set out to achieve by 2020, and now seems a natural point at which to take stock of our progress and success and look forward to what the Council’s priorities should be for the next five to 10 years. We are also aware that there is increasing debate within the criminal justice sector about what the Council’s role and focus should be.

13. The Council began thinking about long-term priorities two years ago and commissioned Professor Sir Anthony Bottoms of the University of Cambridge, along with Dr Jo Parsons, to carry out an independent review of the Council and how we had fulfilled our statutory functions to date. The Council is very grateful for this work, which has already informed some of our early choices around our work programme and our approach to drafting guidelines. Some of the other recommendations in the report would require choices to be made that could have an impact on the Council’s traditional focus on guideline production.

14. More recently, the Ministry of Justice published a Tailored Review of the Council, in line with the Cabinet Office Code of Practice relating to public bodies. The review reiterated the government’s view that there was an ongoing need for a body such as the Council and that the statutory functions did not need to be changed. However, the review made a number of more practical recommendations, which the Council is taking forward. Finally, the Justice Select Committee suggested, in the report of its Inquiry into the Prison Population 2022, that it may consider initiating an inquiry into the Sentencing Council’s future role.

15. For all of these reasons, the Council believes that now is the right time to consider our role and consult widely to seek the views of all those with an interest in our work on what the Council’s future objectives and priorities should be.
The Council’s approach

16. In considering the future direction of the Council, we have considered:

- the statutory duties set out in the C&JA 2009;
- the independent review of the Council, conducted by Professor Sir Anthony Bottoms;¹
- the report from a Tailored Review undertaken by the Ministry of Justice;² and
- commentaries published on the Council’s work throughout the last 10 years (for example, from academics or interest groups).

17. In the autumn of 2019, Sentencing Council officials also undertook a series of informal discussions with internal and external partners in the criminal justice system and those with an interest in the system to discuss a range of issues that could feed into this consultation. These issues included the Council’s achievements over the first 10 years, the way in which we have interpreted and addressed our statutory duties, where gaps may exist in our work, and suggestions for future areas of work.

18. The outcomes of these informal discussions have been fed back anonymously to the Council and have helped shaped members’ thinking and the proposals that are contained within this consultation document.

Future priorities: outline of the proposals

19. The following sections of this consultation outline the key areas and issues that have emerged from our early work to consider the Council’s priorities. These sections have been split into six broad areas:

- Overarching general issues
- Developing and revising sentencing guidelines
- Analysis and research
- Promoting public confidence
- Costs and effectiveness in sentencing
- How we work

20. These sections should be read in conjunction with the information in Annex B, which outlines how the Council has, to date, addressed the statutory duties. The sections also contain a number of consultation questions (see Annex A for a full list of these questions).

21. Responses to these questions, and any change of emphasis, strengthening of analytical support or additional areas that the Council may wish to pursue as a result of ideas put forward through this consultation, will need to be considered in the light of the resources available to the Council. As outlined above, the Council has a limited budget and is supported by a small team.

22. If the Council did want to rebalance priorities, this may necessitate slowing down the rate of guideline development and revision to release officials to undertake other work.

23. The Council will also explore whether there are potential sources of additional funding to which we can apply in order to resource any extra work that might flow from the consultation. Regarding analysis and research in particular, we have also asked a specific question on whether consultees feel there are any areas of work that could be undertaken by an external organisation, either in full or in part.

24. Throughout the consultation we ask respondents when giving their views on what the Council should do to be as clear as possible as to how much of a priority they consider each activity (or potential activity) to be and why. This will enable the Council to give the fullest and most informed consideration to all the responses received.

General matters

25. The Council’s creation in 2009 coincided with the start of a period of austerity in public finances, which saw its budget cut successively for a number of years (in line with most public bodies). For the past two years, the Council has seen its budget remain constant in real terms.

26. This has meant that the Council has had choose which areas it must focus on. As outlined above, it has chosen to concentrate chiefly on duties relating to the development, testing and evaluation of sentencing guidelines. Without additional resources available, any significant change in emphasis or taking on additional areas of work would have an impact on the other areas of work that the Council currently undertakes. For example, it may necessitate a slowing down of the pace of guideline development and revision.

27. The production and revision of guidelines does indeed form a large part of the Council’s statutory responsibilities. However, there are other areas that the Council
could choose to address more fully if there were a reduced emphasis on guidelines. For example, it has been argued that, having achieved its aim to produce guidelines for all the high volume offences, it could add more value in the future by focusing more on evaluative work or carrying out additional research on trends or practices in sentencing. Others argue strongly that the production of guidelines ought to remain the Council’s primary function as this is where it can have the most practical value to the courts.

28. The Council is therefore seeking views on what consultees feel are the most important issues for the Council to consider when allocating its resources, and what activities it should prioritise.

29. The Council will continue to make the case for more funding and argue for what more it could do if more resources were available. If there were to be a strong view from respondents as to particular activities the Council should undertake – and a clear rationale of the benefits of doing so – this could form part of an evidence base to make the case for additional funding from the government. Similarly, we welcome views from respondents on any alternative funding sources that it would be appropriate to investigate.

Responding to this consultation

30. This consultation invites views on all aspects of the Council’s work, and for this reason it is necessarily long and detailed. We recognise that not all respondents will want to answer all of the questions, and we invite you to select those areas of the consultation that are of interest to you.

31. Questions appear in the relevant sections of the document. At this stage, the Council invites comments on the following questions in relation to general matters. It may be helpful to bear these questions in mind while considering the rest of the consultation and to return to them at the end.

Consultation questions on general matters

Question 1: Is the Council right to continue to focus on the statutory duties that it has prioritised to date (broadly speaking: guideline development, monitoring and evaluation of guidelines, public confidence)? If not, what are your reasons for this?

Question 2: In particular, do you think the Council’s current primary focus on guideline development and revision (including analysis and research
and communication activities to support guidelines) is correct and should continue? Please provide reasons.

Question 3: If you think the Council should focus more on other activities please outline those areas and the reasons why.

Question 4: Taking account of your answers above what do you think the balance should be between guidelines (and the work that supports them) and other activities that you have identified? Please outline your reasons.

Question 5: Are there other sources of funding or funding models that the Council should consider pursuing in order better to fulfil its statutory duties?

Question 6: Are there any other broad matters that you would like to raise, or comments you wish to make on the Council, that are not covered by your answers to any other questions?