

Assessing Methodological Approaches to Sentencing Data & Analysis Report 3: Recommendations

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Key Points Summary

- To assist with the discharge of its functions, the Sentencing Guidelines and Information Committee of the Judicial Council of Ireland commissioned the University of Strathclyde (Scotland) to lead independent academic research to “assess the methodological approaches to sentencing data collection and analysis in Ireland, as well as evaluation of the utility of methodologies employed in other jurisdictions.”
- This document is the third of three interim reports submitted by the international academic team commissioned by the Sentencing Guidelines and Information Committee (SGIC) to assess methodological issues in sentencing data and analysis.
- Our first report surveyed existing sources of criminal justice data in Ireland and explored the kinds of statistical information necessary to support guideline construction and guideline monitoring.
- Our second report provides a review and analysis of the range of data methodologies adopted in three broadly comparable countries and jurisdictions where a body equivalent to the SGIC has been established. It assesses the strengths and weaknesses of sentencing data in the USA, England and Wales, and Scotland. Additionally, it notes developments in some Australian states (most notably New South Wales).
- Our third report builds on the findings of our first two reports to provide recommendations on the steps to be taken to ensure sentencing data is of the highest quality.
- Our final (fourth) report will combine the findings of the three interim reports.
- In light of the multiple statutory functions allocated to the Sentencing Guidelines & Information Committee (SGIC), reliable data will be needed

to ascertain current practice, develop guidelines, monitor the effects of guidelines, and revise guidelines as appropriate.

- Precisely how data collection is to be approached is a matter for the consideration of the SGIC. Variations exist between jurisdictions and the decision will involve many factors, some of which cannot be fully ascertained by us at the time of writing. However, it is clear that the data currently available are inadequate for the SGIC to fulfil its statutory functions.
- In terms of currently available data, the SGIC is at a distinct disadvantage compared, for example, to England and Wales and certain jurisdictions of the United States. Therefore, the SGIC will likely have to expend proportionally more resources than some of its counterparts to fulfil its functions.
- The SGIC will need to establish a comprehensive data collection and management strategy. This will entail recognising the limitations of existing data, and devising means to collect, collate, and analyse sentencing data (including in the District Court). The SGIC should, in concert with key stakeholders, determine the precise data collection methodology to be adopted.
- **We strongly recommend that:**
 1. The SGIC should openly recognise that current data about sentencing in Ireland is profoundly limited and inadequate for its tasks and that the scale of this challenge can only be remedied by a systematic, concerted effort, underpinned by significant and sustained investment.
 2. That a plan to tackle the specific challenges in recording, collating, and representing data from the District Courts is made a high priority.
 3. The SGIC adopt a twin approach of depth and breadth in data. It should look towards establishing a database through a new data

collection exercise instead of, or in addition to, combining data from criminal justice agencies. The breadth of the database should be complemented by the depth of individual research studies commissioned to examine specific important issues.

4. The SGIC consider carefully the need for the appropriate appropriately qualified personnel to record data, in a way that balances the virtues of consistency in recording practices with 'closeness' to the case. The recording of data should not depend on who is recording it.
5. The SGIC consider very carefully the methodological challenges presented by persons convicted of more than one offence in the same case (multi-conviction cases).
6. The SGIC should demonstrate its commitment to open and constructive dialogue, not least to assist in the development of its future research priorities. We suggest that SGIC should also draw on academic expertise for comment and constructive assistance, as well as having a role in anonymised peer review of SGIC research reports.
7. Crucially, to enable all this and to provide the SGIC with the necessary research capacity, we strongly recommend in the strongest terms that a Research Unit (or similarly named office) be established, properly resourced, and operate under the aegis of the Judicial Council, though the precise arrangements would clearly be a matter for the Council itself.

Part 1: Introduction to the Third Report

This Third Interim Report addresses the data needs of the Sentencing Guidelines and Information Committee (SGIC) of the Judicial Council for the purpose of fulfilling its statutory functions.

Our First Interim Report described existing sources of criminal justice data in Ireland, and it concluded that these sources, even when combined together, do not provide a reliable empirical basis for compiling accurate information on existing sentence practice. Therefore, they are inadequate for developing sentencing guidelines or for monitoring compliance with any guidelines adopted by the Council.

Our Second Interim Report described the official data that were available to guideline-setting bodies in England and Wales, Scotland and some jurisdictions in the United States. The experience of these jurisdictions is useful for developing a blueprint for the databases and information systems that might now be created in Ireland.

This Third Interim Report contains our recommendations with respect to data collection for the purposes of establishing an accurate and meaningful picture of sentencing patterns and for devising, and later amending, sentencing guidelines. We do not assume a specific model of guideline, as the scope and form of any guidelines remain to be determined. Rather we consider data collection in a broader way that would support different guideline structures.

The recommendations contained in this report are based on the simple premise that good guidelines depend on good data. The same, of course, holds true for providing information on current sentencing practice, whether for purely descriptive purposes or for monitoring compliance with adopted guidelines.

Our first report assessed the quality of data about patterns of sentencing currently available in Ireland. It concluded that:

*Despite some progress, sentencing data in Ireland still has profound limitations. These limitations include the lack of a large scale, offence specific database, or an annual release of key sentencing indicators, as is the case in some other jurisdictions.*¹

As outlined in our First Interim Report, the annual reports of the Courts Service and the Irish Prison Service are the most useful sources of information now available on existing sentencing patterns. This information may well be adequate for the institutional purposes of the agencies in question, but it is wholly inadequate for the tasks which the SGIC is statutorily required to undertake.

By way of illustration, the annual reports of the Prison Service provide information on the lengths of sentences being served by those currently in custody for various offences and categories of offences. Yet, the practical utility of this information is severely limited because of three factors. First, some of the offence categories are very broad (e.g., “dangerous or negligent acts” or “theft and related offences”) and therefore provide no information on the specific conduct in respect of which the sentences are being served. Secondly, and naturally, these statistics relate solely to prison sentences, whereas non-custodial sentences would have been imposed for many offences within the various categories. Indeed, it may well be that some of the custodial sentences recorded include activated suspended sentences. Thirdly, each of the relevant agencies collects and publishes data that reflects its own particular functions and responsibilities. However, this means that the available data are highly fragmented. “It is difficult, if not impossible, to engage in ‘follow-through’ by tracing, even within fairly broad parameters, the progress of cases from the point of initial reporting or detection to final disposition.”²

The annual reports of the Courts Service are somewhat more informative about the range of sentences imposed in the various courts. Essentially, however, they

¹ Jay Gormley et al., ‘Assessing Methodological Approaches to Sentencing Data and Analysis. Report 1: Ireland’ (Sentencing Guidelines & Information Committee of the Judicial Council (Ireland), 20 January 2022), 50, <https://judicialcouncil.ie/assets/uploads/1st%20Interim%20Report.pdf>.

² Gormley et al., ‘Assessing Methodological Approaches to Sentencing Data and Analysis. Report 1: Ireland’, 20.

do no more than describe the spread of penalties imposed for various categories of offences. The information provided in respect of the Central Criminal Court is somewhat more specific in that it indicates terms of imprisonment, expressed in ranges such as 2 to 5 years, imposed for homicide and sexual offences. Again, unfortunately, information of this nature is of very limited value for guideline creation purposes. For instance, within the category of “rape”, it is not clear how many of the cases involved multiple offences as opposed to single incidents of rape. As to the next category, “sexual offences”, there is no indication as to the precise offences or the conduct coming under this heading. Overall, therefore, while the Courts Service statistics permit certain conclusions to be drawn about the extent to which the various sentencing options are used for certain offences or, more commonly, broad categories of offences, they are of little assistance for the purpose of identifying the sentences imposed for different variants of all the offences, or even the more commonly prosecuted ones, coming before the criminal courts.

In England and Wales, by contrast, reasonably good quality sentencing data is provided by the Ministry of Justice and, nowadays, by the Sentencing Council, as described in Part 3 of our Second Interim Report. As noted there, the statistical information published by the Ministry of Justice has certain limitations but was considered adequate by the Sentencing Guidelines Council when first established under the Criminal Justice Act 2003.

Likewise, in the United States, relatively high-quality data on sentencing practice is available in many jurisdictions where guidelines have been introduced. Sentencing commissions and similar bodies have been responsible for generating much of this data, and they have been given the necessary resources to do so. As their experience illustrates, reliable and comprehensive statistical information is essential before a guideline setting body can even embark on the development of guidelines. For instance, the original United States Sentencing Commission which developed the federal guidelines during the period October 1985 to April 1987 adhered by and large to past sentencing practice when creating offence categories and determining sentence length. For this purpose,

it analysed 10,000 federal sentencing cases drawn from existing databases.³ Without having access to such data, it could scarcely have produced a comprehensive set of guidelines within such a short period of time, least of all guidelines that largely reflected existing practice.

In Scotland, the main source of data available are publications from the Scottish Government, which are derived from data collected from different criminal justice agencies. Currently, the ability of the available data to represent sentencing patterns is better than that in Ireland but limited in some important respects. However, various empirical research studies and literature reviews have been commissioned, which help to provide a fuller picture of sentencing in Scotland. Additionally, Scotland has considerable past experience of seeking to research, design, implement and maintain an information system to provide instant access to meaningful sentencing data. Over a period of around a decade (1993 to the mid-2000s), a project was conducted to research, develop, and implement a Sentencing Information System (SIS) for the High Court of Justiciary, which produced with and for the judiciary high-quality data about sentencing. Changes in judicial leadership combined with a lack of an institutional home and institutional authority meant that after the SIS was fully implemented it was not maintained by the Courts Service.

1.1 Evidence-Based Policymaking

The importance of evidence-based policymaking which, in turn, requires high-quality data, is increasingly recognised in Ireland as well. For instance, in early March 2022, the Criminal Justice Strategy Committee, which was established in 2015, published its Sectoral Strategy for 2022-2024. The core objective of this Strategy is to create a more “joined-up” criminal justice system and, for this purpose, it identifies five strategic pillars, including one entitled “Data as Driver.” One of the more specific objectives under this heading is to “support a data culture to ensure an evidence-based approach to policymaking.” It also aims to

³ Stephen Breyer, ‘The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest’, *Hofstra L. Rev.* 17 (1988): footnote 50. (The author, now a Justice of the United States Supreme Court, was then a federal Appeals Court Judge and a member of the original United States Sentencing Commission).

use research, analysis and data to identify new and emerging trends. The Strategy Committee consists of representatives from all the key criminal justice agencies, including the Courts Service but not the Judicial Council (and it may not be appropriate for the Council to be involved).⁴ However, the significance of the newly published Strategy in the present context is its recognition of the necessity for good data and data sharing for policymaking purposes. It would nonetheless have been preferable if the Strategy had more explicitly recognised the limitations of existing criminal justice data and the need to review the present systems of data collection and analysis.

Part 2: Sentencing Data and the Statutory Functions of the SGIC

In formulating our recommendations in this report, we have had regard first and foremost to the statutory functions of the SGIC as specified in the Judicial Council Act 2019. As set out in s. 23(2), the Committee's primary functions are to:

- “(a) prepare and submit to the Board for its review draft sentencing guidelines,*
- (b) prepare and submit to the Board for its review draft amendments to sentencing guidelines adopted by the Council,*
- (c) monitor the operation of sentencing guidelines,*
- (d) collate, in such manner as it considers appropriate, information on sentences imposed by the courts,*

⁴ The signatories to the new Strategy are the Secretary-General of the Department of Justice, the CEO of the Courts Service, the Director General of the Irish Prison Service, the Director of the Probation Service, the Garda Commissioner, the CEO of the Legal Aid Board, the Director of Public Prosecutions and the Director General of Forensic Services Ireland.

(e) disseminate that information from time to time to judges and persons other than judges.”

Section 23(4) authorises the Committee to undertake related tasks such as collating information on decisions of the courts relating to sentencing and conducting research on court sentencing practice.

Further, s. 91 of the 2019 Act describes the nature of the sentencing guidelines the SGIC may develop and the matters it must take into account when drafting new guidelines or proposing amendments to existing ones. For present purposes, the most significant of these matters is the “sentences that are imposed by the courts” (s. 91(3)(a)).

In light of the multiple functions thus allocated to the SGIC, reliable data will be needed for descriptive purposes, normative guideline creation, and compliance purposes. These will now be considered in turn because each requires its own kind of data, although it is possible that a single database could provide a viable information source for fulfilling most of the SGIC’s core functions.

2.1 The Descriptive Function

The 2019 Act places considerable emphasis on the collection, collation and dissemination of information on existing sentencing practice. This is one of the express functions conferred on the SGIC by s. 23 and it is also implied by s. 91 which requires that account be taken of existing practice when drafting and amending sentencing guidelines. Therefore, follows that an effective system must be put in place for collecting, analysing and disseminating reliable and reasonably comprehensive data on current sentencing practice. The nature and extent of the information to be thus obtained is, to a considerable extent, within the discretion of the SGIC itself. Section 23(2)(d) provides that the Committee shall collate “in such manner as it considers appropriate” information on sentences imposed by the courts. Obviously, the extent to which the SGIC can fulfil this function will be determined in large measure by the resources available to it.

Further, and partly perhaps for a resource-based reason, the SGIC *may* decide to concentrate *at first* on collecting data on sentences imposed for serious offences or certain kinds of commonly prosecuted serious offences, as opposed to collecting data on all sentences imposed in all criminal courts. However, this is a matter for the SGIC itself to decide. In any case, the challenge will be to devise a system for the routine collection of reliable data on existing practice.

The experience of the former Irish Sentencing Information System demonstrates what can be achieved in this regard. But it also bears testament to the degree of policy commitment, and the sustained resourcing needed to collect and analyse information on existing practice, and to disseminate that information through a user-friendly database that is accessible to all. Researchers, mainly junior barristers, were employed to attend court in person and collect the relevant information which was later analysed and made publicly available. Limited resources meant that only a small number of courts, mainly in Dublin and a few other large urban areas, could be covered over the duration of the project.

If the SGIC is to fulfil its information collection role adequately, it will have to extend its reach to all criminal courts, or perhaps certain levels of court in the first instance. Either way, information must be collected on a state-wide basis. While one option would be to have researchers in each court to collect data, on an ongoing basis this could prove too cumbersome or impracticable.

A simpler option would be for each relevant court to collect information in respect of each sentence it imposed (or, as the case may be, the sentences imposed for those offences selected by the SGIC for this purpose).

Obviously, resources will need to be considered in thinking through how much information courts will be able to provide, but the SGIC must identify the essential information needed in respect of the offence(s), the offender(s) and the sentence(s) imposed in each case. The SGIC will obviously need to consider further the precise nature of the information required and the format in which it should be furnished by the relevant sentencing courts. This underscores the need for a professionally staffed information unit under the aegis of the SGIC/Judicial Council, as recommended later in this Report (see Section 4.3).

2.2 The Normative Guideline Function

Under this heading, we consider the nature of the data needed for the development of sentencing guidelines to guide the courts as to how they *ought* to approach sentencing. As already noted, the SGIC is required, under s. 91 of the 2019 Act, to take account of existing sentencing practice, among other matters, when fulfilling this function. Therefore, the information collected through a system of the kind indicated under the previous heading will be crucial for formulating guidelines, together with such limited information as may be gleaned from administrative data contained in reports of the Prison Service, the Courts Service and other publicly available sources.

The precise nature of the data needed for guideline creation obviously depends on the nature and format of the guidelines it is proposed to draft. Drawing on the experience of other jurisdictions, notably the United States and England and Wales, it is possible to identify two broad approaches to guideline creation. The first of these, as reflected in the United States federal system, Minnesota and various other states, involves drafting a comprehensive set of guidelines covering all offences or, more commonly, all serious offences known to the law of the jurisdiction in question.⁵ The grid-centred systems favoured in these jurisdictions clearly facilitate this comprehensive approach. Weightings can be attributed to different manifestations of each offence (e.g., the value of property stolen in theft offences and the type and amount of illegal drugs in drug offences) and to various offender-related factors such as a guilty plea, co-operation with law enforcement authorities and previous criminal record. Sentencing then becomes largely an exercise in calculation, as a trial court's task, once it has established the offence score and criminal history score, is to identify the appropriate starting point or range which is typically at the intersection of the offence axis and the criminal history axis on a grid. Guideline systems of this

⁵ For a detailed analysis of the Minnesota guidelines (often regarded as the most successful American guidelines) and the English guidelines, and the contrasts between them, see Julian V Roberts, 'The Evolution of Sentencing Guidelines in Minnesota and England and Wales', *Crime and Justice* 48, no. 1 (2019): 187–253. In Michael Tonry (ed), *American Sentencing: What Happens and Why?* (Chicago: University of Chicago Press, 2019).

nature vary in the extent to which courts are permitted to depart from the recommended sentence or range of sentences. Further, it should be noted that American numerical grid guideline systems often impose a very heavy premium for previous convictions. The sentence prescribed for an offender with the highest criminal history score may be many times higher than that for a first-time offender.⁶ This is one reason, and perhaps the main one, why American-style numerical grid guidelines have found no imitators elsewhere. In fact, they were expressly rejected in Canada, England and Wales, and Scotland largely for this reason.⁷

The second approach is incremental in nature. It entails the gradual development of offence-specific guidelines as well as more “generic” guidelines dealing with matters such as the assessment of offence gravity and discounts for guilty pleas that are potentially applicable to all offences. This is the approach adopted in England and Wales, and it seems to be the planned approach in Scotland as well.⁸ The English guidelines are more narrative than numerical, at least when contrasted with the grid-centred systems favoured in the United States. The English offence specific guidelines indicate appropriate starting points and sentence ranges, but they also include descriptive accounts of the factors that should increase or reduce offence gravity as well as those that may be relevant in determining the ultimate sentence. The generic guidelines assume a predominantly narrative structure.

We shall assume for present purposes that the guidelines ultimately formulated by the SGIC will be closer, in structural terms at least, to the English than to the American guidelines. However, even if we are wrong about this – and the SGIC may, of course, opt for an entirely different model – it makes little difference for

⁶ Julian V. Roberts and Richard S. Frase, *Paying for the Past: The Case Against Prior Record Sentence Enhancements* (Oxford University Press, 2019), <https://doi.org/10.1093/oso/9780190254001.001.0001>.

⁷ See for example, the Sentencing Commission Working Group and Great Britain, *Sentencing Guidelines in England and Wales: An Evolutionary Approach* (Sentencing Commission Working Group, 2008).

⁸ For a concise but comprehensive account of the English guidelines, Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (Bloomsbury Publishing, 2021); Andrew Ashworth and Julian V Roberts, *Sentencing Guidelines: Exploring the English Model* (OUP Oxford, 2013). The English Sentencing Council has a very useful website where all its guidelines and other information about its work can be found: www.sentencingcouncil.org.uk

present purposes because the data needs are likely to be much the same in any event. We can nonetheless safely proceed on the assumption that offence-specific guidelines formulated by the SGIC will be expressed in sentence ranges, with or without recommended starting points. We make this assumption for two reasons. First, s. 91(2) of the 2019 Act provides:

“A range of sentences may be specified in sentencing guidelines that it is appropriate for a court to consider before imposing sentence on an offender in the proceedings before it.”

Secondly, the Court of Appeal and the Supreme Court have already delivered several guideline judgments, some formal in the sense specified in *People (DPP) v O’Sullivan (Ian)* [2020] IECA 331, and others more informal but still decidedly useful. The approach adopted by both courts has been, broadly speaking, to identify three or more sentence ranges for the relevant offence. Where an offence carries a maximum sentence of life imprisonment, the Court of Appeal has generally adopted a notional maximum of 15 years for guideline purposes, while accepting that a longer sentence may sometimes be warranted. To cite just a few examples, sentence ranges of this nature have been indicated for residential burglary (*People (DPP) v Casey and Casey* [2018] 2 I.R. 337), robbery (*People (DPP) v Byrne (Leon)* [2018] IECA 120), manslaughter (*People (DPP) v Mahon* [2019] 2 I.R. 337) and rape (*People (DPP) v F.E.* [2019] IESC 85 and [2020] IESC 5).

Of course, sentence ranges are generally intended to guide the selection of *headline* sentences. As the Court of Appeal has clarified on numerous occasions, the headline sentence is determined by the gravity of the offence, taking account of the harm caused or risked and the offender’s moral culpability. It is sometimes referred to as the pre-mitigation sentence. A court must then have regard to the personal circumstances of the offender under the second limb of the proportionality principle as it applies in Ireland, and those circumstances are usually mitigating. Typically, therefore, the ultimate sentence will be lower than the headline sentence on account of personal mitigation including, for this purpose, some reduction for a guilty plea where that applies. Aggravating

factors are more likely to be relevant when assessing offence gravity under the first limb of the proportionality principle.

The identification of mitigating and aggravating factors is therefore highly relevant for both assessing offence gravity and establishing the level of deserved personal mitigation. Some such factors are common to all offences, e.g., a guilty plea or co-operation with law enforcement authorities. Others are particular to certain offences or categories of offences. For instance, in a case of a manslaughter or assault offence, it is accepted that bringing a firearm or offensive weapon to the scene of the crime and using it is an aggravating factor, as is an unlawful intrusion into the victim's dwelling in the case of a sexual offence. Offence-specific guidelines should therefore include a list (even if non-exhaustive) of aggravating and mitigating factors to be considered under both limbs of the proportionality principle.

The SGIC is also empowered to develop what may be termed generic guidelines, namely guidelines that are applicable to sentencing generally (s. 91(1) of the 2019 Act). These might include, for example, a guideline on reductions for a guilty plea which, in turn, would require consideration of the underlying rationale for granting such reduction and the levels of reduction that should be granted.⁹ (Under the Criminal Justice Act 1999 (s. 29), a court must ordinarily have regard to the stage at which the plea was entered when determining the discount, if any, to be granted).

Bearing all these considerations in mind, it is clear that the structuring (categorisation and classification) of data collection and analysis of measurable sentencing patterns can be usefully informed by the careful and sustained analysis of case law. This will help to identify the jurisprudence of the appeal courts, including, for example, the factors that do (or should) influence appellate assessments of offence gravity and the adjustments to be made in respect of circumstances personal to the offender. It is the kind of task that can be

⁹ For an analysis of these issues in the context of the English Guideline on discounts for guilty pleas, see Jay Gormley et al., 'Sentence Reductions for Guilty Pleas: A Review of Policy, Practice and Research', *Sentencing Academy*, 2020.

allocated to legal researchers who would be charged with analysing existing case law, primarily from Ireland but usefully from other jurisdictions as well, with a view to identifying aggravating and mitigating factors relevant to sentencing generally or to particular offences.

The offence specific guidelines drawn up by the English Sentencing Council should also be useful for this purpose as they include lists of factors increasing or reducing culpability as well as those relevant to the determination of the ultimate sentence. As for numerical data, it is best collected under the kind of system suggested under the previous heading of the 'descriptive function.'

2.3 The Compliance Function

Under s. 23(2) of the 2019 Act, the SGIC is required to monitor the operation of sentencing guidelines. It is impossible at present to be prescriptive with respect to the data necessary to fulfil that function. In the fulness of time, the Committee will have to decide how best it can discharge this function, and it will have a variety of strategies available to it for this purpose. One possibility, however, is to combine this function with the information gathering function described above in Section 2.1. If the Committee is routinely being furnished with good quality information on sentences imposed by the courts, it will eventually be in a position to identify the extent to which any guideline formally adopted by the Judicial Council is being applied. This in turn underscores the importance of establishing a robust and effective system for collecting, collating, and analysing information on current sentence practice. Having such a system in place should enable the SGIC to discharge several of its functions, notably the provision of information on the sentences being imposed by the courts and also monitoring the application of guidelines once they are adopted.

The SGIC will doubtless need to engage periodically with sentencing judges (including appeal court judges) to identify any problems or issues they may have with Council guidelines, once these are adopted. Guidelines are far more likely to gain acceptance when they are responsive to the concerns of those judges who must implement them. The Judicial Council Act 2019 clearly envisages that existing guidelines may be amended from time to time, and as the need arises.

An effective synergy between the guideline-setting body and those responsible for guideline application is critical for the gradual elaboration of just and workable guidelines. Guidelines are far more likely to gain acceptance when they reflect the collective wisdom of judges who have extensive experience of sentencing, and who become aware, before most others, of emerging patterns of offending and novel issues connected with the personal circumstances of offenders.¹⁰ For the same reason, judges and, indeed, others closely involved in the administration of justice are in the best position to alert a guideline-setting body to problems with existing guidelines and to factors that may necessitate some adjustment or amendment

Part 3: The Challenge of Data Collection and Management in Ireland

The SGIC is starting out at a clear disadvantage compared to similar bodies established elsewhere to the extent that it cannot draw on any existing source of reliable and comprehensive data on current sentence practice. Therefore the SGIC faces the unavoidable challenge of devising a system for the systematic collection and analysis of data for the immediate purposes of developing guidelines and presenting information on current sentencing practice. Similar data will later be needed for monitoring compliance with guidelines. However, while this may be a challenge in the sense of requiring the establishment of a data collection and management system and finding the necessary resources to do so, it also provides the SGIC with a unique opportunity to develop a database specially designed to meet its own information requirements. A potential pitfall that a body akin to SGIC should avoid is having to defend poor quality data. On

¹⁰ Daniel J. Freed, 'Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers Symposium: Punishment', *Yale Law Journal* 101, no. 8 (1992 1991): 1687. ("A sense of justice is essential to one's participation in a system for allocating criminal penalties. When the penalty structure offends those charged with the daily administration of the criminal law, tension arises between the judge's duty to follow the written law and the judge's oath to administer justice").

grounds of short-term expediency and cost, it could be tempting for a new body like the SGIC to pronounce the data adequate so as to produce work from it. As criticism of the data grows such a body may be caught in a dilemma of its making when trying to disassociate itself from the very data it has relied upon.

Viewed in this light, the disadvantage of being unable to draw on existing data may in truth be seen as an advantage because it furnishes an opportunity – and a need – to create a bespoke system to generate the kind of detailed and reliable information, of both a quantitative and qualitative nature, that is essential for the development of good sentencing guidelines.

In fact, data of this quality are unlikely to be available from existing sources in any event, as existing data will probably have been compiled for some purpose other than facilitating the creation of sentencing guidelines. As noted earlier, the former English Sentencing Guidelines Council was able to draw on reasonable quality statistical information published by the Ministry for Justice, but even that information had certain gaps and limitations that had to be addressed through later research conducted by the present Sentencing Council.

The SGIC, by contrast, will be able to determine from the outset the kind of information it needs for its specific purposes and how to go about collecting it. This, admittedly, will take some time but it is an exercise that will pay off in the long term because of the quality of information that can be provided on existing sentencing practice, and the quality of the guidelines that are formulated on the basis of that information.

We **strongly recommend**, therefore, that SGIC should openly recognise that current data is profoundly limited and inadequate for its tasks, and that this can only be remedied by a systematic, concerted and properly resourced effort.

As discussed further below in Section 3.4, the collection and analysis of sentencing data calls for considerable expertise in empirical research methodologies. Initially, however, certain policy decisions must be taken regarding the nature of the data required in both the short and long terms, the range of offences in respect of which current sentencing information will be sought and the courts that will be surveyed. For offences tried on indictment in

the Circuit Court, Central Criminal Court and Special Criminal Court, it should be possible to design a data collection form to be completed under the supervision of the trial judge or court registrar (as deemed appropriate) providing essential information on the offence(s), the offender(s) and sentence(s) imposed in each case.

3.1 Data Collection Template

In April 2022 the SGIC brought to our attention a template for collecting information on sentencing practice in the Central Criminal Court. We understand that the template (Appendix A) was created by the Central Criminal Court. This appears to be based on a ‘census’ approach (akin in that sense to the Crown Court Sentencing Survey which ran in England and Wales – see Report 2 discussing the experience of this and also section 4.2.2 of this report).

We recommend, therefore, that *if* the committee chooses to adopt a census approach it should consider the template used for the Crown Court Sentencing Survey (CCSS) in England and Wales (Appendix B). Of course, the precise content of the CCSS would have to be adapted to render it suitable for use in Ireland. For instance, some of the sentencing options in England and Wales are not available in Ireland. However, it may be worth studying the CCSS, as the general sentencing principles are largely similar in both jurisdictions, as are the data needed for the purposes of creating guidelines and monitoring their implementation, once adopted. Further, a census approach has the advantage of permitting comprehensive information on sentencing practice to be collected. Whether this can be so easily done in the lower courts is a matter which should be examined carefully.

More particularly, in respect of the Central Criminal Court (CCC) template, we offer the following brief comments.

- The CCC template forwarded to us deals with a sentence imposed for manslaughter in the CCC, and the information is presented in a combination of narrative and note form. It has been anonymised and we have assumed that the original included a brief statement at the

beginning setting out the circumstances of the offence and, possibly, the circumstances of the offender, (which was removed for confidentiality reasons).

- It bears noting in this context that, in terms of information collection, manslaughter sentencing is usually relatively straightforward to the extent that there will typically be one offence, one offender and one victim, and the offence is likely to have been fairly recent. However, other types of cases will be more complex in this regard. With sexual offences, for example, there may be a multiplicity of different offences, often committed over a significant period of time, perhaps against more than one victim (see 3.2 below on multi-conviction cases). Occasionally, there may be more than one offender. If there is to be a single template for collecting information on the sentencing of all offences dealt with on indictment (or in the lower courts), it needs to be sufficiently comprehensive to capture information on all the relevant variables. Therefore, a further vitally important issue (which may or may not be addressed by the CCC) is the need to record and properly represent data about cases where there is more than one conviction.
- As the Court of Appeal has repeatedly stated, comparator cases presented to it are often of very limited use, unless there is a definite factual similarity between them and the case at hand and, also, unless certain key information about each comparator case is available, (e.g., did the defendant plead guilty, did he or she have relevant previous convictions and so forth). The same consideration applies when past sentencing practice is being examined or analysed for any purpose, including the information functions which the SGIC is obliged to discharge. Any form or template to collect information on sentences imposed by the courts should therefore be designed to elicit all the data necessary to draw reliable conclusions about sentencing practice for the relevant offences.
- Further, while a certain amount of narrative data of the kind included in the template on manslaughter sentencing is certainly desirable and,

indeed, necessary, it is equally important to have certain key data set out in tabulated form so as to be amenable to calculation and analysis. For example, the Scottish Sentencing Information System (see our Second Report) provided a systematic way of collecting information using an electronic data entry form (with information as to how data should be recorded). This could be supplemented with an option for the sentencing judge to add further narrative remarks if s/he wished (though in practice this typically repeated the systematic information already recorded).

- Such a systematic approach is also vital if information is to be recorded in a *consistent* way, rather than simply depending on who is recording it. What is needed (in addition to any narrative information) is a menu component or, at least, a facility for entering certain key information in a *systematic* way. Thus, for example, the form should have a section where it can be indicated if the offender pleaded guilty, the number of previous convictions (these can be grouped into bands for ease), whether or not these convictions are relevant (e.g. prior sexual offences in a sexual offence case), as well as categorical information about age (which can be in bands), etc. In doing so it is vitally important to ensure that recording practices are *consistent*. For example, what may count as ‘relevant’ previous convictions needs to be explicated so that the recording of these categories does not simply depend on the person recording the information. Likewise what may count as ‘good’ or ‘bad’ features of a case needs to be recorded in a consistent way. It is necessary therefore for those responsible for overseeing data recording to devise explicit recording rules or guidance as to how information should be recorded. We suggest that the SGIC should consult on the content of such recording rules/guidance.

3.2 Multi-Conviction Cases

As our second Report explained, a recurring problem encountered in many jurisdictions where such data are collected is that many offenders will have been convicted of more than one offence:

A particularly significant problem with official data across the world (and which we have already mentioned in earlier parts) is its inability to record and represent cases with more than one conviction adequately and meaningfully from the perspective of sentencing. Typically the “principal offence”¹¹ is selected (often not by the court) and recorded and other information (which may also be an offence) is then added in if possible. In other words, data recording tends to conceive all cases as single-conviction cases and then adjust where it can. The representation of sentencing practices by official data tends to make relatively little distinction between single and multi-conviction cases.¹²

Persons convicted of multiple offences may therefore have been sentenced to concurrent, consecutive or partly concurrent terms of imprisonment, or some offences may have been taken into consideration. The most common strategy by official bodies for addressing this problem is to adopt a “principal offence” approach. In effect, this means that where there is more than one conviction, a main, or principal, conviction is usually selected by a body with the administrative responsibility, not by the court. As our second report explains:

Although in many cases this may be thought by the body to be a self-evident decision, it may often be less apparent, where, for instance, there is more than one conviction that might appear to be of similar gravity. Those selecting the conviction against which the total effective sentence is to be recorded may select the conviction which receives the most severe penalty. However, this raises its own difficulties. For example, multiple-conviction cases may attract different sentences. Sentences may be passed consecutively, concurrently (or in some combination of the two), or, in cumulo (covering all offences in a single

¹¹ Other phrases are used in different jurisdictions to convey a similar idea.

¹² Jay Gormley et al., ‘Assessing Methodological Approaches to Sentencing Data & Analysis Report 2: USA, England and Wales, and Scotland’ (Ireland: Sentencing Guidelines & Information Committee of the Judicial Council (Ireland), 9 February 2022), 70, <https://judicialcouncil.ie/assets/uploads/documents/2nd%20Interim%20Report.pdf>.

*sentence). This can make it difficult to know what the court perceives to be the principal conviction.*¹³

However, a data collection form of the kind suggested can still be designed to include information on the sentence imposed for each offence where the number of offences of conviction is relatively small, and a separate sentence has been imposed in respect of each. This information may still be useful. The situation obviously becomes more complicated when an offender has been convicted of a large number of offences as may happen in cases of fraud or serial child sexual abuse. A complimentary ‘whole offence approach’ was created by the Scottish Sentencing Information System (SIS) which sought specifically to overcome the shortcomings of a principal offence approach. Data were collected and represented in the SIS according to both approaches, allowing users greater flexibility.¹⁴ However, it should be noted that this required a significant research effort to design, test and revise a whole offence taxonomy to capture the course of conduct in multi-conviction cases.

We **strongly recommend, therefore**, that the SGIC considers very carefully the methodological challenges presented by multi-conviction cases. As a way first to understand the scope and nature of the challenge, SGIC should, we suggest, consider conducting a small scoping study to examine in small samples the incidence and character of multi-conviction cases in the different levels of criminal courts. Having done so, if a principal offence approach is adopted careful thought should be given as to how and by whom such offences are recorded against the sentence.

Careful consideration must be given to the skillsets needed for the collection and management of sentencing data. Legal skills are necessary for identifying the precise matters on which data is needed, and for analysing case law in order

¹³ Gormley et al., ‘Assessing Methodological Approaches to Sentencing Data & Analysis Report 2: USA, England and Wales, and Scotland’, 71.

¹⁴ Gormley et al., ‘Assessing Methodological Approaches to Sentencing Data & Analysis Report 2: USA, England and Wales, and Scotland’, 70–71; Cyrus Tata and Neil Hutton, ‘Beyond the Technology of Quick Fixes. Will the Judiciary Act to Protect Itself and Short Up Judicial Independence? Recent Experience from Scotland’, *Federal Sentencing Reporter* 16, no. 1 (21 October 2003): 67–75, <https://doi.org/10.1525/fsr.2003.16.1.67>.

to identify relevant sentencing factors, as outlined above. However, the critically important tasks of designing data collection systems, collating and analysing data as it is collected, and presenting it in a manner that will facilitate the discharge of the SGIC's various statutory functions call for a different kind of expertise. Those who possess this expertise are more likely to have a background in a discipline, possibly within the social sciences, that will have equipped them with a thorough knowledge of empirical research methodologies as well as experience in actually conducting empirical research. Again, it should be stressed that both legal and empirical skills are needed. This combination can be achieved through the recruitment of a small team of researchers with the required diversity of expertise who can work together to deliver high-quality statistical data and legal analysis as required by the SGIC.

We **strongly recommend**, therefore, that the SGIC should demonstrate its commitment to open and constructive dialogue, not least so as to consult and so assist in the development of its future research priorities. We suggest that SGIC should also draw on academic expertise for comment and constructive assistance, as well as having a role in anonymised peer review of SGIC research reports.

3.3 Academic Research

The availability of good quality sentencing data will also facilitate academic research which can be of great practical value, and which can draw attention to fundamental problems or issues that may not be immediately apparent to those engaged in the day-to-day administration of the criminal law.

Our second report explains experiences from other countries (such as England and Wales) where a body akin to SGIC has not engaged with the academic community as closely as critics suggest it could. In relation to the situation in England and Wales, in 2022 it observed:

An open and cooperative relationship between SC and independent researchers enables a fuller and wider public understanding of sentencing; informs the development of policy and practice and the ability to plan

sentencing and wider policy.... From time to time the Council commissions external work from academic or commercial research companies, but these are relatively rare. The Council encourages researchers to use its databases (principally the CCSS), but there is little ongoing collaboration between Council and academics.¹⁵ The principal outward-facing research activity is a half-day seminar on sentencing research co-hosted with a university. The last was held in 2018, which followed that in 2013. The Council has been criticised for failing to do more to facilitate research into sentencing practices and the guidelines.¹⁶

As we observed in our Second Interim Report, bodies such as sentencing councils (which are more or less equivalent to SGIC) can benefit greatly from expert academic assessment and collaboration, as a report commissioned by SC to review its work identified.¹⁷ It is crucially important, therefore, that a council should be open to evaluation (including critical evaluation) by members of the academic community and others. The long-term development of sentencing policy can only suffer unless scholars working in the area feel included in the overall enterprise. Every effort should therefore be made to encourage and recognise scholarly endeavour in all aspects of sentencing.

Therefore, we **strongly recommend** that the SGIC demonstrates that it is committed to maintaining an active, open and constructive approach to engaging with academic scholars.

¹⁵ The Council very occasionally commissions and publishes research reports co-authored with academics. For example, Amber Isaac, Jose Pina-Sánchez, and Albert Montane, ‘The Impact of Three Guidelines on Consistency in Sentencing’ (Sentencing Council of England and Wales, 2021), <https://www.sentencingcouncil.org.uk/wp-content/uploads/The-impact-of-three-guidelines-on-consistency-in-sentencing.pdf>.

¹⁶ Gormley et al., ‘Assessing Methodological Approaches to Sentencing Data & Analysis Report 2: USA, England and Wales, and Scotland’, 48.

¹⁷ See: Anthony Bottoms, ‘The Sentencing Council in 2017: A Report on Research to Advise on How the Sentencing Council Can Best Exercise Its Statutory Functions’ (Sentencing Council of England and Wales, February 2018), <https://www.sentencingcouncil.org.uk/wp-content/uploads/SCReport.FINAL-Version-for-Publication-April-2018.pdf>. See also for example: Rob Allen, ‘The Sentencing Council and Criminal Justice: Leading Role or Bit Part Player?’ (Transform Justice, December 2020), https://www.transformjustice.org.uk/wp-content/uploads/2020/12/TJ_November_2020_IA_3.pdf

Fortunately, the number of well-qualified scholars in Irish universities and elsewhere who are working in the areas of criminology and criminal justice has increased very significantly in recent years. Hopefully, some of these will, on their own initiative, engage in empirical and analytical sentencing research based on accessible statistical data and appeal court jurisprudence of which there is now an abundance, as already noted. They might also be commissioned from time to time by the SGIC to undertake research on specific issues in which they have expertise. Again, the better the available data, the more useful and enlightening the results of such research are likely to be.

3.4 Research Capacity of the SGIC

In our second report we observed:

The research function is central, indeed essential to any guidelines council. Other than having a different composition, a council without significant research capacity would be in danger of offering little significant difference in purpose from a court of criminal appeal producing guidelines. A Council (or similar body) with a substantial research function can achieve things that a Court of Criminal Appeal is unable to do. For example, the English and Welsh Council can research current practices in depth; assess the issues in and the likelihood of compliance with new guidelines; forecast the likely impact of policy changes to and on sentencing; engage with and understand public perceptions about and knowledge of sentencing and examine ways of correcting any misperceptions; etc.

To meet the challenges of data collection and management, systems must be put in place to ensure that all this information is accurately and effectively collected, collated, and analysed. This will require that the SGIC have sufficient research capacity and certain kinds of professional expertise.

To provide the SGIC with the necessary research capacity, we **strongly recommend** that a Research Unit (or similar office) should be established and operate under the aegis of the Judicial Council, though the precise arrangements

would clearly be a matter for the Council itself. The Unit should consist of full-time research officers tasked with the collection, analysis and presentation of sentencing data as required by the SGIC. For the reasons outlined earlier in this report, those officers should include persons with expertise in social science research methods as well as others with expertise in criminal law and sentencing. The number of such officers will naturally depend on the extent of the work being undertaken by the SGIC, but we estimate that at least three would be required at the outset to set in train the processes needed to design and implement an effective data collection system. It is important to the development of sentencing policy, and indeed to the reputation of the SGIC, that such a Research Unit maintains a close and constructive dialogue with external parties, such as academic researchers.

As a potential comparator, the budget of the English Sentencing Council for 2020-2021 amounted to £1.390 million of which £1.271 was devoted to staff costs. The Council was supported by an office with 18 members of staff.¹⁸ Obviously, Ireland is a much smaller jurisdiction which means that there are significant differences in scale. Yet, it should also be stressed that the English and Welsh Council has the advantage of better sentencing data and the SGIC has more work to do in this area.¹⁹ However, the Sentencing Council has been criticised for failing to do more to facilitate research into sentencing practices and the guidelines.²⁰ Although the Council in England and Wales “may be better served by its existing data on sentencing than some other jurisdictions, its ability to fulfil its wider functions in, for example, promoting public awareness appears to have been frustrated by resource pressures.”²¹ In our second report, we also noted: “Relative to its statutory duties and functions in a relatively large

¹⁸ Sentencing Council Annual Report 2020/21, at www.sentencingcouncil.org.uk. The staff include empirical researchers, legal researchers, policy personnel and media officials.

¹⁹ For an overview, see the Sentencing Council website: <https://www.sentencingcouncil.org.uk/research-and-resources/criminal-justice-statistics/>

²⁰ See Section 3.3

²¹ Gormley et al., ‘Assessing Methodological Approaches to Sentencing Data & Analysis Report 2: USA, England and Wales, and Scotland’, 48.

jurisdiction, the Sentencing Council of England and Wales has only a small research budget.”

Irrespective of the size of the jurisdiction or pre-existing data, high-quality information systems and credible, effective guidelines depend crucially on relevant and well-targeted research conducted to a high professional standard. Thus, the need for a dedicated research unit, which will require significant and sustained investment given the scale of challenges it faces in addressing Ireland’s data needs.

Part 4: Recommendations

The foregoing analysis above provides insight into a number of matters to which we suggest the SGIC have regard. In this part of the report, we draw on this analysis to consolidate our key recommendations for the SGIC.

4.1 Establish a Data Collection and Management Strategy to Improve Sentencing Data

Given the limitations of sentencing data in Ireland, the SGIC will need to devise an adequate strategy to address the lack of sentencing data that currently threatens the fulfilment of the statutory function outlined above. To accomplish this, there needs to be clear leadership on the importance of openness in improving policy and practice and how this is in the interests of the judiciary, the public, and justice in the medium to long term. To accomplish this, the SGIC must, in the first instance, be candid about the limitations of existing data, and be clear about the measures necessary to improve sentencing policy-making and practice. This, in turn, will further the interests of justice and assist judges, lawyers and other criminal justice personnel in the discharge of their functions. Below we set out a non-exhaustive list of considerations relevant for these purposes.

4.1.1 Clarify Data Limitations and the Need for Improvement

Sentencing data come from various sources and often serve purposes other than those related to guideline creation and monitoring. As a result, while existing data may satisfy a range of functions for criminal justice agencies, they generally fail to offer sufficient insight into sentencing. Experience from elsewhere suggests that it is valuable for a new guideline creating body (such as the SGIC) to be open about the limitations of existing sentencing data.

Openness about data limitations is important when identifying what efforts and resources will be needed to remedy data deficits and why this is vital for a new guideline creating body to fulfil its functions. Relatedly, if data limitations are not set out, then externally this can be perceived as an endorsement by a new guideline creating body that existing data are adequate for it to function. Such an eventuality poses reputational risks when, perhaps years later, inevitably the need for more data than are available becomes apparent. In this situation, a guideline creating body may find itself facing challenges and criticisms concerning data that it has been (or has been perceived to be) claiming as adequate fails to offer a sufficient evidence base. In Report 2 we analyse how the expectations placed upon guideline bodies to have reliable data appear to have increased.

For Ireland, a first step is to clarify openly that there is a real problem with data. Of course, sentencing data in all jurisdictions of which we are aware have limitations. However, some jurisdictions have poorer sentencing data than others and some guideline creating bodies have greater statutory obligations. Ireland, compared to England and Wales and some United States jurisdictions, is at some disadvantage presently.

We **strongly recommend**, therefore, that SGIC openly recognise that current data about sentencing are profoundly limited and inadequate for its tasks, and that the scale of this challenge can only be remedied by a systematic, concerted effort, underpinned by significant and sustained investment.

4.1.2 Evaluate the Data Necessary to Fulfil the Statutory Functions

The SGIC will seek to make use of legal data (e.g. case law²²), qualitative data (e.g. interviews, court observations, etc), and quantitative data (e.g. statistics). The SGIC will need to consider in more detail what specific data are critical to its functions. The SGIC will then need to develop processes to gather these data. In doing so, breadth and depth should be regarded as complementary in providing a comprehensive view of sentencing.

While the uses of different types of data may overlap,²³ legal analysis will help to elucidate key normative principles (e.g. what factors should aggravate or mitigate sentences), sentence ranges used in reported cases, etc.²⁴ While such analysis cannot, by itself, comprehensively describe sentencing patterns, it can and should help to inform what sorts of information is recorded and how it is analysed and represented.

We **strongly recommend** that SGIC operates a twin strategy of achieving breadth and depth of data. Statistical databases can provide breadth and the ability to monitor real-world sentence trends over time with a consistent methodology.²⁵ Such a larger scale data collection exercise with more or less the same methodology enables comparisons to be over time about trends to be detected and so can inform planning for the future. Bespoke individual research (whether qualitative, quantitative, or mixed methods) can provide more granularity concerning real-world sentencing.²⁶

A strategic plan should be formulated to ensure that the collection, collation, and analysis of all these different data work in tandem to meet the needs of the

²² As noted in Report 1, reported cases are only a minority of all cases and therefore (while they can have precedential value) they are not necessarily reflective of typical cases (in many ways they are atypical).

²³ For example, data may be extracted from case law for qualitative or quantitative analysis.

²⁴ See the table of cases included as part of Gormley et al., 'Assessing Methodological Approaches to Sentencing Data and Analysis. Report 1: Ireland'.

²⁵ The use made of the MoJ data in England and Wales and the USSC data in the USA offers some insight into these uses cases.

²⁶ We note the SGIC is currently undertaking such research

SGIC in the medium to long term. Such a plan may involve setting out key research priorities (e.g. specific guidelines) that the SGIC will focus on. For example, to follow the Scottish example, a strategy could call for a general guideline first (such as on the principles and normative purposes of sentencing) and then, later, an offence-specific guideline. Having a clear plan would enable the SGIC to logically plan data collection. In this hypothetical, the generic guideline selected could largely draw on legal analysis²⁷ and serve to test the guideline creation process. Simultaneously, the SGIC could work to gather the empirical data on current sentencing practices (which may take some time) for the offence-specific guideline.

4.1.3 Plan how Data is to be Disseminated

Consideration should be given to which data will be disseminated and how this will be done. As noted in Report 1, there are several benefits to having accessible and up to date sentencing statistics. First, news media sources cannot place emerging sentences in a statistical context. Without this context, high profile sentences may be taken as representative of more general trends with risks to public confidence. Second, the existence of accessible statistics facilitates public and professional understanding of sentencing. Third, research is able to address key questions about current practice when these are posed by policymakers or politicians, as well as being able to inform planning for future needs.

To achieve these benefits, we **recommend** that the SGIC should determine what data can be made accessible to the public and in what form. In this regard, we note that while England and Wales publish a range of data (e.g. in the form of pivot tables), it is often not as easily understood by the public. Therefore, while as much data as is feasible should be publicly available, the SGIC should also consider providing more accessible reports or summaries that analyse the statistical data.

4.1.4 Establish a Method to Collect Data in the District Courts

²⁷ Case law is readily accessible to the SGIC and may be adequate for this guideline. However, it should be noted that some general guidelines (e.g. concerning reductions following a guilty plea) should also draw data about court practices.

Collecting data on District Court sentencing practice will pose distinct challenges. The importance of this court which is, of course, a court founded on the Constitution, within the criminal justice system cannot be overstated. Even a cursory examination of the statistical tables in the annual reports of the Courts Service reveals the sheer range of the District Court’s jurisdiction and its heavy workload. One significant feature of this Court in the context of developing sentencing guidance is that it has extensive jurisdiction over indictable as well as summary offences. In fact, it may deal with most indictable offences, apart from a small number of particularly serious ones, where the defendant pleads guilty.²⁸ Further, it may impose a prison sentence of up to 12 months in respect of any one offence and up to two years for a combination of offences.²⁹

In 2020, the District Court “resolved” about 195,000 offences (154,000 summary offences and 41,000 indictable offences).³⁰ It is assumed that “resolved” in this context means having dealt with an offence in a final manner (and this may include “strike out” which seems to have occurred in respect of more than 52,000 summary offences and almost 10,000 indictable offences dealt with summarily). The number of defendants is generally much lower than the number of offences, as many defendants face more than one charge.³¹ Of the 154,000 summary offences, 70 per cent consisted of road traffic offences. Drug and theft-related offences accounted for 80 per cent of the 41,000 indictable offences dealt with summarily. The fine was the most prevalent sanction imposed, accounting for the penalty in respect of 31,000 summary offences and about 4,500 indictable offences. However, imprisonment/detention was imposed in respect of almost 7,000 offences (summary and indictable combined), which is quite a significant number.

It is beyond the scope of this Report to offer detailed recommendations on how the SGIC might go about collecting data on District Court sentencing practice.

²⁸ Criminal Procedure Act 1967, s. 13 (as amended).

²⁹ Criminal Justice Act 1984, s. 12, amending the Criminal Justice Act 1951, s. 5.

³⁰ The figures mentioned here are drawn from the Annual Report of the Courts Service 2020, p. 87.

³¹ This is reflected in another statistic in the Annual Report for 2020. In that year, the number of incoming offences in the District Court was 382,455 but involving only 226,081 defendants.

The kind and specificity of data needed will obviously depend on the nature of the sentencing guidelines that may be drawn up for the District Court. Many offence-specific guidelines, once adopted, for indictable offences will presumably apply (or could potentially apply) to the District Court as well as to the higher criminal courts. As already noted, drug and property offences account for 80 per cent of indictable offences disposed of summarily in the District Court. It is reasonable to assume that offences in these categories will eventually be the subject of offence-specific guidelines. As for summary offences, the SGIC might, for example, decide to concentrate on a limited number of offences such as assault or dangerous driving. Alternatively, it might decide to address the more general question of custody thresholds and attempt to devise some guidance on the use of custodial penalties for summary offences, including the relevance of previous convictions when deciding if a custodial penalty is appropriate.³² We note that the SGIC plans to undertake a survey of District Court Judges. This is to be welcomed as it should yield valuable information on the matters that are of most concern to those Judges in exercising their sentencing powers.

Therefore, we **strongly recommend** that a plan to tackle the specific challenges in recording, collating, and representing data from the District Courts is made a high priority.

4.2 Establish a Sentencing Database

While we do not recommend a particular means of data collection, we do see a need for some sort of sentencing database in Ireland. The form this database should take is for the SGIC to determine in concert with key stakeholders such as the Courts Service. This process will probably present a number of pragmatic challenges which the SGIC will be required to manage.

³² The Law Reform Commission's *report* may be of some use for this purpose: 'Report on Penalties for Minor Offences' (The Law Reform Commission, February 2003), <https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/33436>.

In establishing a sentencing database, the SGIC will need to consider what variables are essential as a bare minimum. We have provided some comments on this above and as our analysis of the United States Sentencing Commission (USSC) data shows, there are many relevant variables to understand sentences and compliance with guidelines.³³

While the USSC may be the gold standard for a sentencing database, should such a comprehensive approach be determined by the SGIC to be impractical within given resource constraints, it may be necessary to limit the range of variables. While not as comprehensive as the USSC data, the statistical data available in England and Wales offers another example of a practice that has served the English and Welsh Council when supplemented with bespoke research. Likewise, the SIS and ISIS demonstrate what data it is possible to collect (the latter specifically in the Irish context).

The creation of a sentencing database could, in principle, include links to existing databases from criminal justice organisations (some of which are noted above). However, this is unlikely to prove fruitful in the medium or longer term. As our second report observed:

Administrative data held by different agencies is fragmented and often incommensurable. This impedes insight into how cases progress through the criminal justice system. For understandable reasons, each agency uses its own case-counting, recording and categorisation rules and practices. These fundamental problems mean that combining the datasets of different agencies is a long-term ambition and one, which is dependent on the different agencies agreeing and operationalising common standards of definition and recording practices. At least for the foreseeable future, 'joining up' administrative datasets in any comprehensive and systematic way is unlikely to provide the desired insights into real-world sentencing practices.

³³ The USSC collects data on the percentages of sentences that are within range, above range, and below ranges (for each type of offense).

Given that linking criminal justice agency data is unlikely to be possible in the short or medium term, we **strongly recommend** that SGIC looks towards establishing a database through a new data collection exercise instead of, or in addition to, combining data from criminal justice agencies. Amongst other things, this will entail the development of a detailed data collection protocol to accompany a data collection instrument. Below we note, in broad terms, two options for how data may be collected for a sentencing database. These options are for illustrative purposes and are not recommendations.

4.2.1 Option 1: A Sentencing Information System

One candidate would be a sentencing information system like Irish Sentencing Information System (ISIS) or the Sentencing Information System (SIS) in Scotland. An advantage of such judicially led information systems is that they enable a high degree of control of how and what data are collected. However, as noted in Report 1 and Report 2, these systems tend to be vulnerable to the winds of political and judicial change. Despite producing valuable data that would serve the SGIC well, they were not sustained. In the case of ISIS, this was attributed to resource reasons. In the case of the SIS in Scotland, the problem was not a lack of resources but a failure to institutionalise the SIS which left it vulnerable to changes in judicial leadership. Therefore, if something akin to ISIS or SIS was established in Ireland it would require commitment, a clear institutional home and sustained funding.

There are various ways such a system could be optimised, and it would be for the SGIC to determine the balance to be struck. For example, as well as collecting basic data comprehensively, the information system could also focus on a sample of cases (e.g. snapshots of specific offences or time periods).³⁴ We recommend that this should be done in concert with a strategy for commissioning short-life research studies on specific issues (see Section 3.3).

Such a system, if implemented, would complement legal analyses that can also aid guideline development through identifying principles and mitigating and aggravating factors, etc. However, as above, special consideration would need

³⁴ For example, using audio recordings rather than personnel in court.

to be given to the District Court and whether this method (even if suitable in the Circuit Courts in some fashion) can be appropriately optimised for the District Courts where court time is limited, and caseloads are high.³⁵

4.2.2 Option 2: A Sentencing Survey or Census

The second option would be to implement a sentencing survey or census, akin to the Crown Court Sentencing Survey (CCSS) which ran in England and Wales. The CCSS, according to some sentencing experts, collected and shared some of the best sentencing data worldwide, and various analyses of it have been informative.³⁶ The survey requires a form to be completed by a sentencing judge (or under their supervision). As an illustration, we have added the CCSS form used for drug offences in Appendix B. From this, it should be possible to ascertain how long such a form (suitably tailored to the Irish context) would take to complete.

However, as with ISIS, the CCSS was discontinued due to the resources it required: the burden on judicial time. Therefore, a cost-effective approach to the survey method may also be required. Again, there are various ways such a system could be optimised, and it would be for the SGIC to determine the balance to be struck. For example, the survey may be time-limited to address the current data gap or focused on a sample of offences (a snapshot approach), etc.

Again, a key question with regard to a survey method would be whether it could be applied in the District Court where data and time are both limited. Indeed, in England and Wales, the method was not used in the Magistrates Courts and even in the Crown Court the resource constraints were problematic. Therefore, even *if* considered viable for the District Court, special considerations may need to be given (see Section 4.1.4).

³⁵ Sampling techniques would likely be one methodological consideration given the volume of cases.

³⁶ Jose Pina-Sánchez and Robin Linacre, 'Sentence Consistency in England and Wales: Evidence from the Crown Court Sentencing Survey', *British Journal of Criminology* 53, no. 6 (2013): 1118–38; Eoin Guilfoyle and Ian D Marder, 'Using Data to Design and Monitor Sentencing Guidelines: The Case of Ireland', *Common Law World Review*, 2020, 1473779520975193.

A further question that the SGIC will have to address is how to record data and who should record it. There appear to be at least four options. First, data could be recorded by researchers accountable to the SGIC (similar to that in ISIS) who attend different courts (or use digital court recordings (DAR) where available), though this may prove to be cumbersome and impracticable on anything other than an occasional basis (e.g. for quality control checks). A second option would be for judges to do this themselves (as in the CCSS). This has the advantage of being 'close' to the case, but it may also be open to inconsistency in recording practices. A third option is for an administrative body (as in the USSC) to record data; while its practices may be relatively consistent, it may be more removed from the case. A fourth option, (envisaged but not properly carried out by the Courts Service in the implementation of the Scottish SIS), is for court clerks to enter the data. This could be done in the higher Irish courts by Judicial Assistants, who may be relatively close to the case but also be subject to monitoring and training to avoid inconsistent approaches to recording.

We **strongly recommend** that the SGIC carefully considers the need for the appropriate personnel to record data which balances the virtues of consistency with 'closeness' to the case. So as to assure the quality of the data entered, such personnel should be subject to training in the data entry and the rules of recording cases, as well as regular monitoring that data are being entered correctly and consistently.

4.3 Establish a Research Unit

Many of our recommendations entail significant consideration, work, and management on the part of the SGIC. Given the level of work required to collect, collate, and analyse sentencing data, our strongest recommendation, therefore, is that a Research Unit should be established to support the work of the SGIC.³⁷

³⁷ See Section 3.4.

Part 5: Conclusions: The Next Steps for Sentencing Data in Ireland

Three principal conclusions may be drawn from this Third Interim Report. First, existing data on current sentencing practices are clearly insufficient. Rather than seeking for short term expediency to minimise the profound limitations of available data, it is an opportunity to openly acknowledge the challenge and begin the task of addressing the scale of the challenge. Second, high-quality statistical data (informed and assisted by a detailed legal analysis of existing appeal court jurisprudence), are indispensable if the SGIC is to discharge its statutory functions effectively. This should apply both breadth and depth. Third, systems must be put in place to ensure that all this data and information is accurately and effectively collected, collated and analysed, and this, in turn, calls for certain kinds of professional expertise.

Precisely how the SGIC should proceed is a matter for it to carefully consider in consultation with key stakeholders. The recommendations above should guide this process. The analysis of data collection methods noted in Reports 1 and Report 2 can also assist the SGIC but must be tailored to the contemporary Irish context. For example, in the USA, the Federal court system managed to establish comprehensive statistical data to a degree that proved impractical for England and Wales. England and Wales, for a period, devised an innovative survey method but this too posed challenges in terms of sustainability. For a time, Ireland and Scotland implemented sentencing information systems that could have fulfilled much of the needs above. However, in Scotland, a failure to institutionalise and in Ireland a sense that it was too expensive led to their abandonment, and the survey method was also not sustained because of a sense it was too burdensome for judges. Therefore, the SGIC must consider not just how, in theory, sentencing data may be improved, but how the data may be improved given pragmatic considerations.

In conclusion, we reiterate a point made at the outset of this report: good guidelines depend on good data, and the latter need to be established before

the former can be created and implemented. The next step for the SGIC is to determine how it will achieve this by consulting with stakeholders and establishing a suitable data collection and management strategy.

Appendix A: Sample CCC Form

DPP v. xx

*Manslaughter – Unlawful Killing– Headline Sentence 7 Years’ Imprisonment – 5 Years’
Imprisonment Imposed, Final Year Suspended*

Facts

Information from judge in a single descriptive paragraph setting out the background and events deleted.

At trial, the defendant entered a not guilty plea to a charge of murder and offered a plea to manslaughter. The jury found him guilty of manslaughter.

Aggravating Factors	Mitigating Factors
<input type="checkbox"/> Level of aggression	<input type="checkbox"/> Guilty plea was offered to the offence he was convicted of. <input type="checkbox"/> Co-operation with An Garda Síochána. <input type="checkbox"/> Genuine remorse for his actions. <input type="checkbox"/> Good work history. <input type="checkbox"/> A number of character references were furnished to the Court.
Sentencing	
<p>Manslaughter Offence</p> <input type="checkbox"/> The headline sentence was 7 years’ imprisonment. <input type="checkbox"/> Following mitigation, a sentence of 5 years’ imprisonment was imposed with the final year suspended for a period of 5 years on the basis that the defendant must comply with the requirements of the Probation Service upon his release, as well as any medical regimen imposed, including the taking of medication.	
Appeal	
None	

Appendix B: Sample CCSS Form

Crown Court Sentencing Survey

OFFICIAL WHEN COMPLETE

Drug Offences

[PRINCIPAL OFFENCE ONLY]

Form Details

Form ID	<input type="text"/>
Issued	<input type="text"/>

Please refer to guidance on completing this form overleaf
COMPLETE FOR THE PRINCIPAL OFFENCE ONLY

**Part A: To be completed by the
sentencing Judge/Recorder or Court Clerk**

PLEASE COMPLETE IN CAPITALS

Case Details

Sentence date	<input type="text" value="Day"/> / <input type="text" value="Month"/> / <input type="text" value="Year"/>
CREST case ID	<input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>

Offender Details – Individual

Offender name	<input type="text" value="Surname"/>
	<input type="text" value="Forename"/>
Offender DOB	<input type="text" value="Day"/> / <input type="text" value="Month"/> / <input type="text" value="Year"/>
Offender gender	<input type="checkbox"/> Male <input type="checkbox"/> Female

Offender Details – Company

Company name	<input type="text"/>
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If you have any queries when completing this form or on the Crown Court Sentencing Survey in general, you can contact the Office of the Sentencing Council at research@sentencingcouncil.gsi.gov.uk or 020 7071 5793

1a. Type of offence FOR BREACHES, SEE NOTES OVERLEAF

- Single offence
- Multiple offences - ANSWER FOR THE PRINCIPAL OFFENCE ONLY
- Possession
- Supplying
- Possession with intent to supply
- Conspiracy to supply
- Other (please specify in box below)

- Bringing in/taking out controlled drug
- Production/being concerned in production/cultivation
- Permitting premises to be used

1b. Drug/Class of drug associated with the offence

- Cocaine
- Heroin
- Other Class A
- Cannabis or Cannabis resin
- Other Class B
- Class C

2. Sentence outcome (for the PRINCIPAL OFFENCE ONLY)

SEE NOTES OVERLEAF, TICK ALL THAT APPLY

(a) Custodial Sentence

- Determinate
- Extended
- Life
- Hospital Order

(b) Suspended Sentence Order or Community Order

- SSO
- Community Order

Requirements of Suspended Sentence Order or Community Order
TICK ALL ADULT REQUIREMENTS GIVEN OR NEAREST YRO EQUIVALENT

- Supervision
- Unpaid work
- Curfew
- Activity
- Prohibited activity
- Exclusion
- Residence
- Foreign travel prohibition
- Attendance centre
- Programme(s) (please specify in box below)
- Mental health treatment
- Drug rehabilitation
- Alcohol treatment
- Alcohol abstinence and monitoring (pilot scheme)

(c) Other outcome

- Fine
- Conditional discharge
- Absolute discharge

RECORD COMPENSATION, CONFISCATION & COSTS IN SECTION 6

3. Definitive guideline - Step 1

- No existing guideline
 - For the offence of 'permitting premises to be used' or 'possession'**
 - Category 1 – most serious
 - Category 2
 - Category 3 – least serious
 - For all other drug offences**
 - (a) Culpability (role of offender)**
 - Leading role
 - Significant role
 - Lesser role
 - (b) Harm (quantity)**
 - Category 1 – most serious
 - Category 2
 - Category 3
 - Category 4 – least serious
- Where harm is identified as 'Category 3', complete if appropriate:
- Street Dealer
 - Prison Employee
 - Basis of quantity

4. Definitive guideline - Step 2

- (a) Factors increasing seriousness**
- Statutory aggravating factors**
- Previous relevant convictions: 1-3 4-9 10+
 - Permitted under 18 year old to deliver etc.
 - Offence committed on bail
 - 18 years or over supplies to the vicinity of school etc.
- Other aggravating factors**
- Sophisticated nature of concealment/attempts to avoid detection
 - Attempt to conceal/dispose of evidence
 - Exposure of others to more than usual danger
 - Presence of weapon
 - High purity or high potential yield
 - Failure to comply with current court orders
 - On licence
 - Targeting premises of vulnerable people
 - On-going/large scale evidenced by specialist equipment
 - Presence of others, especially children and/or non-users
 - Use of premises with unlawful access to utility supply
 - Level of profit element
 - Premises adapted to facilitate drug activity
 - Location of premises
 - Length of time premises used
 - Charged as importation of very small amount
 - Nature of likely supply
 - Possession of drug in school/licensed premises
 - Possession of drug in prison
 - Volume of activity permitted
 - Established evidence of community impact
 - Other factors (please specify in box below)

(b) Factors reducing seriousness or reflecting personal mitigation

- Lack of sophistication as to nature of concealment
- Involvement due to pressure/intimidation/coercion
- Mistaken belief regarding type of drug
- Isolated incident
- Low purity
- No previous relevant convictions
- Offender's vulnerability exploited
- Remorse
- Good character/exemplary conduct
- Determination/demonstration to address addiction/behaviour
- Serious medical conditions
- Age/lack of maturity affecting responsibility
- Mental disorder/learning disability
- Sole/primary carer for dependent relatives
- Offender addicted to same drug
- Offender using cannabis to help diagnosed medical condition
- Other factors (please specify in box below)

5. Indication of guilt/guilty plea

- Was guilt indicated at police station?
- Yes
 - No
 - Don't know
- Was a guilty plea entered for the principal offence?
- Yes
 - No
- Where was guilty plea indicated in the court process?
- At magistrates' court
 - At PCMH
 - At preliminary hearing
 - After PCMH/prior to day of trial
 - Between preliminary hearing and PCMH
 - At/after day of trial
- Was the guilty plea entered at the first reasonable opportunity?
- Yes
 - No
- Approximately what reduction for guilty plea was given?
- SEE NOTES OVERLEAF

6. Additional factors

- Were any of the following other factors present or stated to have influenced the sentence imposed?
- DO NOT INCLUDE ANYTHING THAT IS COVERED ELSEWHERE ON THIS FORM
- Totality principle
 - Compensation Order
 - Consecutive sentence
 - Confiscation Order
 - Concurrent sentence
 - Costs
 - Multiple defendants
 - Serving another sentence
 - Ancillary Order
 - Other factors that you stated and are relevant to the sentencing decision, for example S.116 Return to Custody (please specify in box below)

NOT FOR OFFICIAL USE

RELATIONSHIP OF FORM TO SENTENCING REMARKS

The form is designed to record the basis upon which the Judge/Recorder approached the task of passing sentence; fundamental to the principles of open justice, it is important that nothing is included on the form which is not reflected in the sentencing remarks. Judges may therefore find it helpful to complete the form and use it as a checklist when passing sentence. The majority of the information for Part A will be contained in or on the front of the case file.

- You should complete only **ONE** form for the **principal offence** where more than one offence appears on a single indictment in a sentenced case (including committal for sentence cases). However, if on a single sentencing occasion you have more than one indictment for unrelated cases, complete a form for the principal offence on each indictment.
- If an offender is being sentenced for more than one offence, the principal offence will be the offence which attracts the **highest** sentence.
- If there is more than one offence attracting the highest sentence, the principal offence should be the one for which the highest maximum penalty exists.
- If the offences have the same maximum penalty you are asked to (randomly) select one as the principal offence.
- If there are **multiple offenders** in a case a form must be completed for the principal offence for **each offender**.

Breaches: You do not need to complete a separate form for breach proceedings unless the breach attracts a sentence in its own right, e.g. breach of Protective Order or ASBO. In which case use the 'Other Offences' form (light brown).

OFFENCE FORMS AVAILABLE

Arson & Criminal Damage (violet)	Robbery & Assault with Intent to Rob (orange)
Assault & Public Order (blue)	Sexual Offences (turquoise)
Burglary (green)	Indecent Photographs of Children (light turquoise)
Driving Offences (dark brown)	Theft, Dishonesty, Fraud (purple)
Drug Offences (maroon)	Other Offences (light brown)

DRUG OFFENCES

GUIDANCE ON COMPLETION

Section 1: Type of offence

Tick the two relevant boxes to reflect (a) the **principal offence** for which the offender is being sentenced and (b) the drug associated with the principal offence. If the principal offence is not listed please tick 'Other' and specify the offence, but please confirm that there is not another offence form that would be more appropriate.

Section 2: Sentence outcome

Tick the relevant box to reflect the sentence/s imposed. In all cases where a length, term, extension period etc. is given, please ensure that the measurement is also included e.g. hours, days, weeks, years. If a programme requirement was given, please specify what the specific accredited programmes were. If you impose a curfew, specify the length of the curfew only, do not provide the time of

day for which the curfew is in force. If you have imposed an Ancillary Order, Compensation or Confiscation Order this should be recorded under Section 6 'Additional factors'. Please record the actual sentence imposed without taking into account the period credited for remand time.

Section 3: Guideline Step 1 - Factors indicating greater or lesser harm and higher or lower culpability

For this you will need the latest sentencing guideline where available. If the offence is not yet covered by a sentencing guideline (e.g. 'conspiracy to supply') then tick the box 'No existing guideline'. For the offences of 'permitting premises to be used' and 'possession', please tick the relevant category box depending on the level of harm and culpability. For other offences, each guideline presents a table with levels of culpability demonstrated by the offender's role and categories of harm. Associated with each combination of role and category there is a starting point and sentencing range. Tick one box relating to the offender's role and one box for the category of harm. Where harm is identified as 'Category 3', please also indicate the basis for the offence being at this level if appropriate.

Section 4: Guideline Step 2 - Factors increasing and reducing seriousness or reflecting personal mitigation

Tick all the relevant factors for step 2 that you stated you took into account in reaching the sentence imposed. Any additional factors (not listed) should be inserted under 'Other factors' and specified. 'Previous convictions' is now a guideline step 2 factor. If you tick this box please also indicate the number of previous convictions you took into account. Tick the box '1-3' for 'few', '4-9' for 'many' and '10+' for 'substantial'.

Section 5: Indication of guilt/guilty plea

Tick the relevant box to reflect whether there was an indication of guilt at the police station and if a guilty plea was entered for the principal offence. If a guilty plea was entered, tick the relevant box to indicate; at which proceedings it was entered and whether it was entered at the first reasonable opportunity. Write the percentage reduction that was in mind for the guilty plea only, and ignore any other discounts applied. Where a percentage reduction is not appropriate given the nature of the sentence/s imposed, please write in 'Full credit' or 'Not applicable'. If a guilty plea was not entered, only answer the first two questions in this section.

Section 6: Additional factors

A number of other factors may have been present in the case or have influenced the final sentence imposed, if so tick all of the boxes that apply to those stated in your sentencing remarks. You should use this section to record compensation and confiscation orders and any costs imposed. Any additional factors (which have not been specified or could not be included elsewhere on the form) that you stated and which you think were relevant should be inserted under 'Other factors'. This may include, among others, S.116 Return to Custody.

If you have any queries when completing this form or on the Crown Court Sentencing Survey in general, you can contact the Office of the Sentencing Council at research@sentencingcouncil.gsi.gov.uk or 020 7071 5793.

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