



Ministry of
JUSTICE

Government response to the Justice Select Committee's Report:

“Sentencing guidelines and
Parliament: building a bridge”

September 2009



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Justice Select Committee's Report:
"Sentencing guidelines and Parliament:
building a bridge"**

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

September 2009

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Government response to the Justice Select Committee's Report:
"Sentencing guidelines and Parliament: building a bridge"

Introduction

The Government welcomes the Justice Select Committee Report: *Sentencing guidelines and Parliament: building a bridge* and is grateful to the Committee and all those who gave evidence in the preparation of this Report.

The Government's response to the conclusions and recommendations of the Report are set out below.

Government's response to the Committee's recommendations and conclusions

We have identified five themes from the recommendations or conclusions of the Committee's report. We respond below to each of these themes in the order set out in the final chapter of the Committee's report and retaining the references to the paragraphs in the main text of the report.

(i) Role of the Justice Select Committee

"Parliament sets the framework for sentencing in legislation. Sentencing guidelines are a key element to how this legislation works in practice. It is vital that Parliament, representing the public voice, contributes to sentencing guidelines as they are produced and in doing so identifies the crucial issues of public confidence and the effectiveness of sentencing. We are convinced this is compatible with safeguarding the crucial discretion of sentencers to impose a sentence tailored to the individual case. (Paragraph 44)

We are concerned that, all too often, political debates about sentencing descend into a counter-productive competition as to who can appear toughest on crime, measured by sentence length. A select committee works on the basis of consensus and we are less likely to fall foul of the temptation to 'out-tough' each other in our consideration of sentencing guidelines or to confuse length of sentence with effectiveness. (Paragraph 45)

We will continue to review sentencing guidelines in the wider context, seeking thereby to enhance the quality of scrutiny of criminal justice policy and legislation. This is an entirely different process from judgments on individual cases." (Paragraph 46)

The Government agrees that it is for Parliament to set the sentencing framework by creating or amending criminal offences and setting maximum, and in some cases minimum, sentences. It is for sentencers to sentence within that legal framework, taking account of the circumstances of the case before them and having regard to the sentencing guidelines produced by the independent Sentencing Guidelines Council. And it is for Government to set out its sentencing policy.

Our sentencing policy is clear. The Government are committed to ensure serious and dangerous offenders, and persistent offenders, go to prison and if necessary for a long time. For those who do not need to go to prison a community order is often a more effective sentence. Our sentencing policy has been part of an approach to criminal justice which has seen crime fall by a third since 1997.

The role of Parliament in sentencing guidelines and in particular the question of whether Parliament should approve sentencing guidelines was considered by the Sentencing Commission Working Group chaired by Lord Justice Gage. The majority of the Gage Working Group did not favour the idea of Parliamentary approval of guidelines expressing concern that the involvement of Parliament in approving guidelines could lead to the politicisation of the guidelines in ways which the Select Committee's report highlights.

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The Government supports the evolutionary approach which the Gage Report suggests, building on the guidelines system we already have. We believe this evolutionary approach extends to the Parliamentary scrutiny role. Under current arrangements the Sentencing Guidelines Council routinely consults the Justice Select Committee on draft guidelines. The Select Committee is consulted at the same time as Ministers and other interested parties. The Select Committee has in the past provided comments on guidelines and has called witnesses to gather evidence relating to the contents of draft guidelines.

The Government fully supports the contention that the Justice Select Committee should continue to have a role in scrutinising guidelines. The Government therefore introduced in the Coroners and Justice Bill a duty on the new Sentencing Council to consult the Select Committee. We believe this arrangement better reflects both the importance the Select Committee has in scrutinising guidelines on behalf of Parliament and, given the expanded duties of the Council, the need to ensure that scrutiny applies to those additional functions.

We welcome the intention of the Committee to review guidelines in a wider context and agree that this is a different process from commenting on judgments in an individual case.

(ii) The purposes of sentencing

"The five aims of sentencing set out in the Criminal Justice Act 2003 are neither internally coherent nor consistently applied. It is not clear whether the aims are intended to be a hierarchical list or a menu to be combined differently in different cases. It is not clear how the purposes of sentencing relate to, or should be reflected in, sentencing guidelines. As a result, the public, criminal justice organisations, victims, sentencers and the Government all have different expectations as to what sentencing is trying to achieve—suggesting that someone, inevitably, will be disappointed." (Paragraph 66)

The Government does not agree with this conclusion. The criteria are clear and consistent.

The purposes of sentencing are set out in section 142 of the Criminal Justice Act 2003. They include: the punishment of offenders; the reduction of crime (including its reduction by deterrence); the reform and rehabilitation of offenders; the protection of the public and the making of reparation by offenders to person affected by their offences. The Act requires any court to have regard to these five purposes of sentencing when dealing with an adult offender.¹ This is one section of the part of the Act which deals with matters to be taken into account by a court in sentencing, which also includes provisions on determining the seriousness of an offence.

The 2003 Act did not identify any one of the five purposes of sentencing as being of more importance than any other. Courts are required to have regard to all of the purposes in dealing with an offender. The statutory framework is not prescriptive as it considers that the five purposes of sentencing are relevant considerations in all cases (to a greater or lesser extent) and it is for the courts to decide in each individual case how to reflect those purposes in their choice of sentence. It would be, in the Government's view, inadvisable and counterproductive to attempt to prioritise the purposes of sentencing in a manner which would be incompatible with the flexible nature set out in the statute. The balancing of the criteria is a case-specific decision for the sentencer to make.

As we have said above, the purposes of sentencing are considerations for the sentencer in an individual case. The sentencer must also have regard to a number of matters, primarily the seriousness of the offence (with regard to the culpability of the offender and the harm caused), and in addition any discount for an early guilty plea, any statutory aggravating circumstances, Court of Appeal guidance and sentencing guidelines. The Government does not accept that these considerations are contradictory and we do not believe that sentencers are unable to consider the range of purposes of sentencing when dealing with an individual case.

¹ The purposes of sentencing for persons under 18 are contained in section 142A of the Criminal Justice Act 2003 as inserted by section 9 of the Criminal Justice & Immigration Act 2008.

The statutory duties on the Sentencing Guidelines Council when framing or revising guidelines do not extend to producing guidelines which set out sentences in line with each of the purposes of sentencing. The Sentencing Guidelines Council frames guidelines in a way which allows it to provide for different sentencing starting points and sentencing ranges for categories of a specific offence based on the seriousness of the behaviour. The Government agrees with the Sentencing Guidelines Council's approach which is why the provisions in the Coroners and Justice Bill make clear that this will be the desirable, but not mandatory format for guidelines issued by the Sentencing Council.

The Government does not accept however that the guidelines do not include references to the purposes of sentencing. The first guideline issued by the Sentencing Guidelines Council "Overarching Principles: Seriousness" (December 2004) starts by setting out the statutory purposes of sentencing:

- "1.1 In every case where the offender is aged 18 or over at the time of conviction, the court must have regard to the five purposes of sentencing contained in *section 142(1) Criminal Justice Act 2003*:
- (a) the punishment of offenders
 - (b) the reduction of crime (including its reduction by deterrence)
 - (c) the reform and rehabilitation of offenders
 - (d) the protection of the public
 - (e) the making of reparation by offenders to persons affected by their offence
- 1.2 The Act does not indicate that any one purpose should be more important than any other and in practice they may all be relevant to a greater or lesser degree in any individual case – the sentencer has the task of determining the manner in which they apply.
- 1.3 The sentencer must start by considering the *seriousness* of the offence, the assessment of which will:
- determine which of the sentencing thresholds has been crossed;
 - indicate whether a custodial, community or other sentence is the most appropriate;
 - be the key factor in deciding the length of a custodial sentence, the onerousness of requirements to be incorporated in a community sentence and the amount of any fine imposed."

(Sentencing Guidelines Council: "Overarching Principles: Seriousness", December 2004, page 3)

In drawing up offence specific guidelines the Council must have regard to the statutory requirements set out in section 170 of the Criminal Justice Act 2003 but it can also have regard to the purposes of sentencing. The recent consultation paper from the Sentencing Advisory Panel on burglary in a dwelling for example makes reference to the purposes of sentencing and illustrates how the purposes might be met:

"Section 142 of the Criminal Justice Act 2003 requires courts to have regard to five purposes of sentencing: punishment, crime reduction, reform and rehabilitation, public protection, and reparation. The sentencer must consider which of these purposes is appropriate in each particular case, and how it or they might be achieved. Most sentences will involve an element of punishment, but a court may also aim to rehabilitate when deciding what requirements to include in a community or suspended sentence order, and reparation to the victim may indicate a particular form of community order and/or a compensation order. However, the dominant consideration is that the sentence imposed must be proportionate to the seriousness of the offence. The purposes most relevant to the presumptive minimum sentence appear to be public protection and crime reduction, through a combination of deterrence and incapacitation."

(Sentencing Advisory Panel: "Consultation paper on sentencing for burglary from a dwelling", May 2009, paragraph 86, page 33)

The Government believes that Criminal Justice Act 2003 provisions are a forward step in clarifying, for the first time, for the public, criminal justice organisations, victims and sentencers what the purposes of sentencing are. We do not accept that at a practical level this causes any problems for sentencers. We recognise that the Sentencing Council may wish to consider how new guidelines reflect the purposes of sentencing and we will support them in doing so.

(iii) The cost of different sentences and their relative effectiveness

"It is set out in statute that sentencing guidelines should be drawn up with regard to the cost of different sentences and their relative effectiveness. This does not conflict with the duty of the sentencer to determine the sentence appropriate to the individual case. We acknowledge that this is made difficult by the lack of clarity as to the purposes of sentencing, because there is no clear and consensual standard as to how effectiveness should be determined. However, this aspect must have greater prominence in the development of sentencing guidelines. We will therefore prioritise it for scrutiny. (Paragraph 67)

It has been a settled principle of the development of sentencing guidelines for over a decade that their formulation should have regard to the cost of different sentences and their relative effectiveness in preventing re-offending and the need to promote public confidence in the criminal justice system. In our experience, these aspects are both crucial and difficult to capture. We will therefore continue to pursue these aspects in our work on sentencing guidelines. (Paragraph 82)

Sentencing policy needs to consider not only the cost of sentencing, but its cost effectiveness, measured in terms of its ability to prevent people from being victims of more crimes in the future. At the same time, sentencing policy and sentencing in individual cases are influenced by the public's entirely understandable wish to have an outcome from a conviction which recognises the level of seriousness with which society regards such a crime. This statement of seriousness and disapproval is almost always seen as something which can only be achieved by a prison sentence, or by a longer custodial sentence than for other crimes with which it is compared."

The Government agrees that the duty on the Sentencing Guidelines Council to have regard to the cost and relative effectiveness of sentences does not conflict with the duty of the sentencer to determine the sentence appropriate to the individual case. The Government recognises the significance of this requirement on the Council and welcomes the Committee's intention to scrutinise how this duty is addressed.

The requirement on the Sentencing Guidelines Council to have regard to the cost of different sentences and their relative effectiveness in preventing reoffending is contained in section 170(5)(c) of the Criminal Justice Act and repeated in the Coroners and Justice Bill for the proposed Sentencing Council.

In addition to the sentencing and reoffending data the Government already collect and provide to the Sentencing Guidelines Council we have a number of projects designed to improve our understanding of the cost and effectiveness of sentences which should be of assistance to the Council in meeting this statutory obligation and to the Committee in scrutinising guidelines.

We have work underway to understand whether similar offenders given a police caution or court fine or conditional discharge have different reoffending rates. We should have findings available in 2010, which will include analysis by offence type. We are also planning work to understand whether similar offenders given short custodial sentences or Suspended Sentence Orders have different reoffending rates from those given Community Orders. We are considering a range of methods to control for different offender characteristics and produce comparison groups to examine impact of sentence. Initial findings including analysis by offence type are due in 2010.

The Ministry of Justice's research programme also includes three major cohort studies to track large and representative samples of offenders on custodial and community sentences and juvenile offenders. These studies will follow the same groups of offenders from the beginning of their sentences through to post release, then at various points (for example, at mid-point of sentence and at end of sentence). These studies are at various stages of implementation or development.

- **Surveying Prisoner Crime Reduction (SPCR)** is designed to monitor the progress of approximately 4,000 newly sentenced prisoners, sentenced up to a maximum of 4 years, during and after their sentences; SPCR is currently up and running. The study assesses in detail the needs and problems of prisoners as they arrive in prison. It examines the range of interventions they received during their time in custody to address these. SPCR will provide useful evidence on the effectiveness of a range of interventions across the reoffending pathways.
- **The Offender Management Community Cohort Study (OMCCS)** is designed to monitor the progress of approximately 6,600 adult offenders on community orders. The study is just being implemented and will last over four years. The offenders will be interviewed at three points during their order – at the start, middle and end. The results are likely to be available in 2012, with some interim findings prior to that. This will contribute to the evidence base on which multi-modal packages contribute to reducing reoffending.
- **The Juvenile Cohort Study (JCS)** is designed to track some 10,000 young offenders (aged 10 to 17 years old) from 30 different Youth Offending Teams (YOTs) over a period of approximately 2 years to explore the experiences of different types of young offenders within the criminal justice system. The JCS will assess the impact of interventions and combination of interventions that are associated with a reduction in reoffending (including frequency and severity) in different types of young offenders subject to the criminal justice system.

Running alongside these projects, we have a **Unit Cost in Criminal Justice project (UCCJ)**. The primary aim of this project is to generate unit cost information that can be used in combination with outcome data from the cohort research studies to enable cost-benefit or cost-effectiveness evaluations to be undertaken. The final report is due in August 2010.

Finally, we have a project on **Understanding criminal career costs**. This work is being developed to predict better whether an offender will continue to engage in crime in future and the costs that an offender's potential future crimes impose on society, given what we know about an offender (e.g. past offences).

All of the work carried out by the Ministry of Justice will assist the Sentencing Council but the Council is also able to commission its own research to assist in meeting its statutory functions. We expect that the Council will want to work with the Government in maximising its understanding of the evidence available on the cost and relative effectiveness of sentencing.

(iv) Promoting public awareness of sentencing

"We are convinced by the evidence that public attitudes towards sentences change depending on whether people are asked abstract questions about leniency or given details of a situation and asked about the appropriate sentence. When given enough information to understand a sentence, people support sentencing at a level similar to current sentencing practice. We conclude that sentencing policy should not be determined on the presumption that the public find current sentencing too lenient. Public confidence would be better served by ensuring and then demonstrating that sentencing is effective in preventing people from being victims of crime in the future. (Paragraph 80)

Even if more people are sent to prison for longer, people will not necessarily be convinced that sentences are in fact increasing in length. It is also not necessarily what the public wants. Pursuing a sentencing policy based on a misconception of what people want is not intelligent, appropriate or sustainable. More worryingly, it may result in more people being victims of crime in the future and less confidence in the criminal justice system. (Paragraph 81)

Newspaper reports of trials, often including interviews with victims' families, frequently attest that the sentence was not long enough, or should have been custodial rather than community-based, without regard to whether the custodial or longer sentence would be more effective—or at all effective—in preventing further crimes after release. This problem will continue to have a powerful effect on public confidence in sentencing, and on the response of sentencers, unless ways can be found of combining within a sentence a clear signal as to the seriousness of the offence and a rational assessment of how effective the sentence will be in preventing further crimes. We intend to give this issue further consideration in our forthcoming report on Justice Reinvestment." (Paragraph 83)

Sentencing is a difficult and complex task that is not always well understood. That is why the current sentencing legislation (section 174 of the Criminal Justice Act 2003) includes a requirement on every sentencer to explain in open court and in ordinary language the reason for deciding on the sentence and the effect of that sentence.

The Government has also supported research and a number of initiatives to improve public understanding. Local Criminal Justice Boards have held "You Be the Judge" events across the country. These give members of the public the opportunity to hear criminal cases and give their verdict on which sentence best fits the crime. The actual sentence given will then be revealed, and a Judge will give their view on the factors that would have influenced this decision. A defence and CPS lawyer will also be on hand. The aim of the scheme is to explain the different types of sentence available, how Judges make their decisions and to explore public views on sentencing in general terms.

Many of the "You Be the Judge" events take place during Inside Justice Week (this year held between 17–24 October) a week long series of events which are designed to increase the public's understanding of the Criminal Justice System.

Research has been conducted its own research in the area of public perception and understanding of sentencing. We are currently conducting a feasibility study for a public preferences survey, a national survey that will aim to measure public preferences over a range of sentencing disposals and criminal justice outcomes. This study seeks to understand public preferences in more detail than other surveys by examining the specific elements that drive public preferences, the extent to which the public are prepared to make trade-offs with respect to the multiple purposes of sentencing and the amount the public are willing to pay for different disposals. The main aim of this survey is to enable us to 'value' the less measurable purposes of sentencing.

We are examining what more could be done to explain sentencing to the public including considering what sentencing information the public would like to see and the ways in which it could be made accessible.

It is not correct to suggest that Government policy or public concerns are focussed solely on longer custodial sentences. We have consistently said that community sentences are in many cases a more appropriate and more effective sentence than a short custodial term. We have also raised the public profile of community sentences with the introduction of community payback where the public can have a say in what unpaid work offenders carry out in local communities. The Justice Seen Justice Done campaign brought Community Payback to the public's attention and organised a public vote (which attracted 18,000 votes) in April 2009 to pick Community Payback projects in a number of areas around the country.

Finally, we recognise that other non-Governmental bodies can play an important role in engaging with the public on sentencing and other criminal justice issues. The Sentencing Guidelines Council already has a role in this regard. The Sentencing Guidelines Council in producing guidelines must, amongst other things, have regard to the need to promote public confidence in the criminal justice system. The Government welcomes the recent research carried out on behalf of the Sentencing Advisory Panel on public attitudes to sentencing. Such research is an essential element in developing better understanding of public attitudes and concerns and in informing the Sentencing Guidelines Council when drawing up guidelines.

The role of the new Sentencing Council should also include a duty to promote public understanding of sentencing. The provisions in the Coroners and Justice Bill therefore include a duty on the Council to publish statistical information on sentencing at national and local level. The Council can also promote awareness of matters relating to sentencing in particular; the sentences imposed by courts in England and Wales; the cost of different sentences and their relative effectiveness in preventing reoffending and the operation and effect of guidelines. The Government believes this is an important role for the Sentencing Council and we will support the Council in its effort to promote awareness.

(v) Sentencing data

"The added value we can bring by reviewing sentencing guidelines is hampered by the poor standard of information available on the costs of different sentences and on measures of effectiveness of different sentences. It is unacceptable that basic information such as what factors led to a particular sentence being imposed in a particular case is not collected and made available. We recommend that the Government as a matter of urgency commit to identifying information on sentencing that is crucial and put in place a structured plan to collect and publish this data. (Paragraph 84)

We welcome therefore the provisions for information collection, analysis and dissemination in the proposals for a new Sentencing Council for England and Wales. However, we are worried that in practice, such issues may turn out to be peripheral considerations for the Sentencing Council. The Government has demonstrated, as detailed in our report *Towards Effective Sentencing*, an inability to ensure that sentencing policies are resourced so that they may be effectively implemented. We are concerned that, as one example, the impact assessment for the Sentencing Council ignores costs that may be incurred by the judiciary. We recommend that the Government ensures that structures for data collection on sentencing are adequately resourced both at a national and local level." (Paragraph 85)

The Government notes the concerns of the Committee in regard to the collection of sentencing data but would point out that the Committee's report can be seen as confusing different responsibilities for data collection and analysis.

The Government collects and publishes data on the outcome of sentencing decisions. There is extensive data on the outcome of sentencing decisions including custody rates and sentence lengths broken down by amongst other things offence type, sentence type, age, gender and court area. This information is published as National Statistics in the yearly publication "Sentencing Statistics". Additional data are available in other Ministry of Justice publications including the "Offender Management Caseload Statistics" and "Prison Population Projections".

There is a distinction to be made, however, between data on the result of the sentencing decision and data relating to the sentencing decision process. The report of the independent working group chaired by Lord Justice Gage is clear about the lack of data relating to the sentencing decision process rather than detail of the sentence handed down. The working group found that:

- 4.13 The SGC has attempted to obtain data enabling it to monitor the effect of its guidelines. The SAP in its response to our consultation points to the abandonment of an important research project due to the unavailability of reliable data necessary for the research project to be completed. Data currently available is not sufficient to allow the SGC to predict the effect of a draft guideline on the prison population or other correctional resources. In our view, the absence of a system for more precise measurement of resource requirements is an obvious inhibitor to effective planning for management of the sentenced population.
- 4.14 In England and Wales judges and magistrates are under a statutory duty to have regard to sentencing guidelines when sentencing an offender¹⁵ and when passing a sentence of a different kind or outside the range in the guideline to give reasons for doing so¹⁶. At present no information is collected in respect of the number of departures from guidelines nor the reasons for the departure. In our view this represents another defect in the present system.

("Sentencing Guidelines in England and Wales: an evolutionary approach", Sentencing Commission Working Group, July 2008, page 12)

It went on to conclude:

9.5 The Working Group finds that current data collection in England and Wales in respect of sentencing is inadequate and that it is impossible to predict the effect of sentencing guidelines or to predict the requirement for future correctional resources. It concludes that a more comprehensive system of data collection in respect of sentencing in the Crown Court and the Magistrates' Court is required. It recommends that such a system is devised and put into effect as soon as possible. This task is urgent, considerable and needs appropriate funding. It also recommends that the SGC conducts a national survey of current sentencing practice.

9.6 The Working Group concludes that the SGC is best positioned to devise, commission and take ownership of an expert system of data collection and, by that means, to provide Government and the public with reliable assessments of the likely impact of its guidelines. It recommends that the SGC publish such assessments at regular intervals.

("Sentencing Guidelines in England and Wales: an evolutionary approach", Sentencing Commission Working Group, July 2008, page 31)

We agreed with the recommendation of the Gage Working Group that there should be more sentencing data and that this new data collection is best carried out by the Council. The provisions in the Coroners and Justice Bill place new duties of the Sentencing Council to make a number of assessments of the impact of sentencing, sentencing guidelines and government policy and legislation. To make those assessments the Council needs to collect the information set out in the Judges' sentencing remarks. Ways of doing this are currently being explored.

The Coroners and Justice Bill cost assessment carried out by the Ministry of Justice included an initial estimate of the costs of the data collection. The data collection is not however a specific duty set out in the Bill and is not a cost that flows directly from the Bill but the Government did want to illustrate that such costs could arise for the Council. The actual costs of the data collection, including the cost of judicial time, will depend on the Council's decisions on how to manage data collection.

The Government has said during the passage of the Bill that it will provide the Council with appropriate resources to meet its statutory duties and will provide the expanded support the Council is likely to need – in particular the additional analytical capacity required to make impact assessments. Ministry of Justice analysts are assisting the senior judiciary and the current Sentencing Guidelines Council secretariat to develop effective data collection procedures that will enable the Council, once established, to meet its statutory duties without undue disturbance to the work of the Courts.

We do not accept that the Council will treat data collection as a peripheral consideration. Analysis of this additional sentencing data will be key to the Council's role in both producing guidelines and making impact assessments. It is why we have added to the Bill the desirability of one of the non-judicial members of the Council having experience in the use of statistics. The Government will expect the Council to meet its statutory duties in producing impact assessments. We would also expect and welcome the Justice Select Committee's scrutiny of the Council's performance in regard to this duty.



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