# Two-Tier Justice

Policy Exchange

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# About the Author

**David Spencer** is Policy Exchange's Head of Crime & Justice. He was previously a Detective Chief Inspector with the Metropolitan Police Service. David was the co-founder and founding Chief Executive Officer of the graduate recruitment and leadership development social enterprise Police Now.

# Acknowledgements

The author would particularly like to thank those who provided their feedback on drafts of this report – including **Professor Richard Ekins KC (Hon)**, **Charles Wide KC**, **Professor Graham Gee**, **Iain Mansfield** and **Stephen Webb**. Thanks are also due to **Sam Wolfson** who contributed invaluable research support in the early stages of the project. Any errors are, of course, the responsibility of the author.

# Endorsements

*"It is ridiculous that the Sentencing Council is free to demolish the principle of equality before the law without reference to Parliament. This excellent Policy Exchange report sets out in detail the issues and makes clear that it is Parliament that must have the final say on matters of overarching sentencing guidelines and policy. The Government should have supported emergency legislation when it had the chance, but I urge ministers to follow the recommendations of the report and pass a new law now without delay."*

Nick Timothy CBE MP, Member of Parliament for West Suffolk

*"Policy Exchange's insightful report demonstrates the status quo with the Sentencing Council cannot stand – the Government should not hesitate to act on these recommendations. There is also a broader lesson here for Government and Parliament about how we have delegated powers to quangos – the time has come to reconsider our entire approach to arms-length bodies."*

Rt Hon Sir Desmond Swayne MP, Member of Parliament for New Forest West

*"Individual sentencing is rightly a matter for trial judges and magistrates – however the setting of overarching sentencing policy is very clearly a question for Government and Parliament. This report explores in detail the issues and the history that has led us to this point – I urge the Government to act on Policy Exchange's targeted recommendations. Beyond the current guideline there remain real questions about whether a Sentencing Council is required – something that the Government should be willing to explore. It is certainly not an encroachment on judicial independence to make these recommendations."*

Lord Faulks KC, Former Minister of State for Justice

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# Contents

# Executive Summary

**New guidelines produced by the Sentencing Council for judges and magistrates to follow when sentencing offenders are both significant and controversial.** The *Imposition of community and custodial sentences* guideline, due to come into effect on the 1st April 2025, sets out the considerations for judges and magistrates when sentencing an offender who has been found or pleaded guilty in the criminal courts.

**The *Imposition of community and custodial sentences* guideline instructs courts to request and consider, prior to sentencing, a pre-sentence report before forming an opinion about sentencing.** Pre-sentence reports enable the court to have as much information as possible about the offender, including the risk they pose to the public, before passing sentence. Judges and magistrates are instructed that they need not order a pre-sentence report only if they consider it unnecessary.

**The new guideline requires that from the 1st April 2025 a pre-sentence report will "normally be required" when sentencing offenders from one of a whole host of different and specified groups – while some groups are included, others are excluded**. In particular, those within the cohort where a pre-sentence report will "normally be required" include individuals who are from an ethnic, faith or cultural minority group. While there is nothing specifically preventing a court requesting a pre-sentence report for other offenders, those who are white or male will not, unless they can fit themselves into one of the other groupings available, qualify under the criteria that "a pre-sentence report will normally be considered necessary".

**The Lord Chancellor and Secretary of State for Justice, Rt Hon Shabana Mahmood MP, has made clear that she does not agree with the new *Imposition guideline* and, given the Sentencing Council have refused to withdraw it, she is willing to legislate to prevent "two-tier justice".** On the 28th March 2025 the Lord Chancellor said: "I have been clear in my view that these guidelines represent differential treatment, under which someone's outcomes may be influenced by their race, culture or religion. This is unacceptable, and I formally set out my objections to this in a letter to the Sentencing Council last week. I am extremely disappointed by the Council's response. All options are on the table and I will legislate if necessary." The Lord Chancellor is right. There must be no two-tier justice – which the new guideline represents – and the government should legislate without delay to correct the Sentencing Council's error.

**In conversation with the authors at Policy Exchange, the Rt Hon Jack Straw – the former Lord Chancellor and Secretary of State for**

**Justice who created the Sentencing Council – has expressed his strong support for Rt Hon Shabana Mahmood MP.** He said:

> *"I strongly support the Lord Chancellor and Secretary of State for Justice, Shabana Mahmood MP, in the position she is taking relating to the new Imposition Guideline that the Sentencing Council have published. It is clear that the Government will need to take steps to correct the error. Given the cross-party support for this to be resolved, as shown by the position of the Shadow Secretary of State, Robert Jenrick, I hope that this can be done quickly."*

**Pre-sentence reports, typically written by a probation officer, are key to judges and magistrates deciding whether to sentence an offender to prison or to a non-custodial community order – particularly in borderline cases.** As a result, deciding which defendants are to be included in the cohorts where a pre-sentence report will "normally be required", and which don't, can be key in deciding who goes to prison and who doesn't.

**The Sentencing Council, which produced the new guideline, is an independent non-departmental body that is sponsored by the Ministry of Justice.** The Labour government, under Prime Minister the Rt Hon Gordon Brown, created the Sentencing Council through section 118 of the Coroners and Justice Act 2009. The Council commenced operations in April 2010. The framework for the creation of sentencing guidelines evolved during the period of Labour in office between 1997 – 2010. Two bodies associated with the production of guidelines for the sentencing of offenders – the Sentencing Advisory Panel and Sentencing Guidelines Council – were created (and subsequently abolished). We outline the history of this period in **chapter 2** of this report.

**The Sentencing Council is responsible for the preparation of sentencing guidelines for judges and magistrates to follow when sentencing offenders.** Section 120 of the Coroners and Justice Act 2009 specifies that the Sentencing Council must prepare:

> *"(a) sentencing guidelines about the discharge of a court's duty under section 73 of the Sentencing Code (reduction in sentences for guilty pleas), and*
>
> *(b) sentencing guidelines about the application of any rule of law as to the totality of sentences"*
>
> *and may prepare sentencing guidelines about any other matter.*

We outline how the Sentencing Council is required to operate, under statute, in **chapter 3** of this report.

**The membership of the Council is made up of both judicial and non-judicial members.** Eight members of the Council are appointed by the Lord Chief Justice with the agreement of the Lord Chancellor ("judicial members") and six members are appointed by the Lord Chancellor with the agreement of the Lord Chief Justice ("non-judicial members"). We outline the current membership of the Sentencing Council, how members

are appointed and some of the Council members more notable public statements in **chapter 4** of this report.

**Discussions relating to changes in the approach to pre-sentence reports when sentencing have been in the making since October 2022.** The production of the guideline was subject to consultation and discussion at meetings of the Sentencing Council between October 2022 and January 2025. Since being published in March 2025 the production of the new guideline has, unsurprisingly, led to calls – not least from both the Secretary of State for Justice and the Shadow Secretary of State for Justice – that the new approach represents an example of "two-tier justice". Baroness Falkner of Margravine, the Chair of the Equalities and Human Rights Commission, has warned that the new guideline may well be discriminatory, saying: "…we do have some concerns from an Equality Act perspective in terms of the public sector equality duty". We outline in **chapter 5** of this report the background to the creation of the new guideline and the substantive issues they raise.

**Despite the request of the Lord Chancellor, the Sentencing Council has declined to amend the *Imposition Guideline* which comes into effect on the 1st April 2025.** The Sentencing Council's refusal to amend the guideline reflects a disregard for the legitimate criticisms raised by both the Lord Chancellor and the Shadow Lord Chancellor – that the approach outlined in the guideline will result in differential treatment by the courts based on membership of an 'ethnic, faith or cultural minority'.

**The position of both the Secretary of State for Justice and the Shadow Secretary of State for Justice is that the Sentencing Council has failed to get this right. We agree.** This is not a party-political issue – at its core is the issue of whether an elected Parliament, government and minsters should be pre-eminent in setting policy. The Sentencing Council's guideline concerning pre-sentence reports should be overhauled. Furthermore, it is time for a further evolution in how sentencing guidelines are created to ensure the right balance between judicial independence and Parliamentary accountability.

**We make three core recommendations for the Lord Chancellor and Secretary of State for Justice:**

1. The new *Imposition of community and custodial sentences guideline* should be abolished through an Act of Parliament – reverting to the pre-existing *Imposition guideline* previously issued in 2017 until such time as a new guideline is approved by Parliament.

2. All future sentencing guidelines produced by the Sentencing Council should be required to be confirmed via order in Parliament prior to coming into effect.

3. The government should legislate to prevent ethnicity, race, religion or membership of a "cultural minority" being a factor

in determining the sentence imposed by a court, nor a factor in procedures which may influence the sentence such as pre-sentence reports.

# 1. Introduction: judicial independence and political accountability

The setting of sentencing guidelines are hugely consequential – not only for individual offenders who are most directly the subject of them, but for wider society and the criminal justice system as a whole. The process of the creation and development of sentencing guidelines – in particular, how the different facets of the state interact in that process – also poses significant questions for how our constitution operates in practice.

The new *Imposition of community and custodial sentences* guideline was issued by the Sentencing Council as a definitive guideline – in accordance with section 120(8) of the Coroners and Justice Act 2009 – on the 5th March 2025. It states that, "This guideline outlines the general approach to sentencing and provides guidance on how sentencers should address specific issues that may arise when they consider the most appropriate sentence. Sentencers should have this guideline in mind throughout the sentencing process, beginning with when a guilty plea is entered or finding of guilt is made, right up to the imposition of the sentence."[1] The guideline supersedes the previous version issued on the 1st February 2017.

The guideline applies to all offenders aged 18 and older, sentenced on or after the 1st April 2025. As set out in section 59 of the Sentencing Act 2020, all judges and magistrates must follow the guideline unless the court is satisfied that it would be contrary to the interests of justice to do so.

The new guideline includes instructions for magistrates and judges relating to the request and consideration of pre-sentence reports**.** Pre-sentence reports are used by a sentencing court to develop a greater understanding of an offender's background before passing sentence. They include information on: factors which may have contributed to an offender's behaviour (such as mental illness or substance abuse), the risk the offender may pose to others, and what rehabilitative activities might reduce the likelihood of an offender committing further crimes.

From the 1st April 2025 a pre-sentence report will "normally be required" when sentencing offenders from one of a whole host of different and specified groups – while some groups are included, others are excluded. In particular, those within the cohort where a pre-sentence report will "normally be required" include individuals who are: female, or from an ethnic, faith or cultural minority group, or have "disclosed

1. Sentencing Council, Imposition of community and custodial sentences, 1st April 2025, link

they are transgender". While there is nothing specifically preventing a court requesting a pre-sentence report for other offenders – those who are white or male will not, unless they can fit themselves into one of the other groupings available, qualify under the criteria that "a pre-sentence report will normally be considered necessary".

Pre-sentence reports, typically written by a probation officer, are key to judges and magistrates deciding whether to sentence an offender to prison or to a non-custodial community order – particularly in borderline cases. As a result, deciding which defendants are included within the cohort where a pre-sentence report would "normally be considered necessary", and which are not, can be key in deciding who goes to prison and who doesn't. The previous version of the *Imposition* guideline, issued on the 1st February 2017, did not make any reference to different cohorts who should be the subject of a pre-sentence report.[2]

Since being published in March 2025 the production of the new guideline has, unsurprisingly, led to significant criticism – not least from both the Lord Chancellor and the Shadow Lord Chancellor – that the new approach represents an example of "two-tier justice".

On the 5th March 2025, following the publication of the new guideline, the Lord Chancellor, Rt Hon Shabana Mahmood MP said:

> *"The Sentencing Council is entirely independent. Today's updated guidelines do not represent my views or the views of this government. I will be writing to the Sentencing Council to register my displeasure and to recommend reversing this change to guidance. As someone who is from an ethnic minority background myself, I do not stand for any differential treatment before the law, for anyone of any kind. There will never be a two-tier sentencing approach under my watch."*[3]

On the 5th March 2025, the Shadow Secretary of State for Justice, Rt Hon Robert Jenrick MP said:

> *"Under new guidance prison sentences will be less likely for 'ethnic minorities' and 'faith minority communities'. This would create a two tier justice system. We belive [sic] in equality under the law."*[4]

In conversation with the authors at Policy Exchange, Rt Hon Jack Straw – the former Lord Chancellor and Secretary of State for Justice who created the Sentencing Council – has expressed his strong support for Rt Hon Shabana Mahmood MP. He said:

> *"I strongly support the Lord Chancellor and Secretary of State for Justice, Shabana Mahmood MP, in the position she is taking relating to the new Imposition Guideline that the Sentencing Council have published. It is clear that the Government will need to take steps to correct the error. Given the cross-party support for this to be resolved, as shown by the position of the Shadow Secretary of State, Robert Jenrick, I hope that this can be done quickly."*

The Sentencing Council has asserted that the intervention of the Lord Chancellor represents an unwarranted intrusion into the work of the

2. Sentencing Council, Imposition of community and custodial sentences, 1st February 2017, link
3. X, @ShabanaMahmood, 5th March 2025, link
4. X, @RobertJenrick, 5th March 2025, link

independent judiciary. We agree with much of the Lord Chancellor's critique and disagree with the approach of the Sentencing Council. This report explains why.

*

Of central importance is the appropriate extent of judicial independence, and the role of ministers and Parliament, in relation to sentencing policy. The ability of the judiciary to set individual sentences and, prior to 1998 through the judgments of the appellate courts, to set overarching sentencing guidelines, has historically been broad – however, the role of Parliament, and ministers, cannot be underestimated.

There is significant precedent to demonstrate Parliament's preeminent role in setting sentencing policy. The upper limits for the sentencing of offenders are set by Parliament through statute. Examples, for example within the Theft Act 1968, include:

- Section 7: a person guilty of theft shall on conviction on indictment be liable to a imprisonment for a term not exceeding 7 years;
- Section 8 (2): a person guilty of robbery shall on conviction on indictment be liable to imprisonment for life;
- Section 13: a person guilty of abstracting electricity shall be liable to imprisonment for a term not exceeding five years.

In addition to setting maximum limits for specific offences, Parliament has set minimum terms for several offences following conviction – albeit in most of these cases a court can depart from this requirement if exceptional circumstances exist. Schedule 21 of the Sentencing Act 2020 sets out detailed provisions for how judges should approach sentencing those guilty of murder. The Sentencing Act 2020 more broadly establishes a comprehensive framework for sentencing.

Claims that there has been an intrusion on judicial independence in the current context, particularly that the steps taken by the Lord Chancellor and Secretary of State for Justice represent an intrusion on judicial independence, have been overblown. Judicial independence is vital when relating to individual sentencing decisions – which are rightly the purview of individual trial judges and magistrates, alongside the appellate courts where necessary. However, in relation to the work of statutory bodies in which the judiciary are involved, such as the Sentencing Council, this is an entirely different matter. Parliament (and ministers accountable to a democratically Parliament) should determine the policy framework within which individual sentences are passed. It is, after all, the public which bears the impact of crime and it is government ministers – ultimately accountable to Parliament and the electorate – who are responsible for allocating public funds to the criminal justice system of courts, prisons, probation officers, police and lawyers.

The White Paper, Justice for All (2002), which preceded the creation

of the Sentencing Guidelines Council (one of the Sentencing Council's predecessor organisations involved in setting sentences) stated an intention for Parliament to consider sentencing guidelines:

> *"We will ask Parliament to have a role in considering and scrutinising the draft guidelines drawn up by the Council. This will ensure democratic engagement in the setting of guidelines, by those who have to consider proposals for, and make the law on, sentencing. The public has a right to expect this democratic engagement in a way that does not contravene the proper distinction between the role of Parliament and the independence of the judiciary."*[5]

However, despite decades of evolution in the approach to setting sentencing policy, Parliament's principal role, beyond those outlined above, in relation to sentencing guidelines is limited to the House of Commons Justice Select Committee being a statutory consultee. This arrangement represents a democratic deficit and, in this most recent case, has contributed to the Sentencing Council creating a guideline which is considered to be illegitimate across the political divide – by both the Secretary of State for Justice and the Shadow Secretary of State for Justice.

*

Independent non-departmental bodies, such as the Sentencing Council, operate at a distance from the influence and control of ministers and Parliament. However, where decisions are made by arms-length bodies this has the effect of neutering the ability of ministers to take decisions and be held to account for policy by Parliament. In his recent speech on the "fundamental reform of the British state", the Prime Minister Rt Hon Sir Keir Starmer MP said:

> *"…I think there is something deeper, about Westminster politics here. Which is really important for us to understand. Which is, there is a knee jerk response to difficult questions, to difficult lobbies. And the response goes like this: let's create an agency, start a consultation, make it statutory, have a review. Until slowly, almost by stealth democratic accountability is swept under a regulatory carpet. Politicians almost not trusting themselves, outsourcing everything to different bodies because things have happened along the way – to the point you can't get things done."*[6]

These are issues which Policy Exchange has previously examined in *'Getting a Grip on the System: Restoring Ministerial Authority over the Machine'*.[7] This report explored the complex landscape of arm's length bodies and the limited degree to which ministers are able to influence them. The recent events over the Sentencing Council and the recent announcement by the government of its intention to abolish NHS England demonstrates that these are issues attracting widespread cross-party support.

In a recent article, Labour MP Jonathan Hinder said:

> *"Across government, unelected bodies have been given too much control over*

5. Justice for All White Paper, July 2002, link
6. 'PM remarks on the fundamental reform of the British state': 13 March 2025, link & Reuters, UK Prime Minister Keir Starmer gives speech on public sector reform, 13th March 2025, link
7. S. Webb, I. Mansfield & P. Richards (2025), Getting a Grip on the System: Restoring Ministerial Authority over the Machine, Policy Exchange, link

> *key decisions. We have a planning system which makes big infrastructure projects near-impossible to deliver, with vested interests given disproportionate influence, while the stifling effect of "judicial review" has become so pervasive across the public sector that government struggles to get anything done."*[8]

Regarding the Sentencing Council Mr Hinder went on to say:

> *"…the Sentencing Council recently proposed guidelines that could result in offenders being sentenced differently based on their ethnicity or religion. The justice secretary rightly objected to this, seeking to reinforce equality before the law, yet the Council's dismissive response begged the question of who is really in charge."*[9]

In a debate in the House of Commons, Conservative MP Sir Christopher Chope said:

> *" As The Times leader this morning puts it:*
>
> *"Arm's-length bodies…have often been favoured by ministers as a way of distancing themselves from contentious issues. But the result is often a duplication of effort, resulting in turf wars between Whitehall ministries and ALBs over policy. Free of the need to answer to voters, ALBs can go rogue, as Highways England did over its promotion, in the face of public opposition, of so-called smart motorways."*[10]

Sir Christopher went on to say:

> *"The Sentencing Council is not unique in being able to ignore the wishes of Ministers and Parliament. Most arm's length bodies have a similar status to the Sentencing Council. They are in three different categories: executive agencies, non-departmental public bodies and non-ministerial departments. They have slightly varying relationships with the House and with Government, but there are far too many of them."*[11]

*

Equality before the law is fundamental principle of our justice system – elements of the *Imposition of Community and Custodial Sentences* represents a violation of that historic principle. The creation of the *Imposition guideline* has not taken place in a vacuum. The Sentencing Council is now operating in the context of a criminal justice system which has, at least in part, shifted towards the adoption of a 'social justice' perspective in its approach.

*The Lammy Review* (2017), conducted by Rt Hon David Lammy MP, was an independent examination of racial disparities in the criminal justice system, with the stated aim of reducing the proportion of Black, Asian, and Minority Ethnic (BAME) offenders within it.[12] Commissioned in 2016 by then-Prime Minister Rt Hon David Cameron, the review was later supported by Rt Hon Theresa May after she took office. The final report recommended greater transparency in sentencing decisions and urged the Ministry of Justice to review the use of pre-sentence reports, arguing that these measures would help address disparities in outcomes for BAME

8. J. Hinder (2025), 'The government does not run this country — politicians need to take back control', politics.co.uk, 20th March 2025, link
9. Ibid.
10. Hansard, HC Deb 14th March 2025, Vol 763 Col 1451, link
11. Hansard, HC Deb 14th March 2025, Vol 763 Col 1452, link
12. D. Lammy (2017), The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System, September 2017, link

offenders. The report is overly credulous in attributing disparities primarily to discrimination and systemic flaws, rather than considering alternative explanations – such as differences in the levels or severity of offending across different ethnic groups. While inequalities in the criminal justice system warrant scrutiny, it is misleading to assume that disproportionality is inherently the result of bias. Other plausible explanations include social and economic factors outside the system, as well as the role of individual agency and the choices made by offenders. Attempting to 'correct' these disparities through countervailing bias, as elements of the review suggest, is similarly unjust and risks undermining the principle of equality before the law.

The *Police Race Action Plan*, introduced by the National Police Chiefs' Council and the College of Policing in 2022, states that it aims for a police service which is "anti-racist".[13] This framing goes far beyond ensuring fairness and impartiality; suggesting instead that police forces must take active steps to combat racial disparities, regardless of whether they result from actual bias or broader societal factors beyond the police's control.

The *Equal Treatment Bench Book*, most recently issued in July 2024, goes to great lengths to outline how certain apparently "marginalised" groups should be treated differently in court under the guise of fairness.[14] In doing so it adopts a host of contentious positions – embedding certain political perspectives into the criminal justice system. Policy Exchange has long been critical of aspects of the *Equal Treatment Bench Book*, and the judicial behaviour which it seeks to encourage – as outlined in *'Prejudging the transgender controversy: Why the Equal Treatment Bench Book needs urgent revision'*.[15] While, following criticism, the chapter on "gender" was subsequently recast with a chapter now retitled "sex", many areas of concern remain. The July 2024 edition, for example, continues to cite the Muslim Council of Britain as a source despite the Government's policy of non-engagement with the organisation.[16] It also utilises a definition of Islamophobia which conflates legitimate criticism of Islamic beliefs or practices with anti-Muslim hatred.[17]

In September 2024 the Bar Standards Board, the regulator for barristers in England and Wales, proposed changes to one of the Core Duties for barristers – changing *Core Duty* 8 from: "You must not discriminate unlawfully against any person" to the far more expansive: "You must act in a way that advances equality, diversity and inclusion".[18] Such a change would represent a radical shift – compelling barristers to champion a specific social and political agenda associated with a progressive ideology. Such a shift would have the inevitable effect of undermining every barrister's most fundamental duties to both the court and to acting in the best interests of their client. The Chair of the Bar, Barbara Mills KC, said of the proposal by the Bar Standards Board:

> *"In short, we are concerned about the BSB's intention to use the code of conduct which is designed to set a minimum professional standard which protects people when we represent them, as the vehicle to attempt to change our culture…The*

13. National Police Chiefs Council & College of Policing (2002), Police Race Action Plan: Improving policing for Black people, link
14. Judicial College (2024), Equal Treatment Bench Book, July 2024, link
15. T. Chacko (2021), Prejudging the transgender controversy? Why the Equal Treatment Bench Book needs urgent revision, Policy Exchange, link
16. Hansard, Muslim Council of Britain, Question for the Department of Levelling Up, Housing and Communities, UIN 15545, 26th February 2024, link
17. Judicial College (2024), Equal Treatment Bench Book, July 2024, link
18. Bar Standard Board, Bar Standards Board consults on revised proposals to promote equality, diversity and inclusion at the Bar, 3rd September 2024, link

*consultation has generated more heat than light and is a great reminder of the care with which we must take, that any attempt to improve equality, diversity and inclusion does not create unhelpful division. The road to hell, it is often said, is paved with good intention."*[19]

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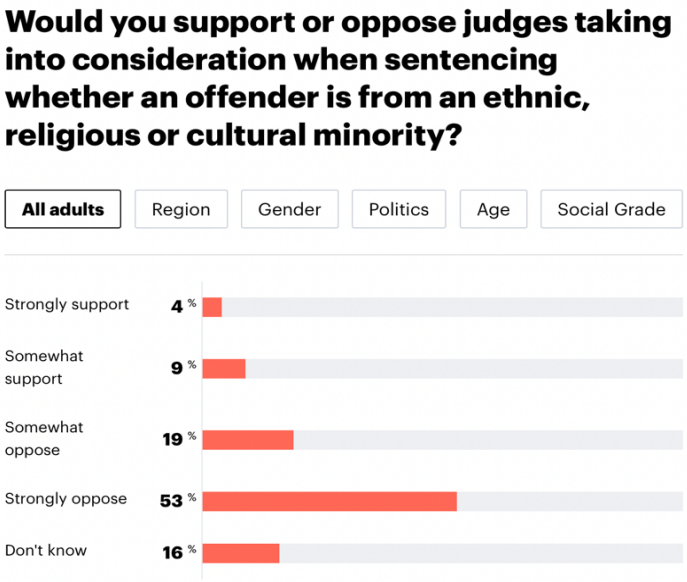
Public sentiment is clearly opposed to an offender's sentence being influenced by their ethnic, cultural, or religious background.[20] A recent YouGov survey showed that 72% of respondents opposed such considerations, with 53% strongly against them – only 13% of those asked supported the idea.[21]




The public rightly favours a justice system that treats all individuals equally, without differentiation based on ethnicity – yet elements of the guideline produced by the Sentencing Council are viewed by vast swathes of the public as being unfair.

The Sentencing Council has defended the new guideline based upon "disparities in sentencing outcomes."[22] In doing so, however, the Council opens itself to the contention that not only has it become 'ideologically captured', but also that it has failed to grasp the degree of concern with which many are viewing these events. Public confidence in the criminal justice system cannot be taken for granted – the perception of fairness and equality before the law is fundamental to maintaining the public's trust.

Ministers, the judiciary, police chiefs and prosecutors have been amongst those who have regularly rebuffed accusations of 'two-tier justice'. And yet the public have been repeatedly confronted with evidence to the contrary – with inconsistencies in how different groups are approached in policy and guidance being regularly observed. The systematic denials of 'two-tier justice' in the face of evidence to the contrary is a toxic mix.

The Sentencing Council's recent guideline concerning pre-sentence

19. Barbara Mills KC, Chair of the Bar Inaugural address, 8th January 2025, link
20. While technically the sentencing guideline addresses which defendants would normally receive a pre-sentencing report – the outcome of this report is then likely to have an impact on the sentence passed by the court.
21. YouGov.co.uk, Would you support or oppose judges taking into consideration when sentencing whether an offender is from an ethnic, religious or cultural minority?, 6th March 2025, 4175 GB adults surveyed, link
22. Letter from the Rt Hon Lord Justice William Davis – Chairman of the Sentencing Council to Shabana Mahmood MP – Lord Chancellor, 10th March 2025, "Imposition Guideline"

reports should be overhauled. Similarly, it is time for a further evolution in how sentencing guidelines are created to ensure the right balance between judicial independence and democratic accountability.

Such steps are in the interests of both the wider public, who are rarely involved in the workings of the criminal justice system, and those who are required to confront its realities – both victims and defendants – on a more regular basis. Indeed, if there is to be any hope of retaining the public's confidence in the criminal justice system, such steps are essential.

# 2. What is the history that led to the creation of the Sentencing Council?

The Sentencing Council was established under the Coroners and Justice Act 2009, enacted during the final years of the New Labour government. The legislation was introduced by Rt Hon Jack Straw as Lord Chancellor and Secretary of State for Justice. The creation of the Sentencing Council followed a decade of evolution in the approach to how sentencing frameworks were created following the election of the Labour Government in 1997 – with two bodies related to the setting of sentencing guidelines created and abolished during that period.

**Prior to 1998:** Prior to 1998 Court of Appeal judges, through their judgments, provided guidelines for sentencing judges and magistrates. These judgments were for both (1) specific offences: such as *R v Spence and Thomas* (1983) relating to kidnapping and *R v Stewart and others* (1987) relating to benefit fraud; and (2) generic sentencing principles: such as *R v Danga* (1992) relating to the age of the offender for the purposes of sentencing and *R v Bird* (1987) relating to the lapse of time between the offence and sentence. Judges and magistrates would then, guided by these judgments, sentence individual offenders.

**Sentencing Advisory Panel (1998):** While judges and magistrates continued (and continue today) to set individual sentences – the changes introduced in 1998 represented the first steps towards others beyond the judiciary, and the role played by Parliament as outlined above, becoming involved in establishing guidelines for sentencing. The creation of the Sentencing Advisory Panel (SAP) occurred through the Crime and Disorder Act 1998 with the SAP commencing operations on the 1st July 1999. Section 81(1) of the Crime and Disorder Act 1998 (since repealed) stated:

> *"The Lord Chancellor, after consultation with the Secretary of State and the Lord Chief Justice, shall constitute a sentencing panel to be known as the Sentencing Advisory Panel ("the Panel") and appoint one of the members of the Panel to be its chairman."*

The Panel provided guidelines for the Court of Appeal, although the Court was not required to follow those guidelines – merely being required to "have regard to the views communicated to the Court, by the Sentencing Advisory Panel".[23]

23. Section 80 (3)(e) Crime and Disorder Act 1998, link

Members of the Sentencing Advisory Panel were appointed by the Lord Chancellor (Lord Irvine of Lairg at the time of the SAP's creation) after consultation with the Home Secretary and Lord Chief Justice. The Panel consisted of, as its first Chairman Professor Martin Wasik stated, "a mix of sentencers, sentence providers, academics, and people outside the criminal justice system".[24] The exact composition and background of the Panel however was not – unlike future sentencing framework bodies – set out in legislation.

The creation of the Sentencing Advisory Panel was an initial first step towards unlocking the judiciary's hold on the production of guidelines relating to the sentencing of offenders – in particular enabling a government minister, to direct the Panel to propose revisions. As the Minister of State for the Home Office stated in the House of Lords at the time:

> *"Section 81 of the Act establishes a new Sentencing Advisory Panel which must be consulted by the court [Court of Appeal] whenever it decides that guidelines are necessary. The panel may also propose that the court frame or revise guidelines and my Right Honourable friend the Home Secretary may direct it to do so."*[25]

**Halliday Review (2001):**[26] In July 2001, John Halliday published the report *Making Punishments Work: A Review of the Sentencing Framework for England and Wales* on behalf of the Home Office. The impetus for the Halliday Report, commissioned by the Home Secretary, stemmed from a view that the sentencing framework at the time suffered from deficiencies which reduced its contributions to crime reduction and public confidence. Haliday was particularly critical of what he described as "the unclear and unpredictable approach to persistent offenders, who commit a disproportionate amount of crime, and the inability of short prison sentences (those of less than 12 months) to make any meaningful intervention in the criminal careers of many of those who receive them." The same debates continue today. The Review set out options for the creation of a new sentencing body – albeit leaving open its precise structure and membership.

Writing in The Guardian in 2007, and potentially providing an insight into his underlying views, Mr Halliday said of the increasing prison population over the preceding years:

> *"The reason for this trend is obvious. Neither governments, nor magistrates, nor judges, wish to be pilloried for being soft on offenders. Who can blame magistrates and judges for choosing to respond to what they see as clear signals from parliament (through legislation), ministers (through policies and comments), and the media, by sending more offenders to prison, for longer periods?*
>
> *"To change this trend, we do not need more "messages" from ministers or senior judges, but a more formal, open understanding between government and an independent sentencing authority about the guidelines within which judicial discretion in sentencing is to be used, and their expected impact on the size of the prison population."*[27]

24. M. Wasik (2002), The Work of the Sentencing Advisory Panel, Prison Service Journal, Issue 142, 1st July 2002, link
25. Hansard, House of Lords, Vol 603: 30th June 1999, link
26. John Halliday (2001), Making Punishments Work: A Review of the Sentencing Framework for England and Wales, July 2001, link
27. John Halliday (2007), Letter to The Guardian, 6th February 2007, link

Halliday assumes in his letter that the rise in imprisonment for those who subject their fellow citizens to crime is inherently undesirable. We disagree. The criminal law, as laid down by Parliament, codifies the limits of what is acceptable behaviour in our society. For those individuals who choose to commit the most egregious acts – as determined by Parliament – it is entirely reasonable that they should be subjected to, in some cases very lengthy, terms of imprisonment. It is hardly surprising that the law-abiding majority might also wish to see those individuals subjected to terms of imprisonment which properly reflect the impact they have upon society. The "clear signals" that Halliday refers to are not only from judges, magistrates, minsters and the media – they are also from the law-abiding majority of the public who quite rightly want to see criminals in prison for extended periods due to their offending behaviour. This is a "trend" which is in no need of reversal.

**Sentencing Guidelines Council (2004):** The Criminal Justice Act 2003 shifted the function of creating sentencing guidelines to a newly established body – the Sentencing Guidelines Council. The Sentencing Advisory Panel continued to draft and consult on guidelines. The Criminal Justice Act 2003 retained the same wording as previous legislation, stating that every court should "have regard to any guidelines" when sentencing offenders.

Membership of the Sentencing Guidelines Council was more prescribed in legislation than that of the Sentencing Advisory Panel. Section 167 of the Criminal Justice Act 2003 set out the membership Council as:

- the Lord Chief Justice – who was the chairman of the Council;
- seven judicial members – appointed by the Lord Chancellor after consultation with the Secretary of State and Lord Chief Justice; and
- four non-judicial members – appointed by the Secretary of State after consultation with the Lord Chancellor and the Lord Chief Justice.

Non-judicial members were eligible for appointment only if they appeared to the Secretary of State to have experience in: policing, criminal prosecution, criminal defence, and the promotion of the welfare of victims of crime. The Director of Public Prosecutions was eligible for appointment as a non-judicial member with experience of criminal prosecution.

**The creation of the Ministry of Justice (2007):** The Ministry of Justice was established in 2007 as part of a restructuring of the Government's legal and judicial administration by the then-Prime Minister Rt Hon Sir Tony Blair – transferring responsibilities from the Department for Constitutional Affairs. The reform was driven by a desire to consolidate the management of the courts, prisons, and probation services under a single department to enhance coordination across the justice system. The new ministry assumed responsibility for criminal justice, sentencing policy, the judiciary, and constitutional affairs – bringing together various functions that had previously been split between the Home Office and the

Department for Constitutional Affairs.

The creation of the Ministry of Justice was not without controversy – the announcement occurred on the day Parliament rose for Easter, leading to criticism from several Members of Parliament and peers.[28] There was also criticism on the substance of the proposals – in particular due to the combination of the role of Lord Chancellor with that of the new role of Secretary of State for Justice. These concerns focused on the question of whether the Lord Chancellor would continue to be in as effective a position to safeguard the independence of the judiciary. Written evidence to the House of Commons Select Committee submitted by the then-Lord Chief Justice of England and Wales stated, "the creation of a MOJ [Ministry of Justice] is not a simple machinery of government change, but one which impacts on the separation of powers by giving the Lord Chancellor, as Minister of Justice, decision-making powers which are potentially incompatible with his statutory duties for the courts and the judiciary".[29]

**Lord Carter of Coles Review (2007):**[30] In June 2007 Lord Carter was commissioned by the Secretary of State for Justice to examine options for improving the balance between the supply of prison places and demand for them. He published *Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales* in December 2007. The report advocated an increase in the number of prison places to 96,000 prison places – including the creation of so-called 'Titan' prisons – albeit also recommending that longer term measures be identified to prevent the need for further prison building.

In addition, Carter advocated creating, "a structured sentencing framework and permanent Sentencing Commission" with judicial leadership in order "to improve the transparency, predictability and consistency of sentencing and the criminal justice system".

The Sentencing Commission that Carter envisaged would, "develop a comprehensive set of indicative ranges according to the objectives set down by the legislature and in consultation with all key parties and the public". He suggested a model where:

> *"(a) the Commission would present them to government along with the accompanying prison population and correctional resources forecast. Government would present them to Parliament for affirmative approval in a format as set out under the originating primary legislation;*
>
> *(b) at the stage of seeking approval, both the Commission and the government would endorse the options that went before Parliament;*
>
> *(c) the government would be prevented by statute from unilaterally altering the set of indicative ranges. If the government wished to make any amendments they would have to consult and agree them with the Commission, who would model the impact, update projections and possibly consult wider before giving agreement."*[31]

28. House of Commons Constitutional Affairs Committee, The creation of the Ministry of Justice, 17th July 2007, link
29. Evidence submitted by the Rt Hon Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales submitted to House of Commons Constitutional Affairs Committee (Ev 25), The creation of the Ministry of Justice, 17th July 2007, link
30. Lord Carter's Review of Prisons (2007), Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales, December 2007, link
31. Lord Carter's Review of Prisons (2007), Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales, December 2007, link

The model outlined by the Carter Review would have explicitly involved Parliament in having a role in confirming guidelines for sentencing – a significant step in both increasing the political oversight and limiting the judicial role in setting sentencing guidelines. The model would also have had the effect of setting sentencing within a broader framework of government priorities and policies – including explicitly linking sentencing with the availability of prison cells and other resources.

**Sentencing Commission Working Group (2008):**[32] Recommendation 3 of the Carter Review proposed the creation of a Working Group to consider the feasibility of creating a structured sentencing framework and permanent "Sentencing Commission". The Working Group, chaired by the Rt Hon Lord Justice Gage, was established in March 2008 and reported in July 2008. The Working Group's final recommendation was that a single unified body be created – describing this as an "enhanced SGC [Sentencing Guidelines Council]".

In response to the Working Group's consultation the Judiciary of England and Wales,[33] commenting on New Zealand proposals at the time for laying sentencing guidelines before Parliament, said:

> *"The principal advantage claimed is this allows elected members of Parliament to participate in the setting of sentencing levels, which may be thought to be a matter of legitimate social concern: it would be a way of giving some form of Parliamentary 'ownership' to the advisory guidelines of the Council. […] The risk must be that it will allow sentencing levels to be driven up yet further by tabloid pressure and political rhetoric."*[34]

In their response, the Council of HM Circuit Judges quoted the former Lord Chief Justice, Rt Hon Lord Woolf, as saying:

> *"We should at all costs avoid the House of Commons becoming involved in a bidding war about sentencing levels in which someone argues for a standard sentence of one year for a first time burglar and someone else suggests two and someone else suggest three".*[35]

The high-handed dismissal of Parliament – and by extension the public's elected representatives – is revealing.

A minority of Working Group members advocated Parliament should approve sentencing guidelines – as Carter envisaged; however a majority of the Working Group did not agree. The Working Group's final report said:

> *"….we agree with the suggestion in some responses that for guidelines to be placed before Parliament for approval would be a fundamental departure from the accepted relationship between the judiciary and the legislature."*[36]

We disagree that this is the case – and the most recently published *Imposition guideline* ably demonstrates why. It would be perfectly lawful – and constitutional – for Parliament, and indeed Ministers, to take a greater role in the setting of the overall sentencing framework and policy. The rejection of Parliament taking a role on the subsequent legislation – the

32. Sentencing Commission Working Group (2008), Sentencing Guidelines in England and Wales: An Evolutionary Approach, July 2008, link

33. This response to the Sentencing Commissioner Working Group's consultation was prepared by "a group of High Court Judges put together by the Senior Presiding Judge". It was also endorsed by the members of the "Rose Committee" - a sub-group of Lord and Lady Justices sitting in the Court of Appeal, Criminal Division (excluding those judges who were members of the Sentencing Guidelines Committee).

34. Response prepared at the request of the Senior Presiding Judge, Response to the Sentencing Commission Working Group Consultation Paper, 30 May 2008 link

35. Response submitted by Council of HM Circuit Judges in Response to the Sentencing Commission Working Group Consultation Paper, 30 May 2008, link – quoted in House of Commons Justice Committee, Sentencing Guidelines and Parliament: Building a Bridge, 23rd June 2009, link

36. Sentencing Commission Working Group (2008), Sentencing Guidelines in England and Wales: An Evolutionary Approach, July 2008, link

Coroners and Justice Act 2009 which created the Sentencing Council – limited Parliament's role merely to the House of Commons Justice Select Committee being a consultee of any draft guideline. The next chapter outlines how the Sentencing Council operates.

# 3. What is the purpose of the Sentencing Council and how does it operate?

Section 118 of the Coroners and Justice Act 2009 established the Sentencing Council for England and Wales. The Sentencing Council commenced operations in April 2010. This new body replaced both the Sentencing Advisory Panel and Sentencing Guidelines Council, consolidating their functions.

The Coroners and Justice Act 2009 specifies that the Sentencing Council must prepare (s. 120 (3)):

> *"(a) sentencing guidelines about the discharge of a court's duty under section 73 of the Sentencing Code (reduction in sentences for guilty pleas), and*
>
> *(b) sentencing guidelines about the application of any rule of law as to the totality of sentences"*
>
> *and may prepare sentencing guidelines about any other matter (s. 120 (4)).*

The Council is required to first publish the guideline as a draft guideline (s. 120 (5)) and must consult: the Lord Chancellor; such persons as the Lord Chancellor may direct; the Justice Select Committee of the House of Commons; and such other persons as the Council considers appropriate (s. 120 (6)).

Once the Council makes any amendments it considers to be appropriate following consultation they must issue definitive guidelines relating to the areas covered in section 120 (3) and may issue definitive guidelines relating to other matters covered in section 120 (4).

Courts must, in most cases, follow the guidelines issued by the Sentencing Council. Section 59 of the Sentencing Act 2020 states that:

> *"(1) Every court—*
>
> *(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and*
>
> *(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,*

*unless the court is satisfied that it would be contrary to the interests of justice to do so."*

The Lord Chancellor has the power to propose to the Sentencing Council that sentencing guidelines may be prepared or revised by the Council in relation to a particular offence, particular category of offence, or particular category of offenders, or in relation to a particular matter affecting sentencing (s. 120(1)(a)). The Court of Appeal, when considering a particular matter, may propose to the Sentencing Council that sentencing guidelines be prepared or revised by the Council in relation to the relevant offence, or in relation to a category of offences within which the relevant offence falls when (s. 120(3)). In both cases the Sentencing Council must consider whether to prepare or revise any guidelines (s. 120(5)) – but is not required to do so.

When issuing guidelines and undertaking consultations under section 120 (11) of the Coroners and Justice Act 2009, the Council must have regard to:

*(a) the sentences imposed by courts in England and Wales for offences;*

*(b) the need to promote consistency in sentencing;*

*(c) the impact of sentencing decisions on victims of offences;*

*(d) the need to promote public confidence in the criminal justice system;*

*(e) the cost of different sentences and their relative effectiveness in preventing re-offending;*

*(f) the results of the monitoring carried out under section 128 [relating to the Council's 'monitoring' functions.*

Notably given the most recent controversy, although not mentioned in Section 120 of the Coroners and Justice Act 2009, the Sentencing Council states on their website that they will prioritise the revision of guidelines where there is evidence (including evidence provided by "interested groups") of, amongst other factors, "inequality in sentencing between different demographic groups".[37]

In addition to issuing and consulting on sentencing guidelines the Council also has responsibilities for:

- Resource assessment: When the Council publishes draft guidelines or issue definitive guidelines they must also publish a resource assessment relating to the provision of: prison places, probation services, and youth justice services (s. 127).
- Monitoring: The Council must monitor the operation and effect of its sentencing guidelines (s. 128).
- Promote awareness: The Council must publish information regarding sentencing practices in local areas and may promote awareness of matters relating to the sentencing of offenders (s.

37. Sentencing Council, Our criteria for developing or revising guidelines, last accessed: 24th March 2025, link

129).

- Annual report: The Council must, at the end of each financial year, provide a report to the Lord Chancellor exercise of the Council's functions during the year – which the Lord Chancellor must lay before Parliament (S. 118).

One of the most consequential changes within the Coroners and Justice Act 2009 concerned how courts would be required to treat sentencing guidelines subsequently. Prior to 2009 courts in England and Wales were directed that in sentencing they "must have regard to any guidelines which are relevant to the offender's case" (Section 172(1) Criminal Justice Act 2003). During the passage of the Coroners and Justice Act 2009 through Parliament the provisions concerning sentencing attracted considerable debate – with the version ultimately adopted at section 125 of the Act stating:

> *"(1) Every court—*
>
> *(a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and*
>
> *(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,*
>
> *unless the court is satisfied that it would be contrary to the interests of justice to do so."*

The newly introduced language was clearly more directive than that which it replaced. Having previously had a requirement for courts to merely "have regard to any guidelines", courts were then required to "follow any sentencing guidelines which are relevant" unless contrary to the interests of justice. This wording was then latterly replicated in the Sentencing Act 2000 (section 59).

The next chapter outlines how the membership of the Sentencing Council is constituted.

# 4. Who are the members of the Sentencing Council and how are they appointed?

Paragraph 1, Schedule 15 of the Coroners and Justice Act 2009 states:

> *The Council is to consist of —*
>
> *(a) 8 members appointed by the Lord Chief Justice with the agreement of the Lord Chancellor ("judicial members");*
>
> *(b) 6 members appointed by the Lord Chancellor with the agreement of the Lord Chief Justice ("non-judicial members").*

Paragraph 2, Schedule 15 of the Coroners and Justice Act 2009 states:

> *The Lord Chief Justice must, with the agreement of the Lord Chancellor, appoint —*
>
> *(a) a judicial member to chair the Council ("the chairing member"), and*
>
> *(b) another judicial member to chair the Council in the absence of the chairing member.*

Under paragraph 5, Schedule 15 of the Coroners and Justice Act 2009 the Lady Chief Justice, currently Baroness Carr of Walton-on-the-Hill, is the President of the Sentencing Council. She is not a member of the Council.

Every Director of Public Prosecutions since the Sentencing Council was created in 2009 has been a member of the Council – including, during his term of office as DPP, the current Prime Minister Sir Keir Starmer KC MP.

**Non-judicial appointments:**[38] Non-judicial appointments to the Council are regulated by the Commissioner for Public Appointments. Non-judicial members are appointed for terms of three years and receive a renumeration of £12,600 per annum for 36-days work. Individuals are eligible for appointment as non-judicial members of the Council if they "appear to the Lord Chancellor to have experience" in one or more of the following areas: criminal defence, criminal prosecution, policing, sentencing policy and the administration of justice, the promotion of the welfare of victims of crime, academic study or research relating to the criminal law or criminology, the use of statistics, or the rehabilitation of

38. Gov.uk, Appointment of Non-Judicial Members of the Sentencing Council, Opening Date: 16th October 2024, link

offenders.

An Advisory Assessment Panel is appointed by Ministers to assess candidates against the shortlisting criteria and decide who should be put forward for interview. Once the Panel has prepared a shortlist this is presented to Ministers for agreement – once the shortlist has been agreed candidates are invited for interview. The Panel then interview candidates and determine who is "appointable". Ministers receive the Panel's recommendations and determine the merit of candidates, before finally deciding who should be appointed.

For the most recent selection process for Sentencing Council members – held between October 2024 and March 2025 – the Advisory Assessment Panel consisted of:

- Adam Bailey, Deputy Director, Head of Sentencing and Parole Policy, MoJ
- The Rt Hon Lord Justice William Davis, Chair of the Sentencing Council
- Dr Caterina Milo, Lecturer in Law, University of Sheffield

## Current Membership of the Sentencing Council:[39]

| Name | Role | Date Appointed | Lord Chancellor at time of appointment | Lord/Lady Chief Justice at time of appointment |
|---|---|---|---|---|
| LJ William Davis | Judicial (Chair) | 1/8/2022[40] | Dominic Raab | Burnett |
| HHJ Amanda Rippon | Judicial | 8/4/2024 | Alex Chalk | Carr |
| HHJ Simon Drew KC | Judicial | 12/6/2023 | Alex Chalk | Burnett |
| Hon Justice Mark Wall | Judicial | 2/1/2023 | Dominic Raab | Burnett |
| DJ Stephen Leake | Judicial | 23/5/2022 | Dominic Raab | Burnett |
| Jo King JP | Judicial (magistrate) | 8/10/2020 | Robert Buckland | Burnett |
| Hon Mrs Justice Juliet May | Judicial | 8/10/2020 | Robert Buckland | Burnett |
| LJ Tim Holroyde | Judicial | April 2015[41] | Chris Grayling | Burnett |
| CC Rob Nixon QPM | Non-judicial (policing) | 1/12/2023[42] | Alex Chalk | Carr |
| Stephen Parkinson | Non-judicial (DPP) | 1/1/2012 | Alex Chalk | Carr |

39. Sentencing Council, Sentencing Council members, last accessed 25th March 2024, link
40. Previously a judicial member of the Sentencing Council (2012 – 2015)
41. Previously Chair of the Sentencing Council (2018 – 2022)
42. Interim member of the Sentencing Council since May 2023

| | | | | |
|---|---|---|---|---|
| Johanna Robinson | Non-judicial (victims) | 5/10/2023 | Alex Chalk | Carr |
| Richard Wright KC | Non-judicial (defence) | 1/8/2022 | Dominic Rabb | Burnett |
| Dr Elaine Freer | Non-judicial (academic) | 1/7/2022 | Dominic Raab | Burnett |
| Beverley Thompson OBE | Non-judicial (probation) | 15/6/2018 | David Gauke | Burnett |

Several members of the Sentencing Council have courted controversy in the past. These statements particularly raise questions as to whether these members have, "the ability to retain the confidence of the Sentencing Council Chair, Ministers, Parliament, the judiciary, other professional bodies in the criminal justice system and the public" as required by members of the Council.[43]

**District Judge Stephen Leake**: When sentencing several individuals who had pleaded guilty to criminal offences, Judge Leake offered in his remarks that they had "inspired" him. The offenders caused considerable disruption to the road network as a result of their actions – including preventing an ambulance with a patient on board from passing. Most were convicted and sentenced for the criminal offence of wilful obstruction of the highway – one individual was convicted of criminal damage to a police motor vehicle. When sentencing Judge Leake said: "I have heard your voices. They have inspired me and personally I intend to do what I can to reduce my own impact on the planet, so to that extent your voices are certainly heard."[44]

Judge Leake, apparently suggesting that he found applying the law in this case some how challenging, said: "These are difficult cases for us judges because we have to apply the law and that is what we have sworn our judicial oaths to do."[45]

**Beverley Thompson OBE**: Ms Thompson has previously undertaken roles as: a probation officer, the Director for Race, Prisons and Resettlement Services at the social justice charity NACRO, a Director for Serco and the Chief Executive of Northants Probation.[46] She was appointed to the Sentencing Council on the 15th June 2018 as a non-judicial member.

In an analysis within a report by the Prison Reform Trust, Ms Thompson claimed that:

> *"The over-representation of BAME people in our justice system and the under-representation of staff from those backgrounds, particularly at senior levels, has beleaguered both organisations".*[47]

Offering support for the controversial Black Lives Matter movement, she said:

43. Gov.uk, Appointment of Non-Judicial Members of the Sentencing Council, Opening Date: 16th October 2024, link
44. BBC News, Insulate Britain: Judge 'inspired' by activists after M25 protest, 12th April 2022, link
45. Guardian-series, Judge praises Insulate Britain protesters despite fining them, 12th April 2022, link
46. Sentencing Council, Sentencing Council members, link & LinkedIn, link
47. Prison Reform Trust (2021), Bromley Briefings Prison Factfile, Winter 2021, link

> *"The BLM movement has been a catalyst for global action, encouraging people and organisations to re-examine their history and sparked efforts within them to challenge and address racial inequality."*[48]

In relation to the contested claim of 'systemic' racism, Ms Thompson said:

> *"It is questionable that any organisation in the criminal justice system would have no knowledge of the pervasive nature of systemic racism or inequality, or what they should be doing to address it."*[49]

**Stephen Parkinson:** Mr Parkinson commenced his term as Director of Public Prosecutions on the 1st November 2023 – joining the Sentencing Council on the same date. Prior to this he was the Senior Partner at the law firm Kingsley Napley. Following the murder of George Floyd in the United States, Mr Parkinson published a blog on the Kingsley Napley website stating his personal commitment to being an "ally" for LGBTQ+ and "black and diverse" colleagues.[50] In relation to the Black Lives Matter movement Mr Parkinson stated that:

> *"The Black Lives Matter movement is important. It shines a light on the disparity of treatment of black people compared to other ethnicities."*[51]

Mr Parkinson also recommended a series of books and television programmes, including the controversial "How To Be An Antiracist" by Ibram X. Kendi.[52] Mr Kendi is perhaps most well known for saying that, "The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination."[53] Such an approach clashes with fundamental legal principles in England and Wales, not least the long-held commitment to equal treatment under the law. If applied in a legal context, Kendi's argument would justify race-conscious policies and sentencing which shifts the focus from individual justice to collective identity. Such approaches contribute to undermining the public's confidence in judicial impartiality and the criminal justice system – they must be resisted.

The next chapter addresses where members of the Sentencing Council have erred in the creation of the new *Imposition guideline*.

48. Ibid.
49. Ibid.
50. S. Parkinson, Want to be a diversity ally? Here's how, Kingsley Napley, 18th June 2020, link
51. Ibid.
52. Ibid.
53. I. X. Kendi (2019), How to be an antiracist

# 5. What is wrong with the new guideline issued by the Sentencing Council?

The new *Imposition of community and custodial sentences* guideline was issued by the Sentencing Council as a definitive guideline in accordance with section 120(8) of the Coroners and Justice Act 2009 on the 5th March 2009. The guideline supersedes the previous version issued on the 1st February 2017.

The guideline applies to all offenders aged 18 and older, who are sentenced on or after the 1st April 2025. As set out in section 59 of the Sentencing Act 2020, all judges and magistrates must follow the guideline unless the court is satisfied that it would be contrary to the interests of justice to do so.

The new guideline includes instructions for magistrates and judges relating to the request and consideration of pre-sentence reports**.** Pre-sentence reports are used by a sentencing court to develop a greater understanding of an offender's background before passing sentence. They include information on: factors which may have contributed to an offender's behaviour (such as mental illness or substance abuse), the risk the offender may pose to others, and what rehabilitative activities might reduce the likelihood of an offender committing further crimes.

Pre-sentence reports, typically written by a probation officer, are key to judges and magistrates deciding whether to sentence an offender to prison or to a non-custodial community order – particularly in borderline cases. As a result, deciding which defendants *automatically* receive a pre-sentence report, and which don't, can be key in deciding who goes to prison and who doesn't.

The previous version of the Imposition guideline, issued on the 1st February 2017, did not make any reference to different cohorts who should receive a pre-sentence report.[54]

The new guideline produced by the Sentencing Council states that:

> *"A pre-sentence report will normally be considered necessary if the offender belongs to one of more of the following cohorts:*
>
> - *at risk of first custodial sentence and/or at risk of a custodial sentence of 2 years or less (after taking into account any reduction for guilty plea)*
> - *a young adult (typically 18-25 years)*

54. Sentencing Council, Imposition of community and custodial sentences, 1st February 2017, link

- female
- from an ethnic minority, cultural minority, and/or faith minority community
- pregnant or post-natal
- sole or primary carer for dependent relatives

"Or if the court considers that one or more of the following may apply to the offender:

- has disclosed they are transgender
- has or may have any addiction issues
- has or may have a serious chronic medical condition or physical disability, or mental ill health, learning disabilities (including developmental disorders and neurodiverse conditions) or brain injury/damage
- or; the court considers that the offender is, or there is a risk that they may have been, a victim of:
    - domestic abuse, physical or sexual abuse, violent or threatening behaviour, coercive or controlling behaviour, economic, psychological, emotional or any other abuse
    - modern slavery or trafficking, or
    - coercion, grooming, intimidation or exploitation."

Based upon this list an offender who is white (or male) will not, unless they can fit themselves into one of the other groupings available, *normally* qualify for a pre-sentence report. This is the very definition of "two-tier justice" at work.

Following publication of the guideline, on the 6th March 2025 the Lord Chancellor and Secretary of State for Justice, Rt Hon Shabana Mahmood MP, wrote to the Chairman of the Sentencing Council, Rt Hon Lord Justice William Davis, expressing her concern. She said:

"…the access to one [a pre-sentence report] should not be determined by an offender's ethnicity, culture or religion. As someone who is from an ethnic minority background myself, I do not stand for differential treatment before the law like this. For that reason, I am requesting that you reconsider the imposition of this guideline as soon as possible.

"I will also be considering whether policy decisions of such import should be made by the Sentencing Council and what role Ministers and Parliament should play. For that reason, I will be reviewing the role and powers of the Sentencing

> *Council alongside the work of the Independent Sentencing Review. If necessary, I will legislate in the Sentencing Bill that will follow that review."*[55]

Demonstrating a degree of cross-party agreement on the issue, the Shadow Secretary of State for Justice, the Rt Hon Robert Jenrick MP, in the House of Commons has stated:

> *"In just 14 days, new two-tier sentencing rules will come into force. These sentencing rules will infect our ancient justice system with the virus of identity politics, dividing fellow citizens on the basis of their skin colour and religion. The rules will ride roughshod over the rule of law and destroy confidence in our criminal justice system."*

The Chairman of the Sentencing Council, Lord Justice Davis, replied to the Lord Chancellor on the 10th March 2025, providing a lengthy defence of how the Sentencing Council had approached its work in relation to the guideline.[56] The Secretary of State for Justice and Lord Justice Davis met to discuss the issues on the 13th March 2025.[57]

**Pre-sentence reports being automatically available for some demographic groups, but not others:** In his letter to the Secretary of State for Justice of the 10th March 2025 Lord Justice Davis states that it is still possible for a judge or magistrate to order a pre-sentence report if they are sentencing an individual not captured within one of the selected demographic groups. This, of course, is true – but it misses the point. It is the automatic nature of the pre-sentence reports for certain groups and being discretionary for others which is the issue.

Pre-sentence reports are used to inform judges about the background of offenders, assessing risks, and recommending appropriate sentencing options, including alternatives to custody. The selective approach – where a defendant from an ethnic, faith or cultural minority group would "normally" be the subject of a pre-sentence report while those who do not fit into any such category are not – creates a fundamental unfairness where some groups are prioritised and therefore benefit over others. The concern is not that some individuals receive pre-sentence reports, but that others who may equally benefit from a full assessment do not automatically receive one.

The Sentencing Council's *Imposition guideline review of trend analysis* – published in 2023 and relating to the previous version of the Imposition guideline which did not automatically presume a pre-sentence report would be obtained for ethnic minorities – found, "for those groups with larger volumes of offenders sentenced, there is predominantly no clear evidence of differential impacts of the Imposition guideline".[58]

Where disparities do exist this could be due several factors, including the differing rates that different groups plead guilty to offences, the distribution of severity of offending across different groups or the differing levels of likelihood of committing crime across different age and ethnic groups. These should be properly explored and understood. The answer to disparities occurring however, is not to introduce further discrimination into the system to somehow "correct" for those disparities

55. Letter from the Rt Hon Shabana Mahmood MP – Secretary of State for Justice and Lord Chancellor to the Rt Hon Lord Justice William Davis – Chairman of the Sentencing Council, 6th March 2025, "Imposition of Community and custodial sentences guideline"

56. Letter from the Rt Hon Lord Justice William Davis – Chairman of the Sentencing Council to Shabana Mahmood MP – Lord Chancellor, 10th March 2025, "Imposition Guideline"

57. Letter from the Rt Hon Lord Justice William Davis – Chairman of the Sentencing Council to Shabana Mahmood MP – Lord Chancellor, 27th March 2025, "The Imposition of community and custodial sentences guideline", link

58. Sentencing Council, Review of trend analysis of the Sentencing Council's Imposition of community and custodial sentences guideline, link

– such an approach would strike at one of the justice system's fundamental principles of equality before the law.

As the Lord Chancellor has stated in her letter of the 20th March 2025 to the Chairman of the Sentencing Council,

> *"I have recently commissioned my Department to conduct a thorough review of sentencing disparity and its causes, particularly given the lack of clarity we have both noted. I think good policymaking depends on a greater understanding of the challenge we face, and that decisions made outside of that could have damaging consequences."*[59]

The chair of the Equalities and Human Rights Commission, Baroness Falkner of Margravine warned that the new guideline may well be discriminatory. In an interview following the publication of the guideline she said:

> *"I wrote yesterday to the Sentencing Council because we do have some concerns from an Equality Act perspective in terms of the public sector equality duty and we've offered to assist them in ascertaining whether there might be some discrimination by leaving out some groups and elevating others.*
>
> *"If having a pre-sentencing report is an advantage, then you run the risk of positive discrimination for those groups that are in the list and not for other groups.*
>
> *"The correct constitutional position would be… that a judge already has tools at their disposal to seek pre-sentencing reports and that they should do so based on an individual case on a case-by-case basis, rather than categorising certain groups."*[60]

**An unnecessary intervention:** Section 30(2) of the Sentencing Act 2020 states: If the offender is aged 18 or over, the court must obtain and consider a pre-sentence report before forming the opinion unless, in the circumstances of the case, it considers that it is unnecessary to obtain a pre-sentence report". Through this primary legislation Parliament has already set the necessary threshold for sentencing judges and magistrates to obtain a pre-sentence report. The guideline appears to add nothing useful that primary legislation does not already address – but as has become clear the guideline has had the impact of reducing 'public confidence in the criminal justice system' contrary to section 120(11)(d) of the Coroners and Justice Act 2009 which sets out the requirements that the Sentencing Council must have regard to in exercising their functions.

**Consultation process:** The consultation on the Sentencing Council's draft *Imposition guideline* took place between the 29th November 2023 and the 21st February 2024. In the consultation document the Sentencing Council state their justification for including, "a list of cohorts for whom a pre-sentence report may be particularly important"[61] by quoting the previous, highly criticised and since updated, version of the Equal Treatment Bench Book:

59. Letter from the Rt Hon Shabana Mahmood MP – Lord Chancellor to Rt Hon Lord Justice William Davis – Chairman of the Sentencing Council, 20th March 2025, "The Imposition of Community and Custodial Guideline", link
60. Daily Telegraph, 'Two-tier' sentencing rules may be discriminatory, says watchdog, 12th March 2025, link
61. Sentencing Council, Imposition of community and custodial sentences guideline – consultation, 29th November 2023, link

> *"The Equal Treatment Bench Book sets out that "Pre-sentence reports may be particularly important for shedding light on individuals from cultural backgrounds unfamiliar to the judge" and, for example, that "Pre-Sentence Report ('PSR') writers must consider requesting a full adjournment for the preparation of a PSR where offenders disclose that they are transgender".*[62]

In the consultation document the Council highlighted the importance of pre-sentence reports for some groups – but as a result not others:

> *"The Joint Committee of Human Rights placed particular importance on PSRs for primary carers (Joint Committee on Human Rights: The right to family life: children whose mothers are in prison; Twenty-Second Report of Session 2017–19), HM Inspectorate for Probation placed particular importance on PSRs for black, Asian and ethnic minority offenders (HM Inspectorate of Probation: Thematic Inspection on Race equality in probation: the experiences of black, Asian and minority ethnic probation service users and staff), and the Justice Select Committee placed particular importance on PSRs for female offenders (House of Commons Justice Committee: Women in Prison, First Report of Session 2022–23)."*[63]

In the document summarising the responses the consultation received the Sentencing Council state: "While responses varied, with strong views both for and against the list, overall, a much higher number of respondents supported retaining the list"[64] – referring to the list of those who would automatically receive a pre-sentence report.

In his letter to the Secretary of State for Justice Lord Justice Davis referred to the consultation process stating that, "It was decided that to remove the list would have been contrary to the majority view expressed by consultees".[65]

That it was a "majority view" that there should be a specified list of groups who automatically receive a pre-sentence report amongst consultees is unsurprising. The consultation process received 150 responses – of whom 40 were from "charity or non-governmental organisations". These included: Prison Reform Trust, Clinks, the Centre for Women's Justice, the Howard League for Penal Reform, and others. As they are perfectly entitled to do, many of these organisations represent and advocate for individuals within their own sectional interest, or for there simply to be far fewer people sent to prison – it is therefore unsurprising that they would advocate for additional groups to be added to cohort of those who would automatically receive a pre-sentence report.

In any event, the fact that it was a "majority view" of consultees should not have swayed the Sentencing Council in the way that it did. Consultees are often a self-selecting and partisan group of organizations driven by their own agendas — agendas that are distinct and may even conflict with what is necessary to ensure the criminal justice system operates with fairness and impartiality as a whole.

**The Lord Chancellor's representative:** Lord Justice Davis's highlights in his letter that during the preparation of the guideline: "At no stage did the Lord Chancellor's representative express any concern or reservation

62. Ibid.
63. Ibid.
64. Sentencing Council (2025), Imposition of community and custodial sentences guideline: Consultation response March 2025, link
65. Ibid.

about the term now under debate."

Minutes of meetings of the Sentencing Council show that there were ten meetings held between January 2024 and January 2025 – with the new *Imposition guideline* discussed at seven of the meetings. Of the seven meetings the Ministry of Justice's Director, Youth Justice and Offender Policy attended on six occasions – on the other occasion the Lord Chancellor and Secretary of State for Justice was represented by a Ministry of Justice Deputy Director. Officials at this level of seniority should have been in a position to identify that the *Imposition guideline*, as drafted, would be unacceptable to ministers – particularly given previous guideline changes had caused similar concerns at ministerial level – yet this appears not to have been the case.[66] This represents an egregious failure on the part of officials and is suggestive that the entire system which has generated the guideline and other associated policy advice is operating within an environment of uncritical "group-think".

**The role of Government, ministers and Parliament:** Lord Justice Davis questions whether in this case the power which exists under section (1) of the Coroners and Justice Act 2009 for the Lord Chancellor to propose to the Sentencing Council that a sentencing guideline be prepared or revised by the Council can be applied in this case.

Section plain 124 (1) of the Coroners and Justice Act 2009 states:

> *"(1) The Lord Chancellor may propose to the Council—*
>
> *(a) that sentencing guidelines be prepared or revised by the Council under section 120 —*
>
> *(i) in relation to a particular offence, particular category of offence or particular category of offenders, or*
>
> *(ii) in relation to a particular matter affecting sentencing;*
>
> *(b) that allocation guidelines be prepared or revised by the Council under section 122 [relating to allocation guidelines]."*

Although the legal advice Lord Justice Davis intends to obtain has not yet been published, it would seem on an ordinary reading of the legislation – given the words of the statue are plain and unequivocal – to be a novel approach if the Lord Chancellor was not permitted to propose a revision to the guideline.

Lord Justice Davis's claim that the inclusion of specific cohorts in the *Imposition guideline* is not a "policy decision of any significance" should not be a matter for a judge – even one as distinguished as Lord Justice Davis – to unilaterally determine in opposition to the Lord Chancellor. While judges are responsible for interpreting and applying the law, it is entirely reasonable for the government, and for ministers, to determine which policies they determine to be important or not. The Sentencing Council,

66. Daily Express, Softer sentences for 'deprived' criminals to be considered by judges, 3rd April 2024, link

though independent, operates within a legal and political framework where its decisions can have far-reaching consequences, including on public confidence in the justice system – every decision they make is by its very nature of great significance.

Lord Justice Davis goes on in his letter to say:

> *"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."*

Lord Justice Davis is mistaken.

First, "the critical constitutional position of the independent judiciary" relates to the sentencing of individual offenders by trial judges and magistrates – and where necessary the involvement of the appellate courts. As has been outlined elsewhere in this report: it does not, or at least should not, relate to the wholesale policy environment in which sentencing frameworks are set. Parliament, and therefore ministers and government, continue to have a critical role in setting overarching sentencing policy and frameworks and it is a misnomer to suggest otherwise. The Lord Chancellor's suggestion that she may legislate is in no way constitutionally unusual – prior to the establishment of the Sentencing Council governments had done so repeatedly over the preceding decade.

Second, Lord Justice Davis implies that the judiciary only accept, and presumably follow, sentencing guidelines "because they emanate from an independent body on which judicial members are in the majority". Such a statement grossly oversimplifies the judiciary's relationship with sentencing guidelines. Judges do not merely accept the guidelines because they are formulated by an independent body with judicial representation; they follow them because they are part of a legally mandated framework – ultimately derived from Parliament. Furthermore, the statement risks implying that judges would reject guidelines from a body with less judicial representation. So long as any such body was properly constituted following an Act of Parliament this would be a remarkable approach, particularly if guidelines were to become subject to ratification by Parliament as has been proposed in the past.

Third, the letter from the Lord Chancellor to which Lord Justice Davis was replying does not state, or even suggest, that Ministers should play any role in the sentences imposed on individual offenders. To suggest otherwise, as Lord Justice Davis does, is disingenuous. In her letter

the Lord Chancellor poses the question as to what role Ministers and Parliament should play in relation to *policy* decisions – not in relation to individual sentencing decisions. The Lord Chancellor is perfectly entitled to pose this question and if, as we recommend, the government chose to make changes to the legislative regime which are subsequently passed by Parliament this would be entirely proper.

Fourth, the sense that courts are not part of "the state" is not only wrong by any ordinary understanding of what "the state" consists of but is explicitly contradicted by the Courts and Tribunals Judiciary's own website, which states: "The justice system is one of the three branches of the state. The other two branches are the executive, or the government, and the legislature, which is the two Houses of Parliament."[67] Presumably, when Lord Justice Davis refers to the "state" he means the executive.

On the 20th March 2025 the Lord Chancellor wrote to Lord Justice Davis, "requesting that the full list of cohorts for whom a pre-sentence report will "normally be considered necessary" is removed."[68] The Lord Chancellor also suggested that the Council take the opportunity to re-open the consultation for the guideline considering the overwhelming public response to its publication.

Lord Justice Davis replied to the Lord Chancellor on the 27th March 2025.[69] He confirmed that the Council had met on the 25th March 2025 and had declined to make any amendment to the published *Imposition guideline* or to reopen the public consultation. In the letter Lord Justice Davis reiterated many of the same points from his previous letter of the 10th March 2025. His letter also stated that,

> *"The Council decided that some clarification of the language of the relevant part of the guideline should be included in the hope that this would correct the widespread misunderstanding which has emerged in the last few weeks. It also was determined that an explanatory statement in relation to this clarification should be published on the Council website."*

This statement demonstrates that the Sentencing Council takes the view that the issues that have arisen are ones of communication and understanding, rather than ones of substance. As has been outlined in this report – they are mistaken.

Ultimately, the Sentencing Council was created by an Act of Parliament. Its powers and membership can be amended by an Act of Parliament. While it is appropriate for the judiciary to hold sway over sentencing in individual cases, it is equally appropriate for ministers and government to determine the broader policy framework within which sentencing operates. Sentencing policy is not solely a matter of judicial discretion; it must be subject to the rule of law and is a key component of criminal justice policy, which falls within the remit of elected representatives accountable to the public through the ballot box.

67. Courts and Tribunals Judiciary, The justice system and the constitution, last accessed 24th March 2025, link
68. Letter from the Rt Hon Shabana Mahmood MP – Secretary of State for Justice and Lord Chancellor to the Rt Hon Lord Justice William Davis – Chairman of the Sentencing Council, 20th March 2025, "Imposition of Community and custodial sentences guideline", link
69. Letter from the Rt Hon Lord Justice William Davis – Chairman of the Sentencing Council to Shabana Mahmood MP – Lord Chancellor, 27th March 2025, "The Imposition of community and custodial sentences guideline", link

# 6. Conclusion

The new *Imposition guideline*, produced by the Sentencing Council, is deeply flawed. There can be no good justification for the creation of a guideline which, in effect, embeds into the criminal justice system a two-tier approach to the sentencing process. This guideline will, and already has, had the effect of eroding the public's confidence in the criminal justice system, fostering the perception that justice is no longer applied equally. It is an approach which runs entirely counter to the fundamental and historic principle of equality before the law, which has long been a cornerstone of our judicial system.

The Sentencing Council's refusal to change their position relating to the *Imposition guideline* is remarkable. As Policy Exchange has long argued, too many arm's length bodies have been given the power to set overarching policy and even to frustrate the will of elected governments.

The Lord Chancellor has rightly said she will, if necessary, legislate to overturn this. This is not a party-political issue – at its core is the issue of whether an elected Parliament, government and minsters should be pre-eminent in setting policy. Based on statements by the Shadow Secretary of State for Justice the Lord Chancellor could anticipate cross-party support for the changes that are necessary.

**We make three core recommendations for the Lord Chancellor and Secretary of State for Justice:**

- The new *Imposition of community and custodial sentences guideline* should be abolished through an Act of Parliament – reverting to the pre-existing *Imposition guideline* previously issued in 2017 until such time as a new guideline is approved by Parliament.
- All future sentencing guidelines produced by the Sentencing Council should be required to be confirmed via order in Parliament prior to coming into effect.
- The government should legislate to prevent ethnicity, race, religion or membership of a "cultural minority" being a factor in determining the sentence imposed by a court, nor a factor in procedures which may influence the sentence such as pre-sentence reports.

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