House of Commons
Justice Committee

Draft Sentencing Council guidelines on arson and criminal damage and public order offences

Thirteenth Report of Session 2017–19
Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General’s Office, the Treasury Solicitor’s Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via www.parliament.uk.

Publication

Committee reports are published on the Committee’s website at www.parliament.uk/justicecttee and in print by Order of the House.

Committee staff

The current staff of the Committee are Rhiannon Hollis (Clerk), Fiona Hoban (Second Clerk), Gemma Buckland (Senior Committee Specialist), Nony Ardill (Legal Specialist), Claire Hardy (Committee Specialist), Christine Randall (Senior Committee Assistant), Su Panchanathan (Committee Assistant), Samira Ali (Sandwich Student), and Liz Parratt and Simon Horswell (Committee Media Officers).

Contacts

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The Sentencing Council

1. The Sentencing Council for England and Wales is an independent non-departmental body of the Ministry of Justice, set up to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary. The primary role of the Council is to issue guidelines on sentencing, which the courts must follow unless it is in the interests of justice not to do so. The Council also assesses the impact of its guidelines on sentencing practice and promotes public awareness of sentencing in the magistrates’ courts and the Crown Court.

2. Under section 120 of the Coroners and Justice Act 2009, the Sentencing Council is required to publish new sentencing guidelines in draft before they are finalised. The Justice Committee is listed as a statutory consultee on draft guidelines under section 120(6) of the 2009 Act. The Council must also consult the Lord Chancellor and any person that the Lord Chancellor directs should be consulted, together with other persons considered appropriate by the Council. In setting guidelines, the Council is required to have regard to a number of factors, including the sentences imposed by courts in England and Wales for particular offences and the need to promote consistency in sentencing.

Our response to the recent consultations

3. On 27 March 2018, the Sentencing Council published for consultation draft guidelines on arson and criminal damage offences, along with a consultation stage resource assessment and a statistical bulletin; the consultation ended on 26 June 2018. The offences covered by these draft guidelines are as follows:

- Arson (section 1 of the Criminal Damage Act 1971);
- Criminal damage with a value not exceeding £5,000 (section 1(1) of the Criminal Damage Act 1971);
- Criminal damage with a value exceeding £5,000 (section 1(1) of the Criminal Damage Act 1971);
- Racially or religiously aggravated criminal damage (section 30 of the Crime and Disorder Act 1988);
- Criminal damage/arson with intent to endanger life, or reckless as to whether life endangered (section 1(2) of the Criminal Damage Act 1971); and
- Threats to destroy or damage property (section 2 of the Criminal Damage Act 1971).

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1 Arson and criminal damage offences guidelines consultation, The Sentencing Council, March 2018
2 Consultation stage resource assessment: arson and criminal damage offences, The Sentencing Council, March 2018
4. On 9 May 2018, the Council launched an overlapping consultation on draft guidelines for public order offences; this consultation closed on 8 August 2018. Alongside the draft guidelines, the Council published a consultation stage resource assessment together with a statistical bulletin. The following offences are covered by the draft guidelines:

- Riot (section 1 of the Public Order Act 1986);
- Violent Disorder (section 2 of the Public Order Act 1986)
- Affray (section 3 of the Public Order Act 1986);
- Threatening Behaviour (section 4 of the Public Order Act 1986);
- Disorderly Behaviour with intent to cause harassment, alarm or distress (section 4A of the Public Order Act 1986);
- Disorderly Behaviour (section 5 of the Public Order Act 1986);
- Racially or religiously aggravated threatening behaviour (section 31(1)(a) of the Crime and Disorder Act 1998);
- Racially or religiously aggravated disorderly behaviour with intent to cause harassment, alarm or distress (section 31(1)(b) of the Crime and Disorder Act 1998);
- Racially or religiously aggravated disorderly behaviour (section 31(1)(c) of the Crime and Disorder Act 1998); and
- Racial hatred offences and hatred against persons on religious grounds or grounds of sexual orientation (sections 18 - 23(3) and sections 29B-29(G)(3A)(3) of the Public Order Act 1986).

5. The Council explained in each of the consultation papers that it was seeking views on:

- the principal factors that make any of the offences included within the draft guideline more or less serious;
- the additional factors that should influence the sentence;
- the approach taken to structuring the draft guidelines;
- the types and lengths of sentences that should be passed for these offences; and
- anything else that respondents think should be considered.

We are grateful to the Council for sharing with us the consultation responses that it received, as it has done on previous consultations. Because of this assistance, we considered it unnecessary for us to seek our own, separate evidence on the Council’s proposals, either formally or informally. We also thank the Council for its flexibility in agreeing to consider submissions from us sent after the consultation deadline.

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6. Our combined response to both sets of draft guidelines (arson and criminal damage, and public order offences) was made by way of a letter from the Chair to the Chairman of the Sentencing Council, Lord Justice Holroyde, dated 11 September 2018. We were pleased to receive a detailed response from Lord Justice Holroyde in a letter dated 2 October 2018. We have decided to publish this short report to draw the attention of both the House and other interested parties to the draft guidelines, to our own response, and the reply that we received from the Council. The two letters appear respectively at Appendix 1 and Appendix 2 to this report.
Letter from the Chair of the Justice Committee to the Chairman of the Sentencing Council, dated 11 September 2018

Draft guidelines on (1) arson and criminal damage (2) public order offences

First, I would like to take this opportunity of congratulating you on your appointment as Chairman of the Sentencing Council. As you may know, the Justice Committee has enjoyed a constructive working relationship with the Council since its inception, and we very much look forward to continuing this relationship under your leadership. We will ask our officials to contact your office in due course to arrange an informal meeting.

We are grateful to the Council for giving us the opportunity of responding to its consultations on the draft guidelines on arson and criminal damage, and on public order offences. Given the constraints of the Parliamentary summer recess, we are grateful for its patience in allowing us extended time in which to offer our comments—particularly for the arson and criminal damage consultation, for which the consultation deadline was on 26 June 2018.

While we broadly support the approach taken by the Council in both these draft guidelines, we wish to comment on some points of detail, which we address below. We also offer some overarching observations, relating to both consultations: on resource assessments; the risk of sentence inflation; the issue of maturity; and the question of equality impact.

Resource assessments

As required by statute, the Council has produced a consultation stage resource assessment for both draft guidelines, estimating that neither is anticipated to have any impact on future demand for prison or probation resources. We note that both these draft resource assessments indicate limitations in the data available to the Council, including a lack of Ministry of Justice (MoJ) data on the seriousness of current cases, meaning that assumptions have been made about the categorisation of current cases across the proposed levels of culpability and harm. The Council acknowledges a risk of inaccuracies in its assessment leading to unanticipated consequences in sentencing practice. We are of course aware that—in the context of financial constraints—the Council decided to discontinue its own Crown Court Sentencing Survey, replacing it with bespoke surveys on particular sentencing issues. The limited scale of some of these surveys gives us cause for concern; for example, while many arson and criminal damage offences are dealt with by magistrates’ courts, only 25 magistrates responded to the survey on sentencing for these offences.

We recognise that the Council makes remarkably effective use of its limited research resources, and that it intends to undertake additional research with sentencers before it produces the definitive guidelines. However, given the current pressures on prison and probation services, we consider that it would be preferable to provide more robust resource
assessments to inform the public consultation process. A longer-term option might be for the Council to work with the Ministry of Justice in developing mechanisms for capture of more sophisticated data on criminal convictions and sentencing, capitalising on the MoJ’s increasing use of digital processes within the criminal justice system. In the short term, we wonder whether it might be possible for the Council to do more with the Magistrates’ Association, HM Council of District Judges and HM Council of Circuit Judges to ensure that the samples of sentencing decisions used to assist the preparation of consultation stage resource assessments are as comprehensive and representative as possible. We note that the idea of a new Sentencing Research Forum to facilitate closer collaboration with academics was put forward in the report of Anthony Bottoms’ review; it appears that the Council’s recent academic seminar may be a step in this direction, which we welcome.

**The risk of sentence inflation**

Linked to the question of the robustness of resource assessments, we have concerns about the potential for these new guidelines to cause unintended sentence inflation. We are aware that the Council’s recent impact assessments of some of its definitive guidelines have found unexpected increases in the severity of sentences for grievous bodily harm, actual bodily harm and burglary that are attributable to the guidelines. We recommend that the Council take steps to monitor the impact of the definitive guidelines for arson/criminal damage and public order offences as soon as it is practicable to do so.

We note that the step-by-step guidance for arson/criminal damage and public order offences does not contain reference to the custody threshold test, which asserts that prison should be reserved for the most serious offences. This test is of course set out in the guideline on Imposition of Community and Custodial Sentences, which explains to sentencers that a custodial sentence—including a suspended sentence—must not be imposed unless the offence (or combination of offences) was so serious that neither a fine alone nor a community sentence can be justified. The Imposition guideline also asks sentencers to consider whether a prison sentence could be avoided where a community order would provide sufficient restriction on liberty while addressing the rehabilitation of the offender; and reminds sentencers that, if a custodial sentence is imposed, this must be the shortest term commensurate with the seriousness of the offence.

We understand that it is the Council’s intention to start rolling out digital versions of its guidelines from this autumn, and that it will take this opportunity to embed overarching guidelines (such as the Imposition guideline) into offence-specific guidelines by inserting links. This is a development that we would very much welcome, given the finding of the Bottoms review that sentencers are less likely to refer to overarching guidelines than offence-specific guidelines when sentencing an offender. We are pleased to see that the Council’s digital-format general sentencing guideline (for use where there is no specific offence guideline), on which it is currently consulting, would embed information on the custody threshold test and the five purposes of sentencing, with a link to the Imposition guideline. We hope that the same approach will be taken in the definitive versions of the guidelines for arson/criminal damage and public order offences.
Lack of maturity affecting the responsibility of the offender

We welcome the inclusion of “age and/or lack of maturity where it affects the responsibility of the offender” as a mitigating factor in relation to all arson/criminal damage and public order offences. We consider that, for young adults, a high proportion of these offences may be linked to the impulsive behaviour and inability to engage in consequential thinking that is often associated with this age group.

As you may be aware, this Committee has taken a particular interest in young adults in the criminal justice system, publishing a report on this topic (Young adults in the criminal justice system; Eighth Report of Session 2017–19, HC 419 June 2018) as a follow-up to the report of our predecessor Committee, published in October 2016 following a year-long inquiry (House of Commons Justice Committee, The treatment of young adults in the criminal justice system, Seventh Report of Session 2016–17, HC 169). Our recent report welcomed the Council’s intention to strengthen its guidance to sentencers on consideration of age and maturity. We are pleased to see that this revised guidance has been embedded into the Council’s draft general sentencing guideline and we suggest that the impact of this change is monitored.

Consideration of equality impact

In contrast to the consultation paper on public order offences, which sets out the demographics of offenders (at Annex E) and explains what the Council has done to fulfil its legal obligations under the Public Sector Equality Duty (Section 8), the consultation paper on arson and criminal damage does no more than seek the views of respondents on any possible equality impact of the new guidelines. We consider the approach taken by the public order consultation to be preferable and we hope that this is the model that the Council will adopt in future.

We now turn to some specific comments on the two draft guidelines.

Arson and criminal damage

- We welcome the Council’s recognition of the link between arson offences and people with mental health conditions, and its proposal to include within the guideline a short section of text asking sentencers to consider whether a psychiatric report should be obtained. However, rather than directing this at “certain offenders to whom this may be relevant”, we suggest a presumption in favour of obtaining a report in all cases of arson; sentencers, who by definition are not psychiatric experts, cannot be expected to know from limited contact with an offender whether the need for a report is indicated in any particular case. We are also aware of research evidence suggesting that people with learning disabilities feature disproportionately highly with regard to this type of offending behaviour, and would suggest that the guideline remind sentencers to consider whether a psychological report may be indicated in such cases.

- For the offences in this guideline, the offender having a mental disorder or learning disability would lead to a lower culpability or qualify as a mitigating factor. The Council proposes that reduced weight may be given to this factor where an offender “exacerbates a mental disorder by voluntarily abusing drugs
or alcohol or by voluntarily failing to follow medical advice.” We agree with the respondents who thought that this caveat was over-simplistic, as it fails to take into account the tendency of those in mental distress to self-medicate and/or the problems they may face in accessing mental health support services. We made the same point in response to similar proposals in the draft guideline on unlawful act and gross negligence manslaughter; these were deleted from the definitive version of the guideline, and we are somewhat surprised that the same qualification has been used in the draft guideline for arson/criminal damage.

**Public order offences**

- We agree with the Bar Council that, in relation to the offences of violent disorder and affray which—unlike riot—do not require a “common purpose”, individual offenders within a single incident may have a wide range of culpability; the guideline should make clear the need to reflect this in sentencing, especially as the Culpability A factors include “targeting of individual(s) by a group”, suggesting that all members of a group would be viewed as equally culpable in these circumstances. We also share the Bar Council’s concerns about the starting point of five years proposed for the lowest level of riot offence, given that the average riot sentence over the past decade is 5 years 3 months, according to the Council’s statistical bulletin.

- In addition, we agree that there may be a risk of double counting where suggested aggravating factors are similar to proposed culpability factors; for example, it is proposed that “ringleader or carried out a leading role” would be a Culpability A factor for the offences of riot and violent disorder; aggravating factors for these offences would include “incitement of others” and, for riot, “actively recruited other participants”. We consider that it would be helpful to remind sentencers of the importance of avoiding double counting when considering which, if any, aggravating factors apply to any particular case.
Letter from the Chairman of the Sentencing Council to the Chair of the Justice Committee, dated 2 October 2018

Draft guidelines on arson and criminal damage and public order offences

Thank you for your letter dated 11 September 2018 regarding the Sentencing Council’s draft guidelines on arson and public order offences and for your kind words relating to my appointment. I apologise for the delay in replying. As you know from our recent conversation, I was out of the country when your letter arrived and have only recently returned.

May I say that I too look forward to continuing the constructive working relationship between the Sentencing Council and your Committee. I know my predecessor held the Committee in high regard and from my own experience as a Council member I’m aware of the value of your input into the development of our guidelines. I would welcome the opportunity to attend an informal meeting with you and my officials await contact from your office.

Thank you also for your broad support for the approach taken in the above guidelines, as well as that taken in our draft General guideline, which includes guidance on issues related to age and maturity. You also raise a number of broader points in your letter, about which I would like to provide some initial thoughts.

As you note, the resource assessments that accompany some consultation guidelines make reference to issues with the data. These can impose limitations on the extent to which we can assess the likely impact of the guidelines on correctional resources and in these circumstances we have to make some broad assumptions. This is an area where we continue to explore what more could be done: either in terms of identifying additional data that may become available, or considering whether more could be done with the data to which we have access. For all of our resource assessments, we work with the Ministry of Justice to establish the range of data that is available and how we might address any gaps in that data. We continue to have ongoing discussions with the Department about what additional data may be available to us in the future and to feed in our view of additional datasets that would be of benefit to the Council in its analytical work.

As you point out in your letter, we also carry out our own programme of research, which includes bespoke data collection exercises to generate further data in relation to each guideline that we produce. Whilst these are based on samples of sentencers, they do yield important information that we can use to help assess resources. This information is not available elsewhere and therefore our bespoke data collections have helped to overcome some of the deficiencies in the data we have. In addition, we collect data in a variety of other ways to help with guideline development and our assessments of resources. This includes analysis of transcripts of sentencing remarks, interviews with sentencers, and obtaining, where possible, data from other government departments and organisations.
You also mention a number of areas for consideration in terms of strengthening our evidence base and I am pleased to say that many of these suggestions are already being actively explored by my Office. We are currently exploring with HMCTS longer-term options for obtaining data via the Common Platform and are setting up an agreement with the Criminal Appeal Office to obtain data on appeal cases.

We also have strong links with bodies—including the Magistrates’ Leadership Executive, the Magistrates’ Association and HM Council of Circuit Judges—which help to promote engagement of their members in consultations and participation in research. We have been in discussions with these bodies about how we might increase participation further and increase the amount of data we collect. We are also actively pursuing the recommendations in Professor Sir Anthony Bottoms’ review around engagement with external academics, and—in conjunction with City Law School, City, University of London—we will be hosting a second academic event in early November, at which you would be very welcome (we will pass on the details to your Clerks).

Your letter also mentions the risk of unintended sentence inflation, and the need for the Council to monitor guidelines. This is something that is built into our work for all guidelines. Where possible, we collect data before the guideline comes into force as well as afterwards in order to make comparisons and evaluate the extent to which the guideline may have impacted sentence outcomes. We have already collected data from magistrates on specific offences in both the arson and criminal damage and public order guidelines and are currently planning the “post” data collection, which we hope will commence in Spring 2019.

As part of our programme of digitisation, I can confirm that we are taking the opportunity to embed our overarching guidelines, particularly the Imposition guideline, into the digital versions of guidelines: a dedicated menu is being developed to help sentencers find the overarching guidelines quickly; they are being developed as individual web pages rather than pdfs so that they are easy to access and navigate; and links to overarching guidelines will be provided at the relevant steps within each of the offence-specific guidelines.

You also raised several specific areas for consideration in relation to the consultation versions of both the arson and criminal damage and public order guidelines: when it may be relevant to request a psychiatric report for defendants charged with offences of arson; the weight given to factors when an offender exacerbates a mental disorder by abusing drugs or alcohol or failing to follow medical advice; the culpability of individual offenders within a single incident of violent disorder or affray; the starting point for the lowest level of riot offence; and the need to remind sentencers to avoid double counting between step one and two factors. We are grateful for all of these more detailed comments and the Council will consider them as part of its review of all responses to the consultations. We will publish the outcome of these discussions, alongside the reasons for them, as part of each guideline’s consultation response document.

I look forward to seeing you when an informal meeting can be arranged.
Formal minutes

Tuesday 30 October 2018

Members present:

Robert Neill, in the Chair

Mrs Kemi Badenoch  Gavin Newlands
Bambos Charalambous  Victoria Prentis
Mr David Hanson  Ms Marie Rimmer
John Howell  Ellie Reeves

Draft Report (Draft Sentencing Council guidelines on arson, criminal damage, and public order offences), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 6 read and agreed to.

Resolved, that the Report be the Thirteenth Report of the Committee to the House.

Two papers were appended to the Report as Appendices 1 and 2.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Tuesday 6 November at 9.30am]
# List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee’s website. The reference number of the Government’s response to each Report is printed in brackets after the HC printing number.

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