Sentencing Council

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Shabana Mahmood MP
Lord Chancellor

By email

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Dear Lord Chancellor,

IMPOSITION GUIDELINE

Thank you for your letter of 6 March 2025. Before I deal with the two substantive issues you raised, I think it is appropriate to set out some important background.

As you will know the Sentencing Council was established by the Coroners and Justice Act 2009. It replaced the Sentencing Guidelines Council and the Sentencing Advisory Panel. It has been operating since 2010. The principal role of the Council is to prepare sentencing guidelines. The guidelines may be general in nature or limited to a particular offence, particular category of offence or particular category of offender.

Since 2010 the Council has published guidelines relating to hundreds of offences. It also has published guidelines of general application e.g. reduction for plea of guilty, sentencing offenders with mental disorders and general principles relation to domestic abuse. One of the guidelines of general application is the guideline on imposition of community and custodial sentences. This is commonly referred to as the Imposition guideline. The Council first issued such a guideline in 2017. As you are aware, the Council now has revised the guideline. It was published on 5 March 2025.

The membership of the Council consists of 14 people. Eight members are judges: two Lord Justices of Appeal (of whom I am one); two High Court judges; two Crown Court judges; a District Judge (Magistrates' Court); a lay magistrate. These members are appointed by the Lady Chief Justice with the agreement of the Lord Chancellor. The remaining membership is non-judicial and is appointed by the Lord Chancellor of the day, with the agreement of the Lady Chief Justice. The Director of Public Prosecutions represents prosecuting authorities. A Chief Officer of Police represents the police interest. The other members are an academic with an interest in sentencing policy, a person representing the interests of victims, a lawyer involved in defending criminal cases and a person to reflect the interests of those involved in rehabilitative work with those in the criminal justice system. The Lady Chief Justice has the title of President of the Council. She is not a member. The Lord Chancellor may appoint a person to attend and speak at any meeting of the Council. That person must be someone appearing to the Lord Chancellor to have experience of sentencing policy. There has

always been such a person appointed (the Lord Chancellor's representative) and they have attended all of the Council meetings referred to below.

When a new or revised guideline is proposed, this either will be as a result of the Council's own determination that one is required or because those with an interest in the relevant area have suggested that the Council should fill a gap in the sentencing landscape. In either event, the Council will begin by considering a paper prepared by policy officials setting out the proposed scope of the new guideline. Once the basic scope has been agreed, officials will present a series of proposals for the guideline at successive meetings of the Council for the membership to approve, amend or reject. The Council meets approximately once a month. It will take several and sometimes many meetings to reach the point at which there is a draft guideline which the Council membership is able to approve.

The draft guideline is then published as a consultation document. The Council invites anyone interested to answer specific questions posed in the document. There is also the facility for general comments. We are statutorily obliged to consult the Lord Chancellor of the day and the Justice Select Committee. The consultation period usually is 12 weeks.

Once the consultation period has expired, Council officials will collate all of the responses. Over a number of meetings thereafter, the Council membership will consider the responses. Sometimes the draft proposed by the Council will be amended in light of the views expressed by consultees. Sometimes the Council will acknowledge the views but not adopt them. Not infrequently consultees will express no view at all on a particular issue.

Once the review of the consultation has concluded, the Council will approve a final version of the guideline. Prior to publication of the guideline the Council will walk through the guideline with officials from the Ministry of Justice. This is done to sight the Ministry on changes made to the consultation guideline. When it is published, it will be accompanied by a consultation response. This document will include a resource and impact assessment and an equalities assessment. The resource and impact assessment will consider any increase in prison places which might be the result of the guideline and any extra demands on the Probation Service. Throughout the process the Council relies on evidence to support its conclusions.

All of these steps were taken in relation to the revised Imposition guideline which was published on 5 March. I shall set out the stages at which the section of the guideline relating to pre-sentence reports was considered. Overall the guideline was discussed at 15 Council meetings between July 2022 and January 2025.

The first meeting at which the Council considered what the guideline ought to say about pre-sentence reports was in October 2022. The Council agreed inter alia to include text to remind sentencers of their statutory duty to request and consider a pre-sentence report, this duty being of general application. It further agreed to include a section specifying cohorts of offenders for whom a pre-sentence report may be particularly important. The Council was provided with a wide range of evidence to support the inclusion of particular groups. In relation to ethnic minority offenders, HM Inspectorate for Probation had prepared a thematic inspection report stating the

importance of a quality report in those cases. Officials at the Council had discussed the position with the HMPPS Probation in Courts team. That team highlighted what they considered to be the importance of referring to specific cohorts when reminding sentencers of the importance of requesting pre-sentence reports. The Council considered the Equal Treatment Bench Book published by the Judicial College, the content of which is based on research and reports from multiple sources. Based on all the available evidence and guidance, the Council's decision was to specify cohorts of offenders. It did not determine a final version of the wording for offenders from ethnic minorities.

At the meeting in June 2023 the Council spent some time discussing the terminology for each cohort of offenders which was to be specified. In relation to ethnic minorities, a January 2023 policy briefing published by ARE and chapter 8 of the Equal Treatment Bench Book were considered. It was agreed that the term "from an ethnic minority, cultural minority and/or faith minority community" should be used in the consultation document.

The section in relation to pre-sentence reports in the draft guideline in the consultation document began with:

"When considering a community or custodial sentence, the court must request and consider a pre-sentence report (PSR) before forming an opinion of the sentence unless it considers that it is unnecessary."

This rubric was taken from the requirement set out in section 30 of the Sentencing Act 2020. After general guidance about when a pre-sentence report was necessary or unnecessary, the draft guideline continued with the words "A pre-sentence report may be particularly important if the offender is…." followed by a list of cohorts of offenders. The list included "from an ethnic minority, cultural minority and/or faith minority community".

The consultation document explained why the list of the cohorts of offenders had been included. It said that the list was non-exhaustive. There was media comment on the consultation document when it was launched. This was in relation only to matters concerning female offenders. The press office of the Sentencing Council was not aware of any comment in respect of the cohort which now is the subject of widespread attention.

There were 150 responses to the consultation. These included a response from the then Minister for Sentencing (as the representative of the Lord Chancellor) who welcomed "the fuller guidance around the circumstances in which courts should consider a pre-sentence report…." No concern was expressed about the term now under debate. The Justice Committee did not express any concern about the inclusion of a list of cohorts of offenders. It said that the non-exhaustive nature of the list should be made clear in the guideline and that the Council should consider including a reminder that, even if an offender did not fall into any of the specified cohorts, a pre-sentence report may still be valuable.

Of the 150 respondents, 17 did not agree with one or more of the cohorts or did not agree with having a list of cohorts at all. Of those, 8 (4 individuals and 4 magistrates)

referred to the inclusion of those "from an ethnic minority, cultural minority and/or faith minority community" as being part of their reasoning for objecting to the list.

The consultation responses in relation to pre-sentence reports were discussed at meetings of the Council in May and June 2024. The Council discussed the suggestion that there should be no list of particular cohorts. It was decided that to remove the list would have been contrary to the majority view expressed by consultees. It would have departed from the views expressed by the statutory consultees, the Lord Chancellor and the Justice Committee. Some amendments were made, in particular to reflect the observations of the Justice Committee.

The opening sentence in the published guideline reads: "When considering a community or custodial sentence, the court must **request and consider** a pre-sentence report (PSR) before forming an opinion of the sentence, unless it considers that it is unnecessary (section 30 of the Sentencing Code)." This emphasises the general duty to obtain a pre-sentence report and its statutory basis.

Before the list of cohorts, there is a paragraph which reads: "PSRs are necessary in **all** cases that would benefit from an assessment of one or more of the following: the offender's dangerousness and risk of harm, the nature and causes of the offender's behaviour, the offender's personal circumstances and any factors that may be helpful to the court in considering the offender's suitability for different sentences or requirements." The list of cohorts must be read in the light of that general guidance.

The list of particular cohorts in the published guideline is headed with the words "**A pre-sentence report will normally be considered necessary if the offender belongs to one (or more) of the following cohort**s". The words "will normally be considered necessary" replaced "may be particularly important". The change in wording was to align the guideline with the statutory language in section 30 and, by the use of "normally", to retain the element of discretion. The list in the published guideline concludes with the words "**This is a non-exhaustive list and a PSR can still be necessary if the individual does not fall into one of these cohorts**." This sentence was not part of the consultation guideline. It reflects the view of the Justice Committee.

This is a very summary review of the way in which the Council determined (unanimously) that the terms of the Imposition guideline published on 5 March were necessary and appropriate. At no stage did the Lord Chancellor's representative express any concern or reservation about the term now under debate. The walk through of the guideline with officials from the Ministry of Justice took place on Monday 3 March. Again no concern was expressed about the relevant term. If you request it, a detailed explanation of the various stages of the process can be provided together with a full list of the evidential sources relied on by the Council in relation to ethnic minorities, cultural minorities and/or from a faith minority background.

With that description of the process by which the guideline came into being, let me turn to the specific issues raised in your letter, the first part of which concerns differential treatment being afforded to those of particular ethnicity, culture and faith.

The list of cohorts in the guideline is extensive. In the guideline, the list comes immediately after the guidance as to when a pre-sentence report may be unnecessary, namely if the court considers that it has enough information about the offence and the offender. Based on evidence including from the Probation Service, the Council was concerned that sentencers had concluded that they had enough information in cases where in reality they did not. One example within the direct knowledge of members of the Council who sit in the Court of Appeal Criminal Division was the sentencing of pregnant offenders or sole carers of young children. We have heard appeals from sentences imposed without a pre-sentence report being obtained. In those cases, no or no proper regard was had to the effects of custody on the offender or their dependents.

The purpose of the list is to remind sentencers of the kinds of cases in which it is likely that they will require more information about the offence and the offender to reach an appropriate opinion of the sentence. The guideline does not mandate a pre-sentence report in those cases. Rather, a report will normally be considered necessary. It does not exclude a pre-sentence report in relation to an offender who does not fall within any of the wide range of groups reflected in the list. The guideline expressly states that the list is non-exhaustive. If access to a pre-sentence report were to be determined by membership of a particular cohort – whether being a victim of domestic abuse or trafficking or having mental ill health or being from an ethnic minority background – that would not be a proper approach. That is not what the guideline does.

In relation to offenders from ethnic minorities, there is good evidence (both from the Council's own research and other independent research) that in relation to some types of offence there is a disparity in sentence outcomes as between white offenders and offenders from an ethnic minority. Offenders from some ethnic minority backgrounds are more likely to receive an immediate custodial sentence than white offenders. In some offence specific guidelines this fact is highlighted. Why this disparity exists remains unclear. The Council's view is that providing a sentencer with as much information as possible about the offender is one means by which such disparity might be addressed. This is why ethnic minority offenders were included in the list of cohorts. In relation to cultural and faith minorities, the Equal Treatment Bench Book emphasises the need for judges to understand cultures and faith that may not be within their general experience. Where a judge or a magistrate is to sentence an offender from such a minority, it is necessary for the judge or magistrate to be fully informed about the background of the offender. Whether their culture or faith is of relevance to the sentencing exercise cannot be determined unless and until the sentencer has sufficient information.

I am aware that in some quarters there has been an eliding of the obtaining of a pre-sentence report and the sentence imposed. This is a confusion of two separate steps in the sentencing process. I have seen it suggested that the guideline instructs sentencers to impose a more lenient sentence on those from ethnic minorities than white offenders. Plainly that suggestion is completely wrong as I hope I made clear in my public statement published on the afternoon of 5 March 2025 on the Council website following comments reported in the media.

You will be aware of your power under section 124(1) of the Coroners and Justice Act 2009 to propose to the Council that sentencing guidelines be prepared or revised by the Council under section 120 in relation to a particular offence, particular category of offence or particular category of offenders, or in relation to a particular matter affecting sentencing. This is not a power which ever has been used to ask the Council to revise a guideline immediately after it has been published and which has been the subject of detailed consultation with the Lord Chancellor. I shall have to take legal advice as to whether the power under section 124(1) applies in those circumstances. If it does, the issue will be considered at the next meeting of the Council.

However, for all the reasons I have given, I do not accept the premise of your objection to the relevant part of the list of cohorts for whom a pre-sentence report will normally be considered necessary.

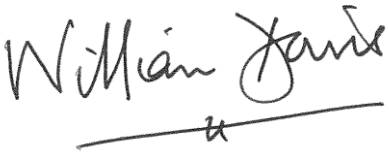
The second part of your letter indicates that you will be considering whether "policy decisions of such import" should be made by the Sentencing Council. You will consider what role Ministers and Parliament should play. I respectfully question whether the inclusion of a list of cohorts in the Imposition guideline was a policy decision of any significance. However, whatever the import of the decision, it related to an issue of sentencing. The 2009 Act set up the independent Sentencing Council after a report by Lord Carter which considered the possible creation of a sentencing commission. Lord Carter recommended that a working party should review that proposition. The working party recommended a body with the powers and duties now exercised by the Sentencing Council.

All judges and magistrates are required to apply any relevant guideline unless the interests of justice require otherwise. In practice, the guidelines form the backbone of every sentencing decision made throughout England and Wales. There is general acceptance of the guidelines by the judiciary because they emanate from an independent body on which judicial members are in the majority. The Council preserves the critical constitutional position of the independent judiciary in relation to sentencing.

In criminal proceedings where the offender is the subject of prosecution by the state, the state should not determine the sentence imposed on an individual offender. If sentencing guidelines of whatever kind were to be dictated in any way by Ministers of the Crown, this principle would be breached.

I look forward to meeting you to discuss these matters.

Yours sincerely,



LORD JUSTICE WILLIAM DAVIS

CHAIRMAN OF THE SENTENCING COUNCIL