

THE MAGISTRATES' ASSOCIATION
JUDICIAL POLICY & PRACTICE COMMITTEE

Coroners and Justice Bill Briefing

The parts of the Bill about which the Magistrates' Association would like to comment are principally in Parts 3, 4 and 5 and the relevant schedules.

Part 3: Criminal evidence, investigations and procedure

Clauses 85 and following (Eligibility for special measures)

The Magistrates' Association welcomes the provisions in relation to special measures for young, vulnerable and intimidated witnesses, but stresses that the decision in each case must be one for the court.

Clauses 93 and following (Directions to attend through live link)

Live links can be useful in appropriate cases. However, it must be a decision for the court in each case — and the court must satisfy itself that the defendant understands what is happening; and that witnesses are not disadvantaged. It is, of course, essential that sufficient resources are made available if this is to work properly.

Clauses 98 and 99 (Bail)

Our view is that 48 hours is too long and 24 hours should be the maximum.

Part 4: Sentencing

Clause 104 and Schedule 13 (Sentencing Council for England and Wales)

We question the need to replace the existing arrangements which are already in legislation (Criminal Justice Act 2003). We note that the Gage report stated that the significant information gaps should be filled before further development of the existing legislation - a view supported by the Justice Committee, and shared by the Magistrates' Association.

The Bill aims to 'ensure that victims are at the heart of the criminal justice system' and proposes a more consistent and transparent sentencing framework. We would ask, in what way is the current system *not* consistent and transparent?

The SGC and SAP Sentencing Guidelines — which have only recently been revised — can and do ensure consistency of sentencing. There is no cogent evidence to indicate there is inconsistency in sentencing in magistrates' courts. Indeed, the recent research report *Local Variations in Sentencing in England and Wales*, (MoJ, 2007) into the effect of sentencing guidelines in the magistrates' courts shows that '*while custody rates in magistrates' courts had been relatively stable through time, the range in custody rates had narrowed from 15.7 percentage points in 2003 to 9.8 percentage points in 2006.*' It is quite possible that since the

latest guidelines were introduced last summer our courts are even more consistent across the country when deciding on whether or not custody is appropriate.

The only data available gives figures suggesting 48% of sentences are ‘outside’ the guidelines. This data is based on a limited survey in the Crown Court. These sentences may be below a guideline range due to guilty plea or other mitigating factors or above the range due to serious aggravating factors. Courts must have this measure of discretion

The membership of the Council is prescribed in schedule 13. We note that the judicial majority has effectively been reduced from 4 to 2 but we welcome the additional place for magistrates. However, given that magistrates deal with 95% of all criminal matters and the guidelines have most relevance to our courts we would recommend that there should be more magistrates on the Council.

Schedule 13 3(1) Judicial Membership

These guidelines will be more applicable in magistrates’ courts where over 95% of all criminal matters appear, we would like to see more than just two justices on the Council and would prefer four or six.

Clause 106 (Sentencing guidelines)

Clause 106(2) refers to the different types of guideline, but we are not sure how these will be determined and are concerned that they may become far too complex in comparison with the current guidelines.

Clause 106(6) is a very full list of consultees with an over-emphasis on political involvement, who have differing approaches to sentencing. The Legislature makes the laws but the Judiciary must be free to apply them without interference in terms of guidelines.

Clause 106(11)(d) places a duty on the new Council to have regard to cost of differing sentences and their relative effectiveness in preventing re-offending.

At paragraph 9.16 of his report, Gage recommends that it would be inappropriate for a duty to be placed on the Council to have regard to Parliament’s intentions on resources, together with other matters to which it must have regard, when formulating its guidelines. We support this view.

Clause 107 (Sentencing ranges)

We understand that what is set out in Clause 107 is an attempt to describe the process which the existing Sentencing Guidelines Council employs to develop guidelines. However, we believe that it will be impossible to create sufficient categories with ranges and starting points to cover all examples of particular offences. The instances of theft can vary considerably with a wide range of impacts and victims – the same applies to fraud and assault as well as other offences. It must surely be for the sentencer to assess culpability and/or harm based on the actual offence and the surrounding circumstance (107) (3) (a), (b). Furthermore, we are concerned that this will become too complex with different factors appearing in one or more categories. Currently there is a list of such factors to consider and sentencers decide on the level of seriousness using this list. We welcome the Government’s recent changes giving to the Sentencing Council the power to decide on whether or not to categorise the offences but still feel that it should be left to the individual sentencers to make the appropriate decision.

Clause 108 (4) Allocation Guidelines

This is a very full list of consultees with an over emphasis on political involvement, who have differing approaches to allocation. The Legislature makes the laws but the Judiciary must be free to apply them without interference in terms of guidelines. We note that this list does not require the Judiciary, in particular the Magistrates' Association, to be consulted.

Clauses 111 and 112 (Sentencing guidelines: duty of the court)

Clause 111 causes us particular concern as we believe that what is proposed will impinge significantly on judicial discretion blurring the distinction between the executive and the judiciary. Clause 111 makes it a requirement that every court **must** follow the guidelines unless 'in the interests of justice'. This is a much stronger requirement than 'have regard to' as required by section 172 of the CJA 2003 although we have been told by government that 'there is no intention to remove judicial discretion'. Nevertheless we believe that Clause 111, as currently drafted, could have just this outcome. However, we note that the Government has hinted that it would be prepared to consider alternatives to the wording in this clause and we propose that "must" should be replaced with "should".

Clause 113 (Resource implications of guidelines)

The Bill places a duty on the Council to publish a resource assessment in respect of the guidelines. This is acceptable if, and only if, there is no requirement on sentencers to have regard to the impact on resources when sentencing in individual cases.

Clause 114 (Monitoring)

We are quite content that the Council should monitor the operation of its sentencing guidelines. This is right and proper given that sentencing takes place in the public arena. We note the change in wording of this clause to make it appear less judgmental. However, we are concerned that there is an increasing trend for the police and prosecution to use out of court disposals which are not open to public view, nor subject to judicial scrutiny. We would therefore recommend that a duty is placed upon the Council to monitor the operation and effect of out of court disposals which are not open to public or judicial scrutiny. We would propose an amendment as a Clause 4.

(4) The Council must

- (a) monitor the operation of out of court disposals to include Fixed Penalty Notices, Penalty Notices for Disorder and Conditional Cautions, and*
- (b) consider what conclusions should be drawn from the information obtained by virtue of paragraph (a).*

Clause 114 (2) **(b)** requires that the Council should draw conclusions about 'the frequency with which, and extent to which, courts depart from sentencing guidelines;'

If those conclusions are based solely on the data collected then incorrect interpretations can follow. What is important is to establish why sentencers have gone outside the guidelines. As stated above, Ministers have suggested the reasons for these proposals are that 48% of sentences were outside guidelines, but were unable to say why these sentences were imposed – there may have been very legitimate reasons for such sentences in all the circumstances.

Overall Comment

We are concerned about the role of the Lord Chief Justice, who is the senior Law Officer. We have always welcomed specific guidance from the LCJ on specific crimes. Such guidance has always been given expeditiously to inform our sentencing in the courts. There should be provision in the Bill for this to continue as a formal body such as a Sentencing Council would not be able to respond in an effective and timely manner when such cases arise.

4 April 2009