

Prison Reform Trust response to the Sentencing Council consultation: What next for the Sentencing Council? – September 2020

The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. The Prison Reform Trust provides the secretariat to the All Party Parliamentary Penal Affairs Group and has an advice and information service for people in prison.

The Prison Reform Trust's main objectives are:

- reducing unnecessary imprisonment and promoting community solutions to crime
- improving treatment and conditions for prisoners and their families
- promote equality and human rights in the criminal justice system.

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Introduction

We welcome the opportunity to respond to this consultation. Ten years on from its creation, the appropriate role and purpose of the Sentencing Council continues to be a subject of debate among commentators. Some have argued that the Council should have a role in tackling sentence inflation and the overuse of prison through greater community engagement and by taking account of available prison resources in the setting of guidelines. Others have suggested that such an approach is too narrow and that the role of the Council in the development of guidelines is primarily judicial in function.

The origins of this debate can be seen in circumstances which led to the foundation of the Council in 2010. The Carter review of the use of imprisonment, published in December 2007, proposed that a permanent sentencing commission be set up in England and Wales. The creation of a commission was seen as a means of improving the transparency, predictability and consistency of sentencing, and thus bringing the demand for imprisonment and the supply of prison places into closer alignment.

PRT's 2008 publication *Creating a Sentencing Commission for England and Wales*¹ presented the findings of a review of the policy options relating to a sentencing commission. It proposed that:

- The commission should have a wider remit than the existing bodies: in addition to providing sentencing guidance, it should have a research and monitoring function, and should undertake community engagement. A

¹ <http://image.guardian.co.uk/sys-files/Society/documents/2008/07/07/PRTreport.pdf>

sentencing commission would thereby promote stability and consistency in sentencing practice, and reduce the politicisation of sentencing policy and practice.

- The existing definitive guidelines produced by the SGC should provide the foundation for those issued by the sentencing commission, although the sentencing commission guidance should be simpler, clearer and more consistent in its format and presentation. Parliament should consider introducing tighter restrictions on departure from the guidance than is currently imposed by the statutory direction to sentencers to ‘have regard to’ the SGC guidelines.
- The research and monitoring role of the commission would encompass a number of specific tasks, including monitoring compliance with the guidelines and their impact on sentencing practice; contributing to government forecasts of prison population trends; assessing the impact of proposed reforms to sentencing policy; and conducting original research into views of sentencers and public attitudes to sentencing.
- Community engagement should be a central function of the commission. It should participate in a range of activities aimed at informing and educating the public about sentencing; and it should consult the public as widely as possible to ensure an appropriate degree of congruence between public opinion and sentencing policy and practice.”

A working group chaired by Lord Justice Gage considered the proposal for a sentencing commission. While the working group accepted many of the proposed functions for a commission, it rejected a more proactive role for the proposed body in matching sentencing guidelines to available prison and probation resources. The Gage recommendations were given effect by the C&JA 2009.

As we argued in 2008, the Prison Reform Trust believes that the Council has an important (but as yet unfulfilled) role in addressing the problems of prison over-use and sentence inflation. In our view, where the Council has been strongest is in the development of guidelines. While the current guidelines are not without fault, they have undoubtedly bought a greater degree of consistency and transparency to the sentencing process. By extension they may have to a limited extent contributed to public confidence in the criminal justice system. Where the Council has been weaker is in the areas of its wider remit relating to promoting public confidence and awareness of sentencing practice, as well as some aspects of its monitoring and oversight of sentencing guidelines. Arguably these areas were not given sufficient priority in its founding statutory remit, and so were not given the attention or resource required, particularly in the context of austerity.

Our response to this consultation is informed by this general view. Furthermore, we endorse many of the recommendations made by Anthony Bottoms in his report on research. We hope in particular that the Council will take forward his proposals on effectiveness, to more closely match guidelines to support the process of desistance and to reflect consequentialist approaches to sentencing.²

² Consequentialism holds that the rightness or wrongness of actions—or rules for action, or (relevant to our context) institutions—is determined solely by their consequences. Thus consequentialist accounts of punishment defend the practice as instrumentally valuable: the consequences of maintaining an institution of legal punishment, according to this view, are better than the consequences of not having such an institution. For many consequentialists, the burden of punishment itself is seen as a negative consequence—an “evil,” as Jeremy Bentham called it (Bentham, 1789: 158). Thus for punishment to be justified, it must be the

- 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?**

We do not consider it reasonable for the Council to be expected to deliver on its statutory remit without sufficient resource to do so. Neither is it reasonable for the Council to be expected to prioritise between different duties, all of which are important for performing its proper role and function. We endorse Anthony Bottom's overarching recommendation that "the Council is attempting to fulfil its pivotal role in the criminal justice system on a very limited budget which—like the budgets of most public sector bodies—has been cut in recent years. These financial constraints mean that the Council does not have the means to fulfil adequately all its statutory duties. It is hoped that the Council might be able to use this Review to argue for an increased budgetary allocation."

However, with the development of guidelines for all high-volume offences due to be completed by 2020, there may be an opportunity for the Council to take stock and examine the case for prioritising other aspects of its remit. In particular, as we highlight below, greater priority should be given to promoting public confidence in and awareness of sentencing practice, as well as improving some aspects of the Council's monitoring and assessment of guidelines. In line with Anthony Bottoms' recommendations, further thought should also be given to improving the structure of guidelines themselves, so they better support the process of desistance and take greater account of consequentialist approaches to sentencing.

- 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.**
- 3. If you think the Council should focus more on other activities please outline those areas and the reasons why.**
- 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.**
- 5. Are there other sources of funding or funding models that the Council should consider pursuing in order better to fulfil its statutory duties?**
- 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?**
- 7. What are your views on the extent to which the Council, through the development of sentencing guidelines, meets the duties to have regard to:**

case that it brings about other, sufficiently valuable consequences to outweigh its onerousness for the person on whom it is inflicted. Typically, punishment is defended as a necessary means to the socially valuable end of crime reduction, through deterrence, incapacitation, or offender reform. Source: <https://iep.utm.edu/m-p-puni/#H3>

- a. **the need to promote consistency in sentencing;**
- b. **the impact of sentencing decisions on victims; and**
- c. **the need to promote public confidence in the criminal justice system?**

Please suggest any ways in which you think this could be improved.

a. the need to promote consistency in sentencing

The guidelines rightly prioritise consistency of approach over outcome, since there may be justifiable differences in outcome for similar cases, depending on the circumstances and needs of the individual defendant. Inevitably this makes the task of assessing whether the Council is fulfilling its statutory remit to promote consistency difficult, since it relies on being able to measure justifiable differences in outcome between case. Nonetheless, it is important that the guidelines retain this focus on consistency of approach, and not aim to produce an aggregate level of consistency between cases.

Furthermore, it is important to recognise that consistency is a “slippery concept” which may work against other important principles such as equity and proportionality.³ For instance, the burglary guideline was supposed to increase consistency and “regularise practice”, rather than “substantially altering it”. However, the impact assessment of the guideline found instead that there has been a shift towards more severe sentences for all kinds of burglary, and for non- domestic cases “a steep increase”, with average custodial sentence lengths going up 13% between 2011 and 2014. The impact assessment of the assault guideline also revealed unexpected increases in the severity of sentence for two offences (GBH s.18 and ABH).

In addition, the impact assessment of the burglary guideline revealed that there had also been an upward trend in the severity of sentences for these offences from about 2007. The assessment stated that the Council’s “resource assessment anticipated no change in sentencing practice”, and therefore the enhanced sentence levels experienced after the guideline remain ‘in line with the anticipated result’. As Anthony Bottoms highlights, however, “This judgement is open to question. It can be argued, to the contrary, that the purpose of a guideline is to set sentencing levels, and if there is a pre-existing upward trend for the particular offence, and the guideline recommends (broadly) the existing sentencing levels, then the intention of the guideline is to stabilise the upward trend. Accordingly, it is recommended that when conducting impact assessments, if there is a pre-existing upward trend and sentence severity continues to rise after the implementation of a guideline, the Council should in future treat this as an unanticipated, and not an anticipated, increase in the sentence level.”

We welcome the decision of the Council to commission an academic to devise a methodology on consistency in order to inform its work in this area. Any methodology will need to strike a careful balance, so that approaches to improve consistency do not unintentionally increase severity or consolidate existing upward trends in sentencing levels.

³ Padfield N 2013 Exploring the Success of Sentencing Guidelines in ed Ashworth A and Roberts J Sentencing Guidelines: Exploring the English Model

b. the impact of sentencing decisions on victims

It is entirely correct that the Council seeks to take account of the impact of sentencing decisions on victims in the process of developing its guidelines. Studies show that victims' views are shaped by the way their case is handled, and that many victims express a strong interest in ensuring that, if possible, the offender does not commit further offences.⁴ Evidence suggests that there is some overlap between what victims and defendants value in terms of their experience of the criminal justice system. Research on procedural justice shows that defendants place a strong premium on being treated fairly and that perceptions of fairness can directly impact on their levels of compliance with and progression in the sentence.⁵ Furthermore, research on desistance shows that most offenders, even most persistent offenders, eventually stop offending; and even those who do not stop often express a wish that they could stop.⁶ From the perspective of both victims and offenders, therefore, there is scope for guidelines to both promote fairness and consistency and support the process of desistance to reduce the risk of future offending. The latter is covered in more detail below in our response to the questions on effectiveness.

It is unclear why there is not a corresponding duty on the Council to consult with defendants. Doing so would help both to uncover areas of the guidance that were perceived by defendants to be unclear or unfair. It would also assist the Council in developing its remit to consider the effectiveness of sentencing. We endorse Anthony Bottoms recommendation that the defence 'voice' on the Council, along with expertise on mental health and addictions, should be strengthened through either membership or advice (paragraph 21). Arguably, however, the Council should go further. Statutory agencies such as the HM Inspectorate of Probation and the Prisons and Probation Ombudsman are increasingly recognising the value of lived experience in the process of policy development. People with lived experience of the criminal justice system should be routinely consulted as part of the process of developing guidance. The risks to defendants experiencing sentencing as a fair process are currently very severe, given difficulties in accessing competent legal advice, and the absence of any intermediary assistance for defendants with learning difficulties or disabilities. A stronger voice for defendants and a greater concern for their perception of fairness is wholly complementary to the Council's proper concern for victims—an unfair process does a disservice to all concerned.

c. the need to promote public confidence in the criminal justice system?

The development of sentencing guidelines has undoubtedly bought a greater degree of consistency and transparency to the sentencing process. By extension they may have contributed to public confidence in the criminal justice system. However, evidence from public confidence research commissioned by the Council suggests that the impact of the development of guidelines on public confidence in general has been limited. We provide a fuller response on the issue below.

⁴ See for example: H Strang *Repair or Revenge: Victims and Restorative Justice* (Oxford University Press 2002); J M Shapland, G Robinson and A Sorsby *Restorative Justice in Practice: Evaluating What Works for Victims and Offenders* (Willan 2010).

⁵ Beijersbergen, K. A., Dirkzwager, A. J. E., & Nieuwbeerta, P. (2016). Reoffending after release: does procedural justice during imprisonment matter? *Criminal Justice and Behavior*, 43, 63–82

⁶ For an overview of desistance research see J M Shapland and A E Bottoms (2017) 'Desistance from Offending and Implications for Offender Rehabilitation', in A Liebling, S Maruna and L McAra (eds) *The Oxford Handbook of Criminology* (sixth ed.) (Oxford University Press 2017)

8. What are your views on the suggested criteria (in paragraph 66 above) for prioritising the development or review of guidelines? Please suggest any additional criteria that you think should be considered or criteria you think should be removed.

We welcome the addition of the proposed criteria that “Evidence indicates that existing guideline(s) have had a problematic, unintended impact on sentencing severity.” This has been found to be the case for both the assaults and burglary guidelines, and we are pleased that the Council has decided to review both sets of guidance as a consequence. In order to be effective as a criteria for review, the Council should address the following:

- The definition of a “problematic, unintended impact on sentence severity”. There are a number of reasons why an increase in severity may be considered problematic, not necessarily related to whether the increase in severity was intended or not. First, the increase in severity may mean that the sentences passed are no longer proportionate in comparison to other offences of comparable seriousness or in comparison to other types of offence within the offence category. Second, the increase in severity may prioritise one of the statutory purposes of sentencing to the detriment of other purposes. Third, the increase in severity may be seen as putting unacceptable pressure on available prison resources. Furthermore, an impact may still be deemed “problematic” for these reasons even if it was intended or anticipated. We would recommend that both concerns about proportionality and impact on available resources should be included as part of the definition of “problematic”. In addition, we suggest that the definition of the criteria is broadened so that the impact is “problematic and/or unintended”.
- Furthermore, the Council will need to clarify what it means by “unintended”. For instance, Bottoms highlights a particular problem in relation to the impact of the burglary guideline. The impact assessment found an upward trend in sentence severity prior to the introduction of the guideline. As a consequence, it concluded that the continuing increase in sentence severity following the introduction of the guidance was “in line with anticipated results”. As Anthony Bottoms highlights, however, “This judgement is open to question. It can be argued, to the contrary, that the purpose of a guideline is to set sentencing levels, and if there is a pre-existing upward trend for the particular offence, and the guideline recommends (broadly) the existing sentencing levels, then the intention of the guideline is to stabilise the upward trend. Accordingly, it is recommended that when conducting impact assessments, if there is a pre-existing upward trend and sentence severity continues to rise after the implementation of a guideline, the Council should in future treat this as an unanticipated, and not an anticipated, increase in the sentence level.”
- Finally, the Council will need to devote sufficient resource to assessing the impact of existing guidelines, to ensure that any problematic and / or unintended increase in sentence severity can be identified and acted upon.

We have concerns regarding the following proposed criteria for review: “A substantial body of interested parties request a guideline to be issued or revised for a particular area of sentencing and there is evidence to suggest that a guideline would have a significant impact on sentencing.” In particular, we do not consider “a significant impact on sentencing” to be a sufficient criteria to judge the merit of any proposal, even if it is supported by a substantial body of interested parties. The inclusion of this criteria as it stands, for instance, could risk the Council’s workplan being hijacked by populist interests, if a tabloid newspaper got behind a campaign to change

sentencing guidelines in a particular area. Therefore, we recommend that the Council develop a more robust set of principles for assessing the merit of any proposal for a review. This might be framed as follows:

A substantial body of interested parties request a guideline to be issued or revised for a particular area of sentencing, and there is evidence to suggest that this would lead to a significant improvement in sentencing in this area, which:

- helps to deliver on the statutory purposes of sentencing, while retaining an appropriate balance between those purposes; and/or
- helps to improve outcomes, including addressing any disproportionate outcomes, for people with protected characteristics.

9. Should the Council expand the policy for making changes to existing guidelines (short of a full revision) as outlined in paragraph 53 above? Please suggest what situations should be covered by such a policy.

We have concerns about loosening the criteria for making changes to existing guidelines short of a full revision. The consultation suggests that the existing criteria “could be extended to cover situations where interested parties make a case to improve an existing guideline short of a full revision”. There is a danger that substantive changes to guidelines could be made based on the views of a particular interested party, bypassing the formal process of resource assessment and consultation which the Council has developed for the formulation of guidelines. At the very least, the Council will need to develop clear criteria to judge the merits of each case, including criteria for what types of changes would and wouldn’t be permitted as part of a more limited review. We would also recommend that any form of limited review should still include an impact assessment and a process of consultation, so that resources impacts can be properly assessed, and a range of views sought before any change is introduced.

10. Can you suggest practical ways in which the flexibility afforded by delivering guidelines in a digital format could be used by the Council to improve guidelines?

One benefit of delivering guidelines in a digital format has been the ability to cross refer to other useful areas of guidance such as the Equal Treatment Benchbook. One concern raised by Anthony Bottoms in his review of research is that overarching guidance tends to be underused by sentencers compared to offence-specific guidance (paragraph 54). One way to remedy this would be to improve signposting between offence specific guidelines and overarching guidelines. For instance, any reference to mental health in relation to culpability or mitigating factors should include a link to the overarching guidance in this area.

11. Is there a guideline for a particular offence or set of offences that the Council should develop or revise as a priority? Please give reasons.

12. Is there a guideline for a particular overarching issue that the Council should prioritise? Please give reasons and explain how best you think this could be addressed.

Sole or primary carers

We propose that the Sentencing Council consider issuing a new 'Overarching Principle—Sentencing Sole or Primary Carers' to provide clear guidance to the court at the outset regarding its duty to investigate caring responsibilities of defendants and to take these into account in sentencing decisions. This would set out the duty of the court to:

- determine, as an essential step in the sentencing process, whether the offender has dependent children and whether he or she has sole or primary caring responsibilities.
- specify how the child's rights and best interests are being taken into consideration in the decision on sentence.
- ensure that it has all the information relevant to such a determination, if necessary, adjourning the sentencing decision in order to obtain this.

In addition, in all cases where the defendant has dependent children and a custodial sentence is imposed, the sentencing court should be required to provide reasons for imprisonment and set out the consideration that has been given to dependent children. This would contribute to greater consistency and transparency in sentencing decisions that have consequences far wider than for the individual offender and would enable more systematic monitoring and feedback in this area.

Detailed arguments for this proposal are set out in our 2016 report *Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children*

http://www.prisonreformtrust.org.uk/portals/0/documents/sentencing_mothers.pdf

Young adults (aged 18–25)

PRT is a member of the Transition to Adulthood (T2A) Alliance and shares its view that there should be a separate overarching guideline for sentencing young adults up to age of 25. Evidence suggests that the 20 to 25 year-old age group are most likely to desist from offending. Therefore, developing a guideline in this area would go some way to meeting Anthony Bottoms recommendation to more closely match guidelines to the process of desistance. We refer the Council to the 2018 Howard League report, *Sentencing Young Adults: Making the case for sentencing principles for young adults* <https://howardleague.org/wp-content/uploads/2019/01/Sentencing-Young-Adults.pdf>

We also endorse the following recommendations made by Anthony Bottoms regarding overarching guidance:

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

13. Are there any ways in which the technical aspects of the Council's analytical work could be improved? If so, please state what these might be (for example, improving the data sources we draw on or the time we give to accessing different types of data). Please be as specific as possible.

14. Are there any ways in which the focus of the Council’s analytical work could be improved? If so, please state what these might be (for example, broadening out the types of impacts we evaluate—including more in relation to specific demographic groups, focusing more on assessing consistency in sentencing, or exploring the ways in which the guidelines are used in practice). Please be as specific as possible.

In cooperation with other criminal justice agencies, we believe that more should be done to evaluate the impact of sentencing on groups with protected characteristics. Given evidence of disproportionate outcomes for people from BAME backgrounds, particular priority should be given to assessing impacts on individuals belonging to this group, as well on people from faith backgrounds. Given its relevance to sentencing, including relevance to culpability and personal mitigation, priority should also be given to disability, particularly mental health needs and learning disability.

For instance, in relation to the recent impact assessment of the guideline on terrorism offences, we were concerned to note that in 74% of cases the perceived ethnicity of the offender was not recorded or not known. Therefore, as the consultation itself acknowledged, “the proportions amongst those for whom data was provided may not reflect the demographics of the full population, and these figures should be treated with caution.” On the basis of this analysis, it was not possible to tell the likely impact of the draft guideline on ethnicity. There was also no breakdown according to the protected characteristic of religion.

Similar concerns apply to the collection of data on disability, particularly with regards to mental health and learning disability. For instance, there is currently insufficient data to identify how many people are remanded in custody pending a psychiatric report, how many are assessed as having a mental health problem, and how many are so unwell that they require transferring out of custody for treatment.

We use this opportunity to highlight recommendations 1 to 4 of the Lammy review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System. We ask that the Council seeks to ensure that its own procedures for recording and analysing data meet the standards set by the review, and that it works with criminal justice partners to ensure a consistent approach to capturing data on religion and ethnicity, as well as other protected characteristics including disability.

1. A cross-CJS approach should be agreed to record data on ethnicity. This should enable more scrutiny in the future, whilst reducing inefficiencies that can come from collecting the same data twice. This more consistent approach should see the CPS and the courts collect data on religion so that the treatment and outcomes of different religious groups can be examined in more detail in the future.
2. The government should match the rigorous standards set in the US for the analysis of ethnicity and the CJS. Specifically, the analysis commissioned for this review—learning from the US approach—must be repeated biennially, to understand more about the impact of decisions at each stage of the CJS.
3. The default should be for the Ministry of Justice (MoJ) and CJS agencies to publish all datasets held on ethnicity, while protecting the privacy of individuals. Each time the Race Disparity Audit exercise is repeated, the CJS should aim to improve the quality and quantity of datasets made available to the public.

4. If CJS agencies cannot provide an evidence-based explanation for apparent disparities between ethnic groups then reforms should be introduced to address those disparities. This principle of 'explain or reform' should apply to every CJS institution.

15. Do you feel that the Council has prioritised, either too highly or insufficiently, any of our statutory duties that specifically relate to analytical work? If so, please state which ones and give your reasons.

We agree with Anthony Bottoms that the Council has fulfilled its statutory duty to assess the impact of every guideline "only to a limited extent". To date, three impact assessments have been published, relating respectively to impact of the guidelines on sentencing for assault, burglary and environmental offences. We note with concern that two of the three impact assessments for assault and burglary revealed unexpected increases in sentencing for some offences. Rightly, the Council is now conducting a further review of the assault guideline in order to address these anomalies. However, a concern remains that, as with the guidelines on assault and burglary, other guidelines will have had similar and unexpected consequences for sentencing practice which will not have been identified because of a lack of resource available to monitor their impacts.

Bottoms recommends that "the Council may therefore need to consider carefully the work priorities for the Analysis and Research group in the near future—whether it is better to prioritise completion and publication of impact assessments or fresh analytical work on proposed new guidelines." Guidelines for high volume offences, which the Council has prioritised over the past 10 years, will have a disproportionate impact on sentencing practice overall. Therefore, it is vital that the Council has a good understanding of their impact in order to address any unintended outcomes. We therefore believe this work should be prioritised over fresh analytical work on proposed new guidelines.

16. Are there any other areas that you feel the Council should be considering as part of the programme of analytical work? If so, please state what these are and give your reasons.

17. Which areas of analytical work do you feel the Council should make the highest priority? Are there any areas that you feel are so important that they warrant slowing down the pace of guideline development/ revision? Please state what these areas are and give your reasons.

See our answer to question 15.

18. Are there any areas of work that you feel would be more suitable for an academic institution or external organisation to undertake? If so, please state what these are and give your reasons.

19. Which areas of activity do you think could achieve most in promoting public confidence, and why?

Promoting public confidence in the criminal justice system, and the associated duty to promote public awareness of the realities of sentencing, are areas of the Council's remit where increased prioritisation and resource would be justified. As the

consultation document acknowledges, these two duties of promoting public confidence and public awareness are intertwined. The public confidence research the Council commissioned in 2019 revealed that increased knowledge about sentencing correlated with higher levels of confidence in the system.

The majority of work the Council has conducted relating to these two duties has primarily been restricted to the process of developing and communicating the guidelines themselves. Evidence suggests that this work may have only had a limited impact on levels of public confidence and awareness. The 2019 public confidence research commissioned by the Council and the annual Crime Survey for England and Wales show continuing low levels of public knowledge of, and confidence in, the criminal justice system. Furthermore, the Crime Survey of 2017 reported that only 33 per cent of the public were aware that the sentencing guidelines exist.

Unfortunately, the conclusion of our 2008 report on the issue of public confidence continues to be apposite: “The general public are systematically misinformed about sentencing practices. They believe that the courts are much more lenient than they in fact are. Inaccurate media representations of sentencing feed into the public misconceptions.” In this regard, it is worth restating the recommendations of that report relating to the role of the proposed sentencing commission in promoting public confidence:

- A sentencing commission that was a source of authoritative, trusted and accessible information about sentencing could help to correct public misconceptions, and create a more constructive climate of public and political debate about penal issues.
- The sentencing commission should thus develop and implement a comprehensive public information and education strategy, targeting all sectors of the general population and the mass media.
- The commission should not, however, stray into areas which properly fall to the government and to Parliament. Decisions about the overall severity of our penal system are political ones, and a commission should not aim to displace political leadership in this regard—or to compensate for a lack of such leadership.

We believe that the best approach the Council could take to promoting public confidence would be to seek to address the lack of knowledge and understanding of the realities of sentencing exhibited by the majority of the public. This may require understanding public confidence, or the lack of it, in a more sophisticated way; and, in turn, addressing in its approach the factors that drive public confidence. This may necessitate the Council being more assertive in responding to factors which undermine public confidence, including correcting inaccurate and misleading commentary as well as to promoting accurate commentary. We welcome the Council’s decision to develop an education pack for young adults to be delivered as part of citizenship education. However, given the lack of confidence in the criminal justice system exhibited by older people in comparison to other groups, consideration should also be given as to how to reach out to this section of the population. This is likely to necessitate the more assertive approach we advocate, including challenging inaccurate information about sentencing in the public domain.

Such an approach is likely to pose challenges to the independence and neutrality of the Council. However, given the extent of misinformation about sentencing spread through the mainstream and online media, sometimes actively propagated by parts of the political establishment, the necessity of such an approach can no longer be

avoided. We welcome the decision of the Council to appoint an external agency to examine issues of public confidence in sentencing, including how best to communicate with a variety of stakeholders, and to provide recommendations to feed into the Council's Confidence and Communications strategy. As part of this work, active consideration should be given to how the Council can proactively challenge misinformation as well as provide accurate information about sentencing.

20. Are there any areas of existing activity in relation to promoting public confidence that you think the Council should do more of or less of, and why?

21. Are there any other avenues we could use to inform the public about the Council and the guidelines?

22. Do you have any views on the way the Council has addressed the duty to have regard to the costs of sentencing and their relative effectiveness in preventing reoffending?

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

As the consultation document highlights, the Council's approach to fulfilling this statutory duty to date has been:

"...to produce an annual internal document outlining the latest research evidence in this area regarding reoffending. The evidence review is not intended directly to influence the Council's deliberations on any individual guideline but to supplement Council members' significant existing expertise and experience in sentencing matters, which is brought to bear in discussions when considering the development of guidelines."

We have a number of concerns about this approach:

- Lack of transparency. There is no clear justification for withholding from the public domain the information on reoffending that is being circulated to Council members to inform their deliberations on the development of guidelines.
- Because of this lack of transparency, it is not clear where the evidence is being brought to bear in the formulation of a particular guideline and where it is not. It is perfectly reasonable for the Council to prioritise issues other than reoffending in relation to the development of particular guidelines. The CJA 2003 states that the process of sentencing involves a balance of five purposes, only two of which (the reduction of crime (including its reduction by deterrence) and the reform and rehabilitation of offenders) are relevant to reoffending. However, the Council should be transparent about what purposes it chooses to prioritise and the evidence, including on reoffending, that goes into informing its deliberations.
- There are a number of guidelines, in particular on the imposition of community and custodial sentences, where much of the evidence on reoffending is in favour of community over custodial disposals. For these guidelines, it is particularly important that the evidence is made clear and the

Council is transparent about how it is taken into account in the development of the guideline.

- Publishing the evidence would contribute to the Council fulfilling its statutory duty to promote public awareness of the realities of sentencing and its related duty to promote public confidence in the criminal justice system.

Therefore, we would favour a change to the current approach, prioritising transparency and the explicit consideration of evidence on reoffending relevant to each guideline. This could include:

- The publication of the document outlining the latest research on reoffending.
- The publication of any relevant evidence on reoffending as part of the impact assessment of each guideline.
- The publication of guidance on the CJA 2003 legislative provisions relating to the purposes of sentencing so that there is a clear framework for deciding how evidence on reoffending can be brought to bear and balanced against other purposes in the development of guidelines.

23. Do you have any view on other aspects more broadly in terms of the ‘effectiveness’ of sentencing that the Council might want to consider and if so, how we would go about doing this? To what extent should any further work be prioritised above other areas of the Council’s activities?

We share Anthony Bottoms’ view that the Council’s consideration of ‘effectiveness’ in relation to sentencing has been too limited. In particular, we endorse his recommendations that:

- Offence-specific guidelines might usefully include some reference to the 2003 legislative provision relating to the purposes of sentencing (paragraph 38).
- It is appropriate for those responsible for sentencing (including the Sentencing Council) to structure sentencing practices so that, where possible, they contribute to the desistance process—without, of course, compromising the other purposes of sentencing (paragraph 48).
- Since s. 142(1) of the Criminal Justice Act 2003 includes consequentialist aims among the purposes of sentencing, when constructing guidelines the Council should consider research evidence on consequences (paragraph 91).

The first recommendation would require the Council to update existing and new guidelines, or to produce separate guidance which could then be cross referenced from each offence specific guideline. This is something which the migration of guidelines online should make relatively straightforward.

A comprehensive response to the second and third recommendations would require a review of the ‘step’ framework the Council has adopted for offence specific guidelines. We do not doubt the significant amount of work this might involve. Nonetheless, the consultation should be an opportunity for the Council to reflect on whether the way in has chosen to structure its guidelines to date adequately reflects:

1. “the rapid recent development of desistance research, which has produced clear evidence that most offenders wish to desist” (Bottoms, para 48); and
2. whether it has done enough to take account of the consequentialist purposes of sentencing.

We could, for instance, imagine a framework which was significantly different to the one currently adopted, structured to fully take account of the desistance process. This might involve:

- Step 1:** identify the background to this offence (what led to this offence).
- Step 2:** identify the factors which might lead to this offender not re-offending.
- Step 3:** having put the offence in context (step 1) identify aggravating and mitigating factors in order to evaluate culpability.
- Step 4:** identify offence serious in the light of 1–3.⁷

Even if the Council chose not to embark on such a comprehensive revision of the framework, there are still practical steps it could take to ensure that its guidance better supports the process of desistance and consideration of consequences. Perhaps the most significant would be to consult on an overarching guideline on the sentencing of young adults (aged 18–25), since it is the age-range 20–25 when there is the fastest deceleration of offending among persistent offenders. The Council may also choose to take forward some of the recommendations put forward by Anthony Bottoms to amend the step framework, which would work to support the process of desistance:

- From the point of view of an offender reading the Council's guidelines, there would be merit in separating out personal mitigation factors as a separate Step in the guideline, so that offenders are more aware that their personal circumstances, and their steps towards desistance, are explicitly recognised by the Council as relevant to sentencing. This change is accordingly recommended (paragraph 47).
- The Council should consider whether it would be helpful to add the question 'Is Custody Unavoidable?' as a standard additional Step in guidelines for all imprisonable offences (paragraph 84).
- The possible new 'Is Custody Unavoidable?' Step in offence-specific guidelines might usefully contain a reminder that the court can request an adjournment to ensure that a more considered and reliable pre-sentence report (PSR) is obtained in the interests of better decision-making (paragraph 85).

⁷ This model was originally proposed by Professor Nicola Padfield in an email exchange with Mark Day, Head of Policy and Communications at the Prison Reform Trust.