

# Criminal Justice Alliance

## Coroners and Justice Bill 2009 - Proposals for a Sentencing Council

Committee Stage  
House of Lords  
July 2009

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## About the Criminal Justice Alliance

The Criminal Justice Alliance (formerly the Penal Affairs Consortium) is a coalition of organisations committed to improving the criminal justice system. It has 46 members - including campaigning charities, voluntary sector service providers, research institutions, staff associations and trade unions (for a full list of members see <http://criminaljusticealliance.org/organisations.htm>) - bringing together a wide range of organisations involved in policy and practice across the criminal justice system.<sup>1</sup>

## Context: Prison facts and figures

- The prison population on 3 July 2009 was 83,611, of whom 79,313 were male and 4,298 female.
- In 2007, 125,880 people entered prison in England and Wales.
- The number of prisoners in England and Wales increased by 30% in the decade from 1997 to 2007.
- The increase in the prison population was not a result of a significant increase in people being sentenced by the courts. The total number of offenders sentenced in 2007 was 1,414,700, an increase of only 2% from 1997. In 1997 the average prison population was 61,114. The number of serious cases being sentenced has also been relatively static for most of the period in which the prison population has grown.
- Approximately 70% of the increase in demand for prison places between 1995 and 2005 is estimated to have arisen owing to changes in the custody rate and in sentence lengths.
- Total prisons expenditure has increased from £2.843 billion in 1995 to £4.325 billion in 2006 (both at 2006 prices).
- The Ministry of Justice has projected that by June 2015 there will be up to 95,800 people in prison.
- Following Lord Carter's review of the prison system, published in December 2007, the Government has committed to increasing prison capacity to 96,000 by 2014, including building five 1,500-place prisons (which have replaced proposals for three 'Titan' prisons, each providing up to 2,500 places).
- HM Prison Service defines 'the good, decent standard of accommodation that it aspires to provide all prisoners' for each prison, called the Certified Normal Accommodation (CNA) level. This is the level above which prisons become officially overcrowded. As of 31 May 2009, the prison population was 111% of the CNA level, exceeding the CNA level by 8,166.
- 84 of the 139 prisons in England and Wales, 60%, are officially overcrowded.
- The provisions of this Bill are projected to result in the need for 300 additional prison places, at a cost of £60 million in capital costs and £12 million in resource costs (Explanatory notes, paragraph 769).

## Contents of the Bill

The Criminal Justice Alliance's primary focus is around prison overcrowding, the prison population and sentencing. This briefing addresses the proposals for a new Sentencing Council (Clauses 104-122), which is of particular interest to the Criminal Justice Alliance.

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<sup>1</sup> Although the Criminal Justice Alliance works closely with its members, this briefing should not be seen to represent the views or policy positions of each individual member organisation.

## PART 4: SENTENCING

### ***Sentencing Council for England and Wales (Clauses 104-122)***

Clauses 104-122 of the Bill introduce a Sentencing Council for England and Wales, to replace the existing Sentencing Advisory Panel and Sentencing Guidelines Council.

#### ***Background***

A sentencing commission was proposed by Lord Carter in his review of prisons (*Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales*), which recommended that: ‘A structured sentencing framework and permanent Sentencing Commission should be developed, with judicial leadership, to improve the transparency, predictability and consistency of sentencing and the criminal justice system’. Lord Carter envisaged that a sentencing commission would develop and oversee a structured sentencing framework, which he described as ‘a single comprehensive set of indicative guideline ranges. This would cover sentence lengths, types of community sentences and the level of financial penalty, for groups of all offences, ranked by seriousness and offender characteristics (e.g. criminal history and culpability).’ This was based on systems used in North Carolina and Minnesota in the US, which are centred on a ‘grid’ system and allow sentencers very limited discretion.

As recommended by Lord Carter, a working group, the Sentencing Commission Working Group, was subsequently set up ‘to consider the advantages, disadvantages and feasibility of a structured sentencing framework and permanent Sentencing Commission’. The working group was made up of a mixture of judicial and non-judicial members and chaired by Lord Justice Gage. In its final report, *Sentencing Guidelines in England and Wales: An evolutionary approach*, the working group broadly welcomed the establishment of a sentencing commission. However, the working group rejected Lord Carter’s proposals for a structured sentencing framework based on a rigid ‘grid’ system, arguing that ‘structured sentencing frameworks on the US grid model increase consistency and predictability of sentences but at the cost of an inflexibility that makes them unsuitable and unacceptable in England and Wales.’

The Sentencing Council proposed in the Bill largely reflects the recommendations made by the working group.

#### ***Proposals for a Sentencing Council***

The Criminal Justice Alliance welcomes the introduction of a Sentencing Council, and supports in the most part the proposals set out in the Bill. The Criminal Justice Alliance responded to the Sentencing Commission Working Group’s consultation on *A Structured Sentencing Framework and Sentencing Commission* and supports the decision to reject sentencing ‘grids’ and to implement the recommendations of the Sentencing Commission Working Group’s final report.

The Criminal Justice Alliance believes that a Sentencing Council can promote stability and consistency in sentencing and improve the availability of data and other information about sentencing. The structure of the current Sentencing Advisory Panel and Sentencing Guidelines Council is unwieldy and results in undue delay in producing new guidance. A single Sentencing

Council led by the judiciary but also encompassing non-judicial members, can maintain judicial confidence while also playing a role in reviving public confidence in sentencing.

In particular, the Criminal Justice Alliance welcomes:

- *The introduction of tighter restrictions on the courts on departure from the guidelines (Clause 111)*

At present, the courts must 'have regard to' the guidelines when passing sentence. Under the proposals in the Bill, sentencers must follow the guidelines 'unless the court is satisfied that it would be contrary to the interests of justice to do so'. This should improve consistency without unduly fettering judicial discretion. A survey carried out by the Sentencing Commission Working Group found that of 222 sentences examined, 14% (32) were below the guideline ranges for the level of offence seriousness described and 32% (71) were above the guideline ranges for the level of offence seriousness described. While there may have been legitimate reasons for these variations, these findings suggest that guidelines are frequently not being followed and that greater consistency would be beneficial. However, considerable flexibility would remain, both within the range offered by the guidelines and to depart from the guideline when appropriate, ensuring that justice can be done in individual cases.

- *The proposed duty on the Council to assess the resource implications of their guidelines on the prison, probation and youth justice services (Clause 113) and to assess the impact on resources of policy and legislative proposals (Clause 118)*

The latter is particularly important given the unplanned impact on the prison population of previous legislation, for example the introduction of Indeterminate Sentences for Public Protection (IPPs) in the *Criminal Justice Act 2003*. In that case, the Government estimated that IPPs would result in an increase in the prison population of around 900. Yet by the end of March 2009, 5,243 people had been given an IPP since the sentence was introduced and only 58 people had been released. This resulted in what HM Chief Inspector of Prisons described as 'a perfect storm' in the criminal justice system, which was unable to deal with the influx of prisoners on IPPs. To prevent a repeat of this, the Sentencing Council, by publishing its assessment of the impact of policy and legislative proposals on penal capacity, will ensure that parliament is able to make informed decisions about proposed legislative changes and that the government and the National Offender Management Service can plan appropriately.

- *The proposed duty on the Council to monitor the operation and effect of its guidelines (Clause 114)*

At present there is very limited information on the extent to which courts follow the guidelines of the current Sentencing Guidelines Council, and therefore how effective they are in promoting consistency in sentencing. As stated above, a survey carried out by the Sentencing Commission Working Group suggested that guidelines are frequently not being followed. However, this was just a single survey of limited scope. More information on the extent to which guidelines are being followed, and the reasons given for departing from guidelines, will be essential in ensuring that the proposed Sentencing Council is operating effectively.

As stated, the Criminal Justice Alliance supports in the most part the proposals set out in the Bill. However, the Criminal Justice Alliance would also like to see:

- *An enhanced community engagement function for the Sentencing Council*  
The Criminal Justice Alliance supports the proposals in Clause 115 (Promoting awareness),

which relate to the proposed Sentencing Council's work in better informing the public about sentencing. However, the provisions do not go nearly far enough. Community engagement should be central to the Council's work. It should encompass public consultation, proactive involvement in the public and media debate around sentencing, and providing accessible statistics and other information on sentencing. The public are generally misinformed about sentencing, believing that the courts are much more lenient than they are, and a Sentencing Council with a strong community engagement function could play a leading role in correcting this. It could therefore contribute to improving public confidence in the criminal justice system. This role is already successfully taken on by existing sentencing commissions, for example the Sentencing Advisory Council in Victoria, Australia, which describes its mission as 'to bridge the gap between the community, the courts and Government by informing, educating and advising on sentencing issues'. The Criminal Justice Alliance supports the conclusions of experts Professor Mike Hough, Professor Julian Roberts and Jessica Jacobson that 'a key function of an enhanced Sentencing Guidelines Council should be to engage with the public. By providing the public with reliable, detailed and user-friendly information on sentencing, as well as undertaking public consultation on guidelines, the Sentencing Guidelines Council could generate constructive debate about sentencing and thereby help to break the spiral of penal populism.'<sup>2</sup>

- *Experience of sentencing in the youth court represented on the Sentencing Council*  
Schedule 13 (Paragraph 3) sets out requirements for the judicial membership of the Sentencing Council. The Sentencing Council will develop guidelines for sentencing young people under the age of 18 and to ensure that this is informed by first-hand experience of sentencing young people, at least one of the judicial members should have experience of working in the youth court.
- *Expertise in the reform and rehabilitation of offenders, in the youth justice system and in working with women offenders represented on the Sentencing Council*  
Schedule 13 (Paragraph 4) sets out requirements for the non-judicial membership of the Sentencing Council. In addition to the expertise set out in this paragraph, the Sentencing Council should also include in its membership:
  - Expertise in the reform and rehabilitation of offenders, in particular to inform the Sentencing Council's duty to consider 'the cost of different sentences and their relative effectiveness in preventing reoffending' [Clause 106(11)(d)].
  - Expertise in working with children in the youth justice system, to inform its work on guidelines for sentencing young people under the age of 18.
  - Expertise in working with women offenders, to ensure that the differences between male and female offenders are recognised in the development of sentencing guidelines, for example in the identification of mitigating factors that the Sentencing Council considers relevant [see Clause 107(6)(b)].
- *A duty on the Sentencing Council to promote sentencing that is effective in reducing reoffending*  
Reducing reoffending should be central to sentencing and central to the work of the Council in drawing up sentencing guidelines and in commissioning research on the

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<sup>2</sup> p. 57: Jacobson, J., Roberts, J.V., and Hough, M. (2008) 'Towards more consistent and predictable sentencing in England and Wales' in M. Hough, R. Allen and E. Solomon (eds.) *Tackling Prison Overcrowding* Bristol: The Policy Press.

effectiveness of sentencing. The Sentencing Council should therefore be required to promote effective measures to reduce reoffending in all of its work.

- *A duty on the Sentencing Council to consider the needs of minority groups in the criminal justice system - including women, young people, young adults (aged 18-25) and ethnic minorities*

The Sentencing Council should consider minority groups in developing sentencing guidelines and in its broader work programme, to ensure that the needs of these groups are addressed. The Sentencing Council should also have a positive duty to prevent direct and indirect discrimination in sentencing.

Further discussion of the merits of a Sentencing Council is available in *A Sentencing Commission for England and Wales: an opportunity to address the prisons crisis*, published by the Prison Reform Trust and available at:

[http://www.kcl.ac.uk/depsta/law/research/icpr/publications/FINAL\\_SENTENCING.pdf](http://www.kcl.ac.uk/depsta/law/research/icpr/publications/FINAL_SENTENCING.pdf)

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